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#RAILROAD REPORTS

**(Vol. 42 American and English
Railroad Cases, New Series)**

A COLLECTION OF ALL

**CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT**

IN THE

UNITED STATES.

EDITED BY

THOMAS J. MICHIE.

VOLUME XIX.

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RAILROAD REPORTS

LOUISVILLE & N. R. Co. *v.* MOUNCE'S ADM'R.

(Court of Appeals of Kentucky, Feb. 8, 1906.)

[90 S. W. Rep. 956.]

Master and Servant—Injuries to Servant—Switchman—Negligence—Proximate Cause.*—Intestate, a switchman in defendant's employ, was killed at night, while switching cars to the wrong track, by a collision between the cars and a standing train. Intestate's duty required that after turning the switch he should look at the points of the switch rail; and either such inspection or a glance to the rear after he had boarded the backing cars, would have disclosed to him, before the collision, that the train was backing onto the wrong track, in time to have averted the collision. Held, that intestate's contributory negligence, and not the fact that certain of the switch lights had become extinguished, which caused intestate to turn the wrong switches, was the proximate cause of his death.

Trial—Plea in Avoidance—Direction of Verdict.—Where the defense is a plea in avoidance, and the evidence clearly and without conflict sustains it, there is no question for the jury; but the question should be determined by the court as a matter of law.

Appeal from Circuit Court, Rockcastle County.

Action by William Mounce's administrator against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

*For the authorities in this series on the question what is, or is not, the proximate cause of an injury, see foot-notes appended to *Greenawaldt v. Lake Shore, etc., Ry. Co. (Ind.)*, 17 R. R. 816, 40 Am. & Eng. R. Cas., N. S., 816; *Gilliam v. Texas & P. Ry. Co. (La.)*, 17 R. R. 786, 40 Am. & Eng. R. Cas., N. S., 786; *Ramsbottom v. Atlantic Coast Line R. Co. (N. Car.)*, 17 R. R. 776, 40 Am. & Eng. R. Cas., N. S., 776; *St. Louis & S. F. R. Co. v. League (Kan.)*, 17 R. R. 772, 40 Am. & Eng. R. Cas., N. S., 772; *Lewis v. Vicksburg, etc., R. Co. (La.)*, 17 R. R. 714, 40 Am. & Eng. R. Cas., N. S., 714; *Phillips v. Durham & C. R. Co. (N. Car.)*, 17 R. R. 704, 40 Am. & Eng. R. Cas., N. S., 704; *Anderson v. Southern Ry. (S. Car.)*, 17 R. R. 701, 40 Am. & Eng. R. Cas., N. S., 701; foot-note appended to *Illinois Cent R. Co. v. Watson (Miss.)*, 17 R. R. 199, 40 Am. & Eng. R. Cas., N. S., 199; *Birmingham Ry. Light & Power Co. v. Hinton (Ala.)*, 17 R. R. 173, 40 Am. & Eng. R. Cas., N. S., 173; foot-notes appended to *Peerless Mfg. Co. v. New York, etc., R. R. (N. H.)*, 17 R. R. 13, 40 Am. & Eng. R. Cas., N. S., 13; foot-notes appended to *Alabama G. S. R. Co. v. Vail (Ala.)*, 17 R. R. 718, 40 Am. & Eng. R. Cas., N. S., 718; *Shamblin v. New Orleans & N. W. R. Co. (La.)*, 16 R. R. 528, 39 Am. & Eng. R. Cas., N. S., 528; *Fishburn v. Burlington & N. W. Ry. Co. (Iowa)*, 16 R. R. 444, 39 Am. & Eng. R. Cas., N. S., 444; *Pharr v. Morgan's L. & T. R. & S. S. Co. (La.)*, 16 R. R. 434, 39 Am. & Eng. R. Cas., N. S., 434; *Southern Ry. Co. v. Williams (Ala.)*, 16 R. R. 429, 39 Am. & Eng. R. Cas., N. S., 429; *Smith v. Fordyce (Mo.)*, 16 R. R. 378, 39 Am. & Eng. R. Cas., N. S., 378; *Dean v. Oregon R. & Nav. Co. (Wash.)*, 16 R. R. 237, 39 Am. & Eng. R. Cas., N. S., 237.

Louisville & N. R. Co. v. Mounce's Adm'r

Benjamin D. Warfield and J. W. Alcorn, for appellant.

John W. Rawlings, Williams & Williams, Robert Harding, and Greene & Van Winkle, for appellee.

O'REAR, J. William Mounce was employed by appellant as night switchman in its terminal yard at Livingston. While engaged in the shifting of some cars in the yard, he lost his life by the train on which he was riding coming in contact with another train standing on the yard. This was occasioned by his having thrown the wrong switch, so that this train, instead of running on the track intended, was run onto a track where the other train was. His administrator sued the railroad company to recover for the death of the decedent, charging it with negligence in failing to keep certain switch lights lighted, so that the decedent could discover the location of the switches in the course of his work. A recovery was had. On appeal the judgment was reversed. The facts are very fully and accurately stated in the opinion delivered on the former appeal. It may be found in 71 S. W. 518, 24 Ky. Law. Rep. 1378. On the second trial the facts developed were not materially different. Upon the point upon which we conclude the case necessarily turns, they were not at all different. It is not deemed necessary for that reason to restate all the facts in this case.

Appellee's insistence is that the gravamen of the action was the failure of the appellant to keep the switch lamps lighted. It may be accepted as true that the north light of the double switch referred to in the former opinion was not lighted at the time of the accident. It may likewise be accepted as true that the first switch light south of the double switch was not lighted at that time. It may be assumed that the company maintained switch lights at night for the benefit of switchmen and other trainmen having occasion to use these switches, and that the switchmen had the right to rely on the company to have them there at this point in good order and condition and lighted, so as to enable them to locate the various switches in the yards. If it were a fact that the failure to keep any of these lamps lighted at a time when they should have been lighted was the proximate cause of the death of appellee's intestate, the recovery ought to be allowed. On the other hand, if appellee's death was caused by his own negligence, either alone or in conjunction with appellant's neglect in failing to have these switch lights lighted, so that it would not have occurred but for decedent's negligence, then under familiar principles there ought not to be a recovery. The fact is decedent was directed to move the cut of cars (two cabooses and a coal car attached to a switch engine) from a point on the "house track," a track leading off from the "passing track," as it is called in the record, in the south part of the yard, and about 500 yards south of where the accident occurred, to another track know as "No. 4," which was also in the southern part of the yards, and running practically parallel with the house track and the passing track. To

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go to that point it was necessary for the train to pass north over the house track and over the passing track onto what is called the "drill track" or "river track" in the record. Where they came onto the last-named track was the switch which should have been turned after passing it, so that, in returning, the train would have gone to the left of its former route, going south. The light at this switch is said to have been not burning. For the purpose of this decision it may be accepted as true that it was not burning. Instead of stopping the train at that point, however, decedent signaled the train to go on north until it had passed the double switch light. It may be assumed that the north light of these switches was also out at that time, and that thereby decedent was misled into believing that it was the switch which should have been turned when he first came onto the drill track from the passing track.

Had the accident occurred at the double switch lights, because decedent was misled as stated, we are of opinion that appellee's case would have been made *prima facie*. The evidence is not contradictory, and leads us to the conclusion without doubt that at this point decedent committed an error, or rather a series of errors, that were in no wise attributable to the failure of appellant to have the lights burning at the points complained of. Let it be assumed that when he arrived at the double switch lights he was under a mistaken belief, and not unreasonably so, that he was some hundred feet south of that point where the switch was located that he should have turned into; still he had been told and understood that he was not to set the cars into a track that turned off to the left of the track that he was then on. Indeed, to have executed his orders properly, it would have been necessary to have passed through two switches, both of which should have been turned so as to have deflected the train to the left. At the double switch lights, where he made the mistake, one light was certainly burning. That is undisputed. That was the light upon the target of the switch that he turned. In addition, he had a good lantern with him, which was also burning. These two lights were sufficient to have enabled him to see the switch—not only the target, but the switch rails. They necessarily enabled him to see the switch lever which he manipulated. Seeing it, its position disclosed that it was then set so that the train, in passing back over that switch, would have gone to the left, instead of the right, which was the proper way for the train to have gone. Failing to observe that point, evidently, he threw the lever so as to deflect the train to the right. The target, when the lever was so thrown, turned red, disclosing that the switch, if properly acting, was turned to the right; that is, to turn off that track, taking the cars down to what is known as the "cross-over track," onto the main track used for through traffic, and on which was then standing a freight train with some 30-odd cars. This track was only eight feet away. It is also undisputed, and clearly shown in the evidence, that decedent's duty then, before giving the signal to his engineer to back up,

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was to look at the points of the switch rails and satisfy himself that the switch was working properly. If he had done this, they would have shown him that they were set wrong. It was his duty exclusively at that time to so manipulate them as to safeguard the lives of the employees of the company, including his own life. The points of the switch rails were under his eyes, and just beneath his lantern. Had he looked, he could have seen them.

Crossing over them to the west of the track, he signaled the engineer to back up the train, and as it came by him he climbed onto the forward end of the forward car, going in the direction of the freight train. As stated, the tracks were only 8 feet apart at that point. The evidence shows that these box cars stood out over the rails about 1 foot 11 inches. As decedent climbed onto his car, he was then within less than 6 feet, probably not more than 4 feet, from the other train. His light, the evidence shows without conflict, would have disclosed objects of the size of the train at that distance. His train continued to back up at the rate of 2 or 3 miles an hour. The distance from the double switch lights to the cars on the main track, the point of contact, was about 94 feet. Each moment must have disclosed, if decedent had looked either forward or backward, that his train was not only going to the right, when it should have gone to the left, but was gradually approaching nearer to another train on the very track towards which his train was heading. The engineer and fireman did not know what decedent's orders were. He was in the sole control of his train's movements. He could have even then avoided the injury, had he looked, and by signaling the engineer, who was watching out for his signals, to stop the train, or by jumping from his place of danger. But he did neither. He rode on to his death, evidently unmindful of the mistakes he had made, and of his impending fate. Decedent knew the location of the switches. He had passed over them frequently, and had personally manipulated them. He had passed over them and had used them only a few minutes before the fatal occasion. Only a week before he had made the same mistake in throwing the switches wrong, and had the danger pointed out to him then. He had a short while before passed a written examination for the position of switchman or brakeman. In his written answers, written by himself, he showed that he knew how switches worked, how to work them, and what his duties as a switchman were.

The failure of the lights, even if they were as claimed by appellee, could not have reasonably or properly misled decedent into his accident. For, while they may have misled him into going too far north to find his switch, they could not possibly have misled him into throwing the switch to go to the right, when he knew that the switch he was to enter should have taken him to the left. Even after he had made the mistake in throwing the switch, and had failed to look, as he should have done, to see whether it was right, after it was thrown, the switch lamps,

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whether burning or not, ought not and would not have controlled his sense of vision which he then ought to have exercised, and which it was his duty to exercise, to keep a lookout in front of his train as it moved for possible obstructions or dangers, and to see that he was not going into another train. The accident was the direct result of a fatal mental aberration of decedent in a series of neglects, avoiding any one of which would have saved his life. Speaking of these circumstances in the former opinion, the court said: "In the light of these uncontroverted facts there is no escape from the conclusion that plaintiff was guilty of such contributory negligence as to preclude recovery in this proceeding."

Other features of the case were discussed in the opinion. One ground—that is, as to whether the lights were out at the time of the accident—was treated at some length in the opinion. The court concluded then that the verdict of the jury, finding that they were out at the time, was against the weight of the evidence. Another reason for the reversal of the case was an error in the instruction given to the jury. The case was remanded. The opinion and its reasoning leave no doubt that upon the point which we have discussed in this opinion, if the facts were as then shown, a recovery would not be allowed. This was equivalent to saying a peremptory instruction should have been given. Upon the retrial the evidence varied only slightly from what it was on the first trial, and that was upon the point whether the lights were burning at the time of the accident. There is no difference at all in the evidence, or in its legal effect, upon the subject of decedent's contributory negligence.

If the plaintiff adduces any evidence at the trial tending to sustain a cause of action set out in the petition, the case will be submitted to the jury. This rule, however, is subject to the qualification that if the defendant's evidence is uncontradicted, and, being so, establishes a defense which, notwithstanding the case made by the plaintiff, precludes a recovery by the plaintiff as a matter of law, the court must tell the jury that a recovery cannot be had. This is not where the defendant's evidence tends to refute plaintiff's; nor can it apply, even though the court may believe that defendant's evidence completely overcomes plaintiff's evidence. If the evidence upon each side is directed to the same fact, or to the same set of facts, and is conflicting, from which the jury might infer the truth to be either with the plaintiff or the defendant, the issue is for the jury to decide. Where, however, the defense is a plea in avoidance, and the evidence clearly sustains it, there being no conflict of evidence upon the point, then there is nothing for the jury to decide, because upon that point there is no fact at issue. The matter is reduced to a pure question of law, which is for the court always. *Standard Oil Co. v. Eiler*, 110 Ky. 209, 61 S. W. 8; *Bush v. Grant*, 61 S. W. 363, 22 Ky. Law Rep. 1766; *L. & N. R. Co. v. Breeding*, 13 Ky. Law Rep. 397; *Greenwood*

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v. McHenry Coal Co., 14 Ky. Law Rep. 336; *Henderson Trust Co. v. Stuart*, 108 Ky. 167, 55 S. W. 1082, 48 L. R. A. 49; *City of Lancaster v. Walter*, 80 S. W. 189, 25 Ky. Law Rep. 2189. Upon this record the trial court should have directed a verdict for the defendant.

The judgment is reversed, and cause remanded for proceedings consistent herewith.

SHUSTER v. PHILADELPHIA, B. & W. R. Co.

(Supreme Court of Delaware, Jan. 16, 1906.)

[62 Atl. Rep. 689.]

Master and Servant—Fellow Servants—Operation of Railroad.*—A yardmaster in charge of a yard and a brakeman and conductor are fellow servants of a car inspector employed in the yard to examine cars and determine whether they are in proper condition for use.

Same.†—The superintendent of a division of a railway company is not a fellow servant of a car inspector employed in a yard to examine cars and determine whether they are in proper condition for use, but is a vice principal.

Same—Injury to Servant—Negligence of Fellow Servant.—A superintendent of a division sent a message to a freight conductor, directing him to move a crippled car and "take it on next" to his cabin car. There was no evidence that the car was crippled, except at one end. Held, that the message directed the conductor to put the crippled car behind the cabin car, with its uninjured end attached to the cabin car by means of the usual coupling, making the conductor negligent in putting the car before the cabin car, thereby relieving the company of liability for injuries received by a car inspector in consequence of the conductor's act; the car inspector and conductor being fellow servants.

Same—Crippled Cars in Train—Notice—Sufficiency.—In an action against a railway company for the death of a car inspector in consequence of the negligent placing of a defective car in a train, the evidence showed that it was the custom of the company to give notice of the existence of crippled cars by placing on them shop cards denoting that they were injured, and were to be taken to shops for repair, and that the crippled car in question had on each side of it in the usual place such a shop card. The injured car, at the time of the accident, was not used by the company in its business. It was empty, and was being carried to the shop for repairs. Held, that the company

*As to whether inspectors of appliances, etc., and other railroad employees are fellow servants, see foot-note appended to *Fullmer v. New York, etc., R. Co.* (Pa.), 13 R. R. R. 817, 36 Am. & Eng. R. Cas., N. S., 817; *Hamilton v. Michigan Cent. R. Co.* (Mich.), 12 R. R. R. 365, 35 Am. & Eng. R. Cas., N. S., 365.

For the authorities in this series on the question whether yardmasters are fellow servants of trainmen, see foot-notes appended to *Shaw v. Manchester St. Ry.* (N. H.), 14 R. R. R. 275, 37 Am. & Eng. R. Cas., N. S., 275.

†For the authorities in this series showing who are vice principals or superior servants, see foot-notes appended to *Struble v. Burling-*

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was not guilty of actionable negligence in failing to give further notice of the crippled car.

Same—Rules.†—Since the proper place in a train for a crippled car depends on the character of its injury, it is impracticable to prescribe by general rule the place in which all such cars should be placed, and a railway company is not guilty of actionable negligence toward a servant for failure to establish a general rule.

Same.†—Where it was usual for car inspectors to ride on trains run in on tracks for inspection, and to do so, if not absolutely necessary, was a convenience to them in the prosecution of their work, the failure of the company to establish a rule prohibiting car inspectors from riding on trains while they were run in on a track for inspection was not such negligence as to render it liable for injuries received by an inspector.

Error to Superior Court, New Castle County.

Action by Elsie D. Shuster, widow of Mahlon C. Shuster, deceased, against the Philadelphia, Baltimore & Washington Railroad Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Argued before NICHOLSON, Ch., and SPRUANCE and BOYCE, JJ.

William S. Hilles and William W. Knowles, for plaintiff in error.

Ward & Gray, for defendant in error.

SPRUANCE, J. This action was brought by the plaintiff, the widow of Mahlon C. Shuster, for the recovery of damages for the death of her husband, alleged to have been caused by the negligence of the defendant company. Under instruction of the court the jury returned a verdict for the defendant. To this instruction and the rulings of the court as to the admission and rejection of certain testimony, the plaintiff excepted. At the time of the accident which caused the death of Shuster, and for several years before that time, he was in the employ of the defendant as a car inspector. As such inspector, it was his duty to examine cars at the Edgemoor yard of the defendant, near the city of Wilmington, for the purpose of ascertaining whether they were in proper condition to be used in the business of the defendant. The yard contained 18 or 20 tracks, and was divided into two sections. As a train came in, it was run upon one of these tracks, inspected, and made up for its passage to the point of its destination. On July 22, 1903, a Pennsylvania Railroad box freight car, with the drawbar pulled out and part of the end sill off, was in Seaford, Del. On the same day Alfred Larimore, the conductor of a freight train from Delmar, bound north, received at Seaford from R. L. Holliday, superintendent of the Delaware Division of the defendant company, a telegram, giving the num-

ton, etc., Ry. Co. (Iowa), 16 R. R. R. 259, 39 Am. & Eng. R. Cas., N. S., 259.

†For the authorities in this series on the subject of the duty of a railroad to make, promulgate, and enforce rules, for the protection of its employees, see foot-note appended to *Moran v. Rockland, T. & C. St. Ry. (Me.)*, 12 R. R. R. 721, 35 Am. & Eng. R. Cas., N. S., 721.

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ber of said car and directing him as follows: "Move this car from Seaford to Edgemoor. Take it on next to your cabin car." The conductor testified that he understood this to mean that he should place said car next ahead of the cabin car, and he, with the assistance of two of his train crew, did so place it in his train, and made it fast to the cabin car, which was the last car of the train, by means of a chain which he had found about the truck of the damaged end of the injured car. When, by whom, or for what purpose, the said chain had been put upon the injured car, is not disclosed by the evidence. The damaged car appears to have been attached to the cabin car as securely as was possible by means of said chain, and the journey from Seaford to the Edgemoor yard was made without accident, notwithstanding the fact that there was more slack or play between these cars than there would have been had they been connected by means of the usual coupling. Arriving at the Edgemoor yard, the yardmaster ordered the conductor to back his train on track No. 4, saying that everything was clear. This was in the evening after dark, about 8:05 according to one witness, and after 8:35 according to another. Thereupon the train was backed slowly in on said track, at the rate of between four and five miles an hour; the brakeman, Murphey, standing on the top of the disabled car as a lookout, and Shuster and another car inspector, who had boarded the train while backing it on said track, sitting on the platform of the cabin car next to the disabled car, when the moving train came in violent collision with a car or cars standing on said track, and the shop car, the sill of which was from four to eight inches higher than the sill or platform of the cabin car, rode over and demolished the cabin car, and so injured Shuster and the other car inspector that they both died shortly thereafter.

It is clear that the proximate cause of the accident was the negligence of the yardmaster in directing the conductor to run his train upon track No. 4, and informing him that it was clear, when there was standing upon it a car or cars with which the train was liable to collide. Whether there was negligence on the part of the brakeman standing on the top of the disabled car is not clear from the evidence. If the conductor misinterpreted the telegram of the superintendent, and placed the injured car before, when he should have placed it behind, the cabin car, and coupled them together by means of the chain, instead of the usual and uninjured coupling on the good end of the injured car, he was guilty of negligence, which, to say the least, materially contributed to the fatal accident. But the yardmaster, the brakeman, and the conductor were all fellow servants of the car inspector Shuster and, if his death was the result of the negligence of any or all of these persons, the defendant would not for this cause be liable in this action. *Wheatley v. P. W. & B. R. R. Co.*, 1 Marv. 305, 30 Atl. 660; *Cresswell v. W. & N. R. R. Co.*, 2 Pennewill, 210, 43 Atl. 629. On the other hand, Mr. Holliday, the superintendent, was not a fellow servant of

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Shuster, but a vice principal, and, if the death of *Shuster* was caused by the negligence of the superintendent, the defendant would be liable. *McKinley on Fellow Servants*, p. 292; 3 *Elliott on Railroads*, § 1321; 4 *Thompson on Negligence*, § 4951. It therefore becomes important to determine whether the superintendent was guilty of negligence in sending to the conductor the telegram given above.

It is within the province of the court to construe written instruments, and it is our duty, with the aid of the testimony in the case, to determine, if we can, the meaning of said telegram. While the order of the superintendent was to take the disabled car on next to the cabin car, it did not state whether it was to be placed before or behind the cabin car. A fair interpretation of the order would be that the disabled car, being next to the cabin car, should be placed where it could be safely carried. There is no evidence that this car was crippled, except at one end, and we can see no reason why it should not have been put behind, and with its uninjured end next to the cabin car, and attached to it by the usual coupling. The uncontradicted testimony is to the effect that the accident would probably not have occurred had the shop car and the cabin car been coupled together with the usual coupling, and that the usual, safe, and proper place for a car with a broken coupler is behind the cabin car. Conductor Larimore testified that, if he had been using his own judgment, he would have put said car behind the cabin car, but that he understood the said telegram to mean that he should put it next before the cabin car, and for that reason he did so. We think that the said telegram was sufficiently explicit, and was not misleading, and that the conductor erred in his interpretation of it, and that in so doing, and in putting said car before the cabin car, and in attaching them together as was done, he was guilty of negligence; but, as before stated, he was the fellow servant of *Shuster*, and such negligence is not sufficient to charge the defendant in this action.

It is claimed by the plaintiff that the defendant was guilty of negligence in failing to give to its car inspectors proper notice of the dangerous condition of the injured car. It is in evidence that it was the custom of the defendant to give notice to all concerned of the condition and destination of crippled cars by placing upon them what were known as "shop cards," which denoted that they were injured and were to be taken to the shops for repair; and also that the crippled car in this case had on each side of it, in the usual place, a shop card of this character. It will be observed that in this case the injured car, at the time of the accident, was not being used by the defendant in its business. It was empty, had been laid off at Seaford because it was not fit for use, and was being carried to the shop for repairs. This case differs essentially from that of *Rodney v. St. Louis S. W. Railway Co. (Mo.)* 28 S. W. 887, where the defendant was held liable for injuries to an employee while coupling a damaged car. In that case the car had some time before been laid off as damaged and marked as

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such, but at the time of the accident it was without any danger mark, and was being used in the ordinary business of the company. Under all the circumstances of this case we think that there was no negligence on the part of the defendant in failing to give other notice of the damaged car than was given.

It was urged by the plaintiff that the defendant was guilty of negligence because it failed to provide proper rules for the conduct of its large and complicated business, in that it had no written or printed rule fixing the place in a train in which a crippled car should be put, or prohibiting car inspectors from riding upon a train while it was being run in upon the track for inspection. As the proper place in a train for a crippled car would depend upon the character of its injury, it would be impracticable to prescribe by a general rule the place in which all such cars should be placed. It appears to have been usual for the car inspectors to ride upon trains while being run in on the tracks for inspection, and that this, if not absolutely necessary, was a convenience to them in the prosecution of their work. We are of the opinion that there was no negligence on the part of the defendant in failing to provide rules.

Having found that the death of Shuster was not occasioned by any negligence for which the defendant is liable in this action, it is not necessary to consider whether there was contributory negligence on the part of Shuster. Nor is it necessary for us to consider the assignments of error relating to the rulings of the court below as to the admission and rejection of testimony, as this subject was not discussed in the argument before us, and none of said rulings appear to affect in any way the question as to the negligence of the defendant.

We are of the opinion that there was no evidence upon which the jury would have been justified in finding a verdict for the plaintiff, and that the jury were properly instructed to find for the defendant, and that the judgment below should be affirmed; and it is so ordered.

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(Supreme Court of Alabama, Jan. 9, 1906.)

[39 So. Rep. 1017.]

Action—Form—Trespass or Case.—A complaint alleging that plaintiff's intestate was rightfully at work in defendant's mine, assisting defendant's contractor in the work of mining, when he was struck by defendant's tram cars, negligently allowed to run against plaintiff by defendant's servants, etc., stated a cause of action in case, and not in trespass.

Master and Servant—Injuries to Third Persons—Negligence of Servant.—In an action for death of a third person by the negligence of a servant of defendant corporation, the negligence of the servant is the negligence of the corporation.

Same—Contractor's Servants—Rights.—Where plaintiff's intestate

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was injured by the negligence of defendant's servants while he was employed in defendant's mine as the servant of defendant's independent contractor, intestate was not a mere licensee in the mine, but was in the exercise of a lawful right to be in the mine at the time of his injury.

Same—Liability of Master.*—Where plaintiff's intestate was injured while in defendant's mine as servant of an independent contractor through the negligence of defendant's servants in operating a tram train in the mine, and died from injuries so received, defendant was liable for his death.

Appeal—Pleading—Demurrer—Harmless Error.—Where defendant was given the full benefit of the defense of contributory negligence, both in the evidence and in the instructions given, it was not prejudiced by the sustaining of a demurrer to a plea invoking such defense.

Master and Servant—Fellow Servants.†—Servants of an independent contractor and servants of the principal by whom the contractor was employed are not fellow servants, though working in a common employment.

Appeal from Circuit Court, De Kalb County; J. A. Bilbro, Judge.

"To be officially reported."

Action by G. W. Lea, as administrator, etc., against the Lookout Mountain Iron Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action of damages growing out of the killing of appellee's intestate by certain tram cars used and operated by the appellant corporation in the conduct of its business of mining coal. Appellee's intestate was in the employment of one Summers, who had a contract with appellant to get out coal for it from its mines, and while so engaged in mining coal in a room or apartment of said mine appellant's cars ran down the track into the room where appellee's intestate was working, and crushed and otherwise bruised him, causing his death. The complaint on which the case was tried and judgment rendered contained numerous counts; but the two counts on which the trial was had, and to which the judgment is referable are counts 1 and 2, and are as follows, after being amended: "(1) Plaintiff claims of the defendant \$25,000 as damages, for that heretofore, to wit, on the 4th day of April, 1904, the defendant was the owner of a coal mine in De Kalb county, Alabama, operating the same, running tram or coal cars in the same, for the purpose of hauling and removing coal therefrom, and while so engaged, through its agents and servants, allowed its tram or coal cars to run down its track entering said mine, into a room or entry where plaintiff's intestate was rightfully at work assisting one Sam Summers, who was employed by the defendant to mine coal in its said mine as

*For the authorities in this series on the liabilities of railroads for injuries to the employees of independent contractors, see foot-note appended to Omaha Bridge & Terminal Co. v. Hargadine (Neb.), 13 R. R. R. 827, 36 Am. & Eng. R. Cas., N. S., 827.

†For the authorities in this series on the question whether employees of different masters may be fellow servants, see foot-notes appended to Chicago Term. Transfer Co. v. Vandenberg (Ind.), 17 R. R. R. 740, 40 Am. & Eng. R. Cas., N. S., 740.

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a contractor, the deceased being hired by said Summers to assist him in and about the work of mining coal in said mine; and said cars were thus allowed to run negligently, carelessly, and recklessly against plaintiff's intestate, striking him, crushing and breaking his legs, and otherwise injuring him, from the proximate result of which he died on, to wit, the ——— day of ———, 1904. And plaintiff alleges that said injury was the result of the negligence of defendant's agents and servants in charge of and operating and running said tram cars. (2) Plaintiff claims of the defendant the further sum of \$25,000, for that heretofore, to wit, on the 4th day of April, 1904, defendant was the owner of a coal mine in De Kalb county, Ala., operating said mine, using tram cars that ran on tracks entering said mine for the purpose of hauling coal from the same, and while so engaged, the defendant ran its tram cars into said mine and along its said track into a room or entry where plaintiff's intestate was rightfully at work assisting one Sam Summers, who was employed by the defendant to mine coal in its said mine as a contractor, the deceased being hired by said Summers to assist him in and about the work of mining coal in said mine, and negligently allowed said cars to run against his said intestate, bruising and injuring him, from the results of which injuries he died on the ——— day of ———, 1904."

The first ground of demurrer urged to these counts is as follows: "So far as appears from the averments of said count, plaintiff's intestate was a mere licensee in the mines of defendant, and it does not appear from the averments of said count that the injuries done to plaintiff's intestate were wantonly or willfully inflicted." The second ground is sufficiently set forth in the opinion.

The defendant requested the following written charges, which were refused: "(1) I charge the jury that if from the evidence you find that the plaintiff's intestate was injured in defendant's mines, while engaged at work therein as an employee of the independent contractor, Sam Summers, through the negligence of the defendant's mine driver, Frank Johnson, in leaving the trip of loaded cars on the track where the collision occurred, then such negligence on the part of Frank Johnson was the negligence of a fellow servant, for which the plaintiff cannot recover of the defendant unless you find that the defendant injured the plaintiff's intestate either wantonly, recklessly, or intentionally. (2) Under the evidence in this case, defendant did not owe the deceased any duty, but not to injure him knowingly or intentionally." (3) General affirmative charge. "(4) I charge the jury that under the evidence in this case the relation which the plaintiff's intestate sustained to the defendant was that of a licensee, and the measure of the defendant's duty to him as such licensee was not to injure him wantonly, recklessly, or intentionally." (5) General affirmative charge as to count 2. (6) General affirmative charge as to count 1. (7) General affirmative charge. "(8) If the jury believe from the evidence that the defendant, by ac-

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quiescence in the employment of the deceased by the independent contractor, Sam Summers, invited the deceased to work in its mines, then the deceased became a fellow servant of those engaged in the common employment and assumed the risk of their negligence. (9) I charge the jury that if from the evidence you find that the defendant through its mine superintendent or mine foreman had not in fact given permission to the plaintiff's intestate to work in its mines as an employee of the independent contractor, Sam Summers, but if you further find that the defendant's mine superintendent or mine foreman knew that he was at work there and impliedly acquiesced in his presence in the defendant's mine, such acquiescence would only operate as a mere license to him, and imposed on him the risk incident to the mining of the coal and rock and the operations therewith in the defendant's mine, except such as might result from the wanton or intentional wrong on the part of the defendant or a failure to exercise due care to avert the injury after the danger had become apparent."

John F. Martin, for appellant.

Howard & Hunt, for appellee.

TYSON, J. The trial of this cause and the judgment rendered in it was at a time provided by law for the holding of the court which was presided over by a *de jure* judge. There is, therefore, no merit in the contention that the judgment is a nullity.

The first and second counts of the complaint, after amendment, upon which judgment was rendered, are in case, and not in trespass. *City Delivery Co. v. Henry*, 139 Ala. 161, 34 South. 389; *Birmingham Ry., Light & Power Co. v. Moore* (Ala.) 39 South. —. And the proof of the negligence by the servants of defendant will support the allegation of negligence in each of these counts. In this character of cases the negligence of the agent or servant of a corporation is the negligence of the corporation. *Birmingham Ry., Light & Power Co. v. Moore*, *supra*, and authorities there cited.

There were two objections urged by way of demurrer to the sufficiency of each of these counts. The first is that the plaintiff's intestate, on the averments, was a mere licensee in the mines of defendant, and therefore it owed him no duty other than not to wantonly or intentionally injure him. In each of the counts it is averred that plaintiff's intestate was rightfully at work in the mine of the defendant, assisting one Summers, whom, it is alleged, was employed by defendant to mine coal in its mine as a contractor. It will scarcely be denied that Summers had the right to employ the plaintiff's intestate to assist him, and that defendant had no right to forbid such an employment. The plaintiff's intestate, therefore, had the right to be in the mine, for the purpose of doing work under his employment, without regard to any express or implied license or permission of the defendant. His status, therefore, was not that of a mere licensee, but that of a person asserting and exercising a lawful right.

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The other objection is that the counts do not apprise the defendant of the relation existing between it and plaintiff's intestate at the time of the alleged injury, and of this the defendant was entitled to know. This objection seems to proceed upon the theory that unless the relation of master and servant existed between the parties at the time of the alleged injury, or that plaintiff's intestate was in the mine upon the express or implied invitation of the defendant, there can be no recovery on account of the latter's negligence in the operation or handling of its cars. This is unsound. The principle applicable here, in our opinion, is correctly stated in a note found on page 43 of 46 L. R. A. in these words: "Independently of contract one person must answer for the consequences of his negligence to another, wherever these two conditions are satisfied: (1) The circumstances must be such as to justify the inference that the second person had a legal right, derived from the first person or from some extrinsic paramount authority, to occupy the place where those events occurred which are relied upon as constituting his cause of action. (2) It must be apparent to the first person, considered as a man of ordinary powers of observation, that the position likely to be assumed by the second person in the exercise of the right so acquired, with regard to the first person himself, or some physical agency, organic or inorganic, which was under his control at the time it was brought into the conditions in which it was at the time the accident happened, are such that the second person will be likely to suffer injury if the first person does not take the precautions to prevent that injury which would suggest themselves to a prudent man as being appropriate for that purpose." The demurrer was properly overruled.

Whether the demurrer to plea 8 was properly or improperly sustained is unnecessary to be determined. If the ruling of the court in this respect be conceded to be erroneous, it was without injury, since it affirmatively appears from the testimony, the oral charge of the court, and the written charges given at the request of the defendant, that it had the full benefit of the defense attempted to be invoked by this plea. And this is true with respect to every other plea to which a demurrer was sustained invoking contributory negligence as a defense. The testimony tends to show that plaintiff's intestate received the injuries from which he died while at work as a servant of Summers, in defendant's mine, at a place where he had a right to be, and that his injuries were caused by the negligence of the servants of the defendant having the control and management of the operation of its cars. It was admitted on the trial that Summers was an independent contractor.

The next insistence is that the servants of defendant and plaintiff's intestate at the time of the latter's injury were fellow servants, and therefore there could be no recovery on these counts. Summers being an independent contractor, the relation of master and servant did not exist between him and the defendant, and neither did it exist between his servants and the de-

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fendant. "He is to be deemed the master who has the supreme choice, control, and direction of the servant, and whose will the servant represents, not merely in the ultimate result of his work, but in all of its details." *Sherman & Redfield on the Law of Negligence*, § 160. In section 180 these authors say: "The same principles are applied to determine who is a servant for the purpose of settling a question as to the master's liability or nonliability to him as are applied to the question of his liability for him. Persons who in a sense serve another person, but are not his 'servant' within the definition heretofore given, stand upon the same footing as strangers. Thus an independent contractor or the servant of such contractor is not within the rule, and he may recover against the employer of such contractor in like manner with a stranger." And in section 225 it is said: "Mere co-operation or community of labor and ultimate purpose is not enough to make men fellow servants. They are not fellow servants unless they are all under the control and direction of a common master. Therefore, when a servant works side by side with one employed by his master as an independent contractor or with a servant of such contractor, or the servant of a contractor works with the servant of the subcontractor, they are not fellow servants, even though they help to do the same work for the benefit of the same ultimate employer." The rule is stated in 12 *Am. & Eng. Ency. Law*, p. 995, in this language: "Servants of an independent contractor and servants of the principal by whom the contractor are employed are not fellow servants, although they work side by side in a common employment, if they are not under the control of a common master." The reason of the rule is obvious. Not being the servant of the defendant, there exists no implied undertaking by him that he has assumed the risk of negligence of the defendant's servants. Written charges based upon this hypothesis were, therefore, properly refused.

The twelfth special plea, asserting that plaintiff's intestate was a mere licensee, was not proven. Under the evidence there is no room for the application of the doctrine of assumed risk. The work engaged in by plaintiff's intestate was not obviously dangerous. Whether Summers was guilty of negligence which proximately contributed to the plaintiff's intestate's injury was submitted to the jury for their determination. Under the evidence this was clearly a question for the jury. However, whether his negligence, if established, would have defeated plaintiff's right of recovery, is not presented by this record. We therefore express no opinion upon that question.

No error being shown by the record of which the appellant can complain, the judgment must be affirmed.

DOWDELL, ANDERSON, and SIMPSON, JJ., concur.

NORMAN *v.* MIDDLESEX & S. TRACTION CO.
CHEVALIER *v.* SAME.

(Court of Errors and Appeals of New Jersey, April 20, 1905.)

[60 Atl. Rep. 936.]

Injury to Employee—Fellow Servants.*—Norman, the plaintiff, was in the employ of one Leshner, was repairing the road of the defendant under a contract with defendant, and, while plaintiff was engaged in propelling a car over defendant's road in the service of Leshner, a car of defendant collided with that car and injured plaintiff; the collision being due either to the fact that the servant on the car preceding that on which the plaintiff was, failed to warn defendant's servant driving the colliding car, or else that servant failed to heed the warning and wait on switch. Held, that the direction of a verdict for defendant on the ground that the employees of Leshner and the employees of the defendant were all operating cars over the line of the defendant, and hence were, in the operation of the cars, all fellow servants, was error.

(Syllabus by the Court.)

Error to Circuit Court, Middlesex County.

Action by Charles Norman against the Middlesex & Somerset Traction Company, and by Isabella Chevalier against the same defendant. Judgment for defendant, and plaintiffs bring error. Reversed.

These suits were tried together at the circuit. In the first the plaintiff sought to recover damages for injuries alleged to have been sustained by him by reason of the negligence of the Middlesex & Somerset Traction Company; and in the second the plaintiff, the mother of said Norman, sought to recover for the loss of earnings in consequence of the same injury. The accident in which Norman was injured took place on the 16th of January, 1901, and while he was acting as a trolley boy on a motor car which was drawing a construction car engaged in repairing the road of the defendant. Norman was 14 years old at the time of the injury, and had been working on this car since the 1st of the previous November. This construction car, in connection with the motor car, had been employed in carrying material for repairing the track throughout the system of the trolley company, and for two weeks before the accident in getting crushed stone at Dunellan and taking it over on the Metuchen line, where they were repairing the track. In order to secure a clear track for the running of this construction car, it was the custom, as stated by the motorman, to follow a regular passenger car, and to inform either the motorman or conductor of such passenger car where they were going, so that they would notify

*For the authorities in this series on the question whether employees of different railroad companies are fellow servants under certain circumstances, see foot-note appended to *Chicago Terminal Transfer Co. v. Vandenberg (Ind.)*, 17 R. R. R. 740, 40 Am. & Eng. R. Cas., N. S., 740.

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the car that they met on the switches that the construction car was coming, in order that such car would wait until the construction car had passed. On the day of the accident it appeared that one Eick, who was the motorman of the construction car, gave at New Brunswick to one De Hart, the conductor of the passenger car, the notice that he was going to follow him to Bound Brook, and the conductor replied, "All right." This notice he had given on previous occasions to the conductor or motorman of that car—whichever one he saw. And the giving of this notice was heard by the plaintiff Norman. After De Hart's car started, the construction car followed it and kept it in sight for some distance; but, the morning being foggy, it passed out of sight, when, about a mile above the Landing Bridge, a collision occurred between the construction car and a passenger car coming from Bound Brook, causing the injury to the plaintiff. The firm of T. M. Leshner & Son were doing the repair work to the roadbed of the defendant under an agreement, not in writing, by which the firm agreed to do the work on a percentage basis; the company to pay the cost, and to pay 10 per cent. over the cost of the material and labor. The plaintiff was employed as a motor boy by Dayton, one of the foremen of Leshner & Son. He was paid by the firm and carried on their pay rolls, and he had been originally employed on the original construction of the road, and had been carried along from beginning to end on the pay roll as one of the employees of the firm. It appeared that the plaintiff went on the trolley car first under the direction of one of the foremen of Leshner & Son, and while so employed received his orders from Eick, the motorman of the car; and it also appeared that the boy never did any work of any kind in respect to the repair work or other work on the property of the defendant company, except the work in charge of Leshner & Son. The flat car used for carrying the stone was built by Leshner for his use; he using, by permission of the defendant, one of the old trucks of the company. The company furnished a motor car to pull the flat car, and assigned Eick to it as motorman; he taking, as he testified, all his orders either from Leshner or his men; the car being, as Leshner stated, subject to his orders in doing this work. He admitted that it might have been taken for use by the company when he was not using it, but said that it would not be done if he wanted it. At the close of the testimony the trial judge directed the jury to find a verdict for the defendant.

Alan H. Strong, for plaintiffs in error.

Willard P. Voorhees, for defendant in error.

VROOM, J. (after stating the facts). This was the second trial of this case at the circuit. At the first trial the jury was directed to find a verdict for the plaintiff, and, on the removal of the case to this court by writ of error, it was held that this direction was manifestly wrong, for at the trial there was no question but that the collision injured the plaintiff, and was the result of negli-

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gence on the part of the defendant company, and that the question tried was whether the plaintiff was not also in the employment of the same company, so that the negligence by which he was injured was that of a fellow servant. The *per curiam* opinion then said that there were two views that could be taken of the evidence: One, that Leshar, who employed and paid the plaintiff, acted in so doing as the mere agent of the defendant company; the other, that Leshar had some contract with the defendant company respecting the repair of its tracks, and, having employed the plaintiff in respect to his business, had transferred plaintiff's services *pro hac vice* to the defendant company, with plaintiff's consent, and that there should have been a submission to the jury whether there had been such transference of services with plaintiff's consent. *Norman v. Middlesex & Somerset Traction Co.*, 68 N. J. Law, 728, 54 Atl. 835. When the case came on for trial the second time the evidence was practically the same as at the first trial, with the exception that the plaintiff was able to secure the evidence of Leshar, whose testimony showed that he had the entire direction and superintended the repair work, mostly personally, and had as his assistant Hughes, who was also his timekeeper. He further testified that he paid for the stone to be used in the repair work, and sent the car to be loaded directly off the wagons which delivered it. He further stated that he gave to Eick, the motorman, the orders as to the running of the car, but admitted that Eick was not paid by him. At the close of the case a motion was made to direct a verdict for the defendant, and, disposing of the motion, the trial judge said that it must be conceded that Leshar & Son were independent contractors, and that the plaintiff Norman was the employee of that firm, and that Eick, the motorman, in all that he did for Leshar & Son, was a fellow servant of the employees of Leshar & Son. He, however, granted the motion on the ground that the risks incident to the operation of the car were risks of the business of Leshar & Son, and all such risks the plaintiff Norman must be held to have assumed as an incident of his employment; that, in the operation of the car under the system of notice, Leshar & Sons' servants and the defendant's servants were engaged in the same line of work—all in the work of a common nature, and all subject to the risks incident to the failure to observe the custom. The work of the employees of the defendant was the work of the defendant company. They were all operating cars over the line of the defendant company, in the defendant's work, about the defendant's business, and were in that employment, in operating the cars, all fellow servants in that particular respect. In that condition, among the risks assumed and incident to the business were the risks resulting from the negligence of the servants of the defendant.

The difficulty with this instruction to the jury is that it ignores entirely the two questions that were distinctly held by this court to be matters which should be submitted to the jury, and, as contended by the plaintiff in error, rendered immaterial the fact

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whether Leshar was an independent contractor, or merely a foreman or agent of the defendant company, and whether there had been a transference of plaintiff's services with his consent. To assume, as was done by the trial judge, in order to warrant the direction of a verdict for the defendant, that the plaintiff and the servants of the defendant were, under the evidence, all fellow servants of the company, and that all were operating cars over defendant's road and about defendant's business, was error; and this seems the more apparent, independently of taking so vital a question from the jury, from the fact that the trial judge had distinctly stated that there was proof from which the jury might find that Leshar & Son were independent contractors, and that the plaintiff was an employee of that firm. It does not seem to me to admit of any doubt but that, under the evidence, the jury could have found that in the doing of the work Leshar & Son were independent contractors, and also that the plaintiff was exclusively in the employ of Leshar & Son, and not in that of the defendant company. Whether the services of the plaintiff had been transferred by Leshar, pro hac vice, to the defendant, with the plaintiff's consent, was also, as pointed out in *Norman v. Middlesex & Somerset Traction Co.*, supra, an important question. This transference can be established only by showing that the plaintiff assented expressly or impliedly to the transfer, and, as held in *D., L. & W. R. Co. v. Hardy*, 59 N. J. Law, 38, 34 Atl. 986, "it may be established by direct proof that he agreed to accept the new master and to submit himself to his control, or by indirect proof of circumstances justifying the inference of such assent."

The judgment below should be reversed, and a venire de novo awarded.

WOOD'S ADM'X v. SOUTHERN RY. CO.

(Supreme Court of Appeals of Virginia, Dec. 7, 1905.)

[52 S. E. Rep. 371.]

Master and Servant—Injuries to Servant—Duties of Master—Safe Appliances.*—Where a handhold on the manhole of an engine tender, while primarily used to raise the manhole cover, is also commonly used, without objection from the railroad, by brakemen and others as the most convenient and safe way to assist them in getting on and off the tender, the railroad is bound to exercise ordinary care to see that such handhold is in a reasonably safe condition for the use to which the brakeman and other employees put it.

*For the authorities in this series on the question of the care required of a railroad company, as an employer, in furnishing appliances, see foot-notes appended to *Smith v. Fordyce* (Mo.), 16 R. R. R. 378, 39 Am. & Eng. R. Cas., N. S., 378.

For the authorities in this series on the question of the care required of a railroad company, as an employer, in inspecting appliances, see foot-note appended to *Illinois Cent. R. Co. v. Coughlin* (C. C. A.), 14 R. R. R. 326, 37 Am. & Eng. R. Cas., N. S., 326.

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Same—Actions—Questions for Jury.—In an action against a railroad for the death of a brakeman, evidence held sufficient to require the submission to the jury of the question whether the death of the brakeman was not to be attributed to the negligence of the railroad in failing to keep a handhold on the tender on which the brakeman was riding in a reasonably safe condition.

Evidence—Weight and Sufficiency—Preponderance of Proof.—Plaintiff in an action for personal injuries is not required to prove his case beyond a reasonable doubt, but all that is required to make out a prima facie case is to make it appear more probable that the injury was the proximate result of defendant's negligence than of anything else.

Master and Servant—Injuries to Servant—Contributory Negligence—Sufficiency of Evidence.—In an action against a railroad for the death of a brakeman, alleged to have been caused by the giving way of a manhole cover, to the handhold on which the brakeman was clinging while getting off the tender, evidence held to authorize a finding that the brakeman was not guilty of contributory negligence in making use of the handhold while getting off the tender.

Error to Circuit Court, Amherst County.

Action by Anna P. Wood, as administratrix of J. Buckner Wood, deceased, against the Southern Railway Company. There was a judgment in favor of defendant, and plaintiff brings error. Reversed.

Strode & Tucker and *Caskie & Coleman*, for plaintiff in error.
Horsley & Kemp, for defendant in error.

BUCHANAN, J. This action was brought by the personal representative of J. Buckner Wood, deceased, to recover damages for the death of his decedent, caused, as alleged, by the negligence of the Southern Railway Company.

Upon the trial of the cause, the defendant company's demurrer to the evidence was sustained, and judgment rendered in its favor. To that judgment this writ of error was awarded.

There was evidence tending to prove that about 10 o'clock on the night of February 7, 1904, one of the defendant company's freight trains from Alexandria arrived at Monroe, a station on the defendant's road in Amherst county. The train was to be placed on a siding there and the engine taken to the roundhouse. The front brakeman on the train not being acquainted with the switches at the station, the plaintiff's decedent, who was a yard brakeman, was ordered by the yardmaster to assist in "putting away" the train, and was engaged in that service when he lost his life.

The train came in from the north on the main track, and after passing the depot was switched to another track, where the engine and tender were cut loose from the cars. The engine and tender proceeded over another switch to the main line, and were backed down that track with the intention of getting on the "lead" track through another switch, so as to get to the roundhouse. As the train went south over the main line, and before the engine and tender were cut loose, the deceased lit a "fusee," which makes a flaming red light and burns for about 10 minutes,

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and stuck it in the ground to give warning to an approaching train from the south. After the engine and tender had been cut loose, and as they were backed north on their way to the roundhouse, the deceased picked up the lighted fusee, and with his lantern got on top of the tender of the engine and sat on its rear end, holding the fusee in his hand to signal the engineman, and to give warning to the train approaching from the south and another which was expected from the north. The position of the deceased was a proper one for the duties he had to perform.

When the engine and tender reached the switch over which they had to pass to reach the "lead" track, it was the duty of the deceased to throw or change the switch. As the engine and tender approached the switch, and were within 100 or 125 yards of it, running at the rate of about 12 miles an hour, the deceased was seen sitting on the "manhole" on the rear end of the tender by the engineman, as he turned to shut off the steam and slow down his engine so as to go in on the switch. There was some slight hitch in reversing the lever and slowing down the engine, and when the engineman again looked in the direction his engine was backing he did not see the plaintiff's intestate, but took "it for granted," as he testified, "that he had gotten down and later would throw the switch." As soon as the engine stopped the attention of the engineer was attracted by the action of the car inspector upon the track over which the engine and tender had just passed. The engineer got off his engine and went back to the car inspector, where was found the dead body of plaintiff's intestate.

The car inspector, who was following after the engine, came first upon the lamp of the deceased, then the "manhole" cover, and, a little nearer the engine, upon the dead body of the deceased, all between the rails of the track. The cross-ties and ballast between the ties showed that the manhole cover and the body of the deceased had both been dragged some distance.

The manhole, upon the cover or lid of which the deceased was sitting when last seen alive, and immediately before his death, is located in the center of the rear of the tender, in a line with the top of the ladder leading up and down the rear end of the tender. The manhole cover is about 40 inches in length and 21 inches in width, oblong in shape, is made of iron, and has upon it an iron handhold, parallel with the rounds of the ladder referred to above, and of about the same diameter, located on the side of the cover nearer the end of the tender; and the cover is fastened to the tender by hinges on the side next to the engine. It was the common practice of brakemen and others passing over the tender to use the handhold of the cover for the purpose of pulling themselves up on the tender from the ladder and in letting themselves down the ladder. The location of the handhold was such that it was convenient and inviting, as well as in common use for those purposes, and there was nothing else by which a person ascending or descending the ladder could as conveniently and safely catch hold of. The handhold was also used for raising

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the manhole cover to put water into the tank, and that was most probably its primary use.

About 30 miles from Alexandria, on the run from there to Monroe, the manhole cover slipped when one of the brakemen caught hold of the handhold in coming up the ladder and getting on the tender from the rear. The hinges of the cover, when found on the track after the accident, were broken; one hinge showing a fresh break, and the other an old break, which was rusty and had the appearance of having been made some time before. When both hinges were in proper condition, there was no danger of the cover slipping or breaking loose by the use of the handhold in getting off or on the tender at the rear.

The contention of the plaintiff is that the proximate cause of the accident, which resulted in her decedent's death, was the failure of the defendant to exercise due care in keeping in a reasonably safe condition the manhole cover, the handhold of which the deceased was using and had the right to use in performing his duty at the time of the accident.

The contention of the defendant as to the negligence charged is that it is not proved that the plaintiff's intestate had the right to use the handhold in getting off the tender, or, if he had, that he was so using it in the performance of his duty when he fell from the tender and was killed.

The evidence not only tends to prove, but the jury, if the case had not been taken from them by the demurrer to the evidence, might properly have found, that one of the hinges of the manhole cover was broken, and that it had been broken for so long that the defendant knew, or could by the exercise of reasonable care have known, of its condition. The jury might have further found, even though the primary use of the handhold on the manhole cover was to raise it for the purpose of putting water into the tank, that it was the most convenient and safe way for brakemen and others to get on and off the tender by way of the ladder at the rear end of the tender, and that it was their common practice to so use it, without objection by the defendant; and since it did not prohibit such use (which probably would have seemed absurd), it ought, therefore, to have exercised ordinary care in seeing that it was in a reasonably safe condition for such secondary use. *Coates v. Boston, etc., R. Co. (Mass.)* 26 N. E. 864, 10 L. R. A. 769; *McIntyre v. B. & M. R. Co. (Mass.)* 39 N. E. 1012.

The jury might have further found that the deceased, when last seen alive, was sitting on the manhole cover at the rear of the tender, in the performance of his duties, when the engine was within 125 yards of the switch, to change which was his next duty; that in discharging that duty in the customary and most speedy and convenient way he would have used the handhold on the manhole cover in going down the ladder at the end of the tender, preparatory to getting on the ground to change the switch; and that while thus using the handhole, the other hinge in the manhole cover was broken, and by reason thereof he fell, or was thrown, in front of the backing engine and tender and killed.

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Upon all the facts and circumstances of the case, considered as on a demurrer to the evidence, we cannot say as a matter of law that the injury complained of was not more naturally to be attributed to the negligence of the defendant than to any other cause. A plaintiff in an action to recover damages for personal injuries is no more required to prove his case beyond a reasonable doubt than in any other civil action. All that he is required to do to make out a *prima facie* case is to make it appear to be more probable that the injury was the proximate result of the defendant's negligence than from any other cause. *Griffin v. Boston, etc., R. Co.* (Mass.) 19 N. E. 166, 1 L. R. A. 698, 12 Am. St. Rep. 526; *Labatt on Master & Servant*, § 835; *Marshall v. Valley R. Co.*, 99 Va. 798, 805, 34 S. E. 455; *Va. Iron C. & C. Co. v. Tomlinson*, 104 Va. —, 51 S. E. 362, 364; *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96.

It is insisted by the defendant that, even if it was guilty of negligence in failing to exercise ordinary care to maintain the manhole cover in a reasonably safe condition and the plaintiff's intestate had the right to make use of the handhold thereon in getting off the tender, he was guilty of contributory negligence in attempting to do so under the facts and circumstances of the case.

Without discussing further the evidence in the case, and the proper inferences which the jury might have drawn from the facts and circumstances proved, it is sufficient to say that we are clearly of the opinion that, if the jury had found that the plaintiff's intestate was not guilty of contributory negligence, the court could not have set aside the verdict because contrary to the evidence. We are of opinion, therefore, that, since the jury might have found for the plaintiff upon both the question of negligence and of contributory negligence, we must so find.

The judgment of the circuit court must be reversed, and this court will enter such judgment as that court ought to have entered.

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(Supreme Court of Appeals of Virginia, Sept. 14, 1905.)

[50 S. E. Rep. 731.]

Master and Servant—Injuries to Servant—Railroads—Negligence.*

—Where plaintiff, a brakeman in defendant's employ, was injured while attempting to board defendant's sole locomotive at a time when plaintiff was off duty, and when there was no reason to suppose that any one was in the vicinity or would attempt to get upon the engine, defendant was not negligent in leaving an oil can used by the engine hostler on the footboard of the engine, or in not having a rule forbidding such obstruction.

*See generally, extensive note, 17 R. R. R. 236, 40 Am. & Eng. R. Cas., N. S., 236.

For the authorities in this series on the subject of the liability of

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Same—Absence of Lights—Proximate Cause.†—Where, in an action for injuries to a servant while attempting to board an engine, plaintiff testified that he both saw and heard the engine coming toward him prior to the accident, defendant was not negligent in failing to have marking lights on the rear of the tender.

Evidence—Speed—Expert Testimony.‡—The speed of a train and within what distance it could be stopped are questions on which expert testimony cannot be introduced, unless based on the operation of cars or engines of similar construction and equipment under like circumstances.

Master and Servant—Injuries to Servant—Railroads—Contributory Negligence.§—Where plaintiff, without necessity, after the termination of his service for the day, went to defendant's railroad yard to give the watchman a coach key, and for that purpose stood in the middle of the track when he knew the engine was approaching him backwards, and attempted to get on the footboard in the rear, when he slipped and was injured, he was guilty of contributory negligence, precluding a recovery.

Same—Discovered Peril.—In an action for injuries to a brakeman while attempting to board the tender of an engine approaching him at night, evidence held insufficient to entitle plaintiff to recover

the master for injuries received by his employees while not on duty, see foot-note appended to *Shadoan's Adm'r v. Cincinnati, N. O. & T. P. R. Co.* (Ky.), 14 R. R. R. 280, 37 Am. & Eng. R. Cas., N. S., 280.

†For the authorities in this series on the question what is, and is not, the proximate cause of an injury, see foot-notes appended to *Dean v. Oregon R. & Nav. Co.* (Wash.), 16 R. R. R. 237, 39 Am. & Eng. R. Cas., N. S., 237; foot-notes appended to *Birmingham Ry. Light & Power Co. v. Brantley* (Ala.), 15 R. R. R. 191, 38 Am. & Eng. R. Cas., N. S., 191; *Snow v. New York, etc., R. Co.* (Mass.), 15 R. R. R. 47, 38 Am. & Eng. R. Cas., N. S., 47; *Illinois Cent R. Co. v. McIntosh* (Ky.), 14 R. R. R. 739, 37 Am. & Eng. R. Cas., N. S., 739; *Glassey v. Worcester Con. St. Ry. Co.* (Mass.), 14 R. R. R. 736, 37 Am. & Eng. R. Cas., N. S., 736.

‡See foot-note appended to *Schutz v. Union Ry. Co.* (N. Y.), 15 R. R. R. 777, 38 Am. & Eng. R. Cas., N. S., 777.

§For the authorities in this series on the question whether there can be recovery for injuries to employees caused by their attempts to board moving cars or engines, see extensive note appended to *Kilpatrick v. Grand Trunk Ry. Co.* (Vt.), 20 Am. & Eng. R. Cas., N. S., 300; *McCabe v. Montana Cent. Ry. Co.* (Mont.), 13 R. R. R. 564, 36 Am. & Eng. R. Cas., N. S., 564 (attempting to mount moving engine near switch stand too close to track); *Southern Ry. Co. in Miss. v. Williams* (Miss.), 12 R. R. R. 90, 35 Am. & Eng. R. Cas., N. S., 90; note, 12 R. R. R. 377, 35 Am. & Eng. R. Cas., N. S., 377 (in obedience to order); *McDonnald v. Washington & C. R. Ry. Co.* (Wash.), 8 R. R. R. 593, 31 Am. & Eng. R. Cas., N. S., 593 (question for jury where conductor boarding moving train was struck by post of cattle guard); *Kansas City S. Ry. Co. v. Billingslea* (C. C. A.), 5 R. R. R. 167, 28 Am. & Eng. R. Cas., N. S., 167 (switchman mounting moving train in yard); *Chattanooga Elec. Ry. Co. v. Lawson* (Tenn.), 12 Am. & Eng. R. Cas., N. S., 669 (boarding moving car in obedience to foreman's order is not contributory negligence per se on part of employee); *Donahue v. Boston & M. R. R.* (Mass.), 20 Am. & Eng. R. Cas., N. S., 526 (jumping on moving engine, question for jury).

For the authorities in this series on the question whether railroad employees assume the risks from boarding moving cars or engines, see extensive note, 12 R. R. R. 197, 35 Am. & Eng. R. Cas., N. S., 197 (obedience to orders).

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on the theory that the man in charge of the engine was negligent in failing to stop the same after he discovered plaintiff's danger.

Error to Circuit Court, Wise County.

Action by W. B. McCormick against the Wise Terminal Company. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Ayers & Fulton and Bullitt & Kelly, for plaintiff in error.

William H. Werth, for defendant in error.

CARDWELL, J. The defendant in error, W. B. McCormick, brought this action and recovered in the circuit court of Wise county a verdict and judgment against the plaintiff in error, Wise Terminal Company, which was the defendant in the court below, for \$5,000 as damages for personal injuries alleged to have been inflicted upon him by the negligence of the defendant company.

In the view taken by this court, there was a total failure on the part of the plaintiff to trace actionable negligence to the defendant company, and in no aspect of the case was he entitled to a verdict. Therefore it is unnecessary to notice in detail the numerous assignments of error, other than the refusal of the trial court to set aside the verdict on the ground that it was contrary to the law and the evidence.

The Wise Terminal Company operates a line of railroad about six miles in length, extending from the town of Glamorgan, in Wise county, to the town of Norton, in the same county. The business conducted by the company, at the time of the injuries received by the plaintiff, consisted of two passenger trains between the two points named, one in the morning, and the other in the evening, and the carrying of freight between the same points.

In carrying on this business, the defendant company found it necessary to purchase and use only one engine and one passenger car; the freight cars being furnished by connecting roads. The engine used, though secondhand, was duly inspected before it was purchased by the defendant company by competent inspectors, and pronounced reasonably safe and suitable for the work required of it—in fact, according to the undisputed evidence in the case, was more desirable and much safer on the new road-bed which the defendant company was operating than a new engine would have been. The defendant company employed competent men to manage and conduct its business, and among others of its employees was the plaintiff, McCormick, who was a brakeman, well versed in railroad rules, who usually performed his duties reasonably well, but had fallen into the habit of drinking ardent spirits to excess at times. His duties were those of an ordinary brakeman, and to keep one of the two keys to the passenger coach from the time he went on duty at 7 o'clock a. m. till about 7:30 p. m., when he was to lock the passenger coach and deliver the key to another employee, Taylor, and thereupon his (McCormick's) duties and employment ceased for the day, and

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it became the duty of Taylor, as the night watchman (or "hostler"), to take charge of the engine and passenger coach and keep them in charge during the night. He (Taylor) was also to clean, oil, sand, water, and coal the engine, clean up the passenger coach, and have them ready for the first passenger run from Glamorgan to Norton the next morning. No one besides Taylor had anything to do with the engine or passenger coach after the last or night passenger run from Norton to Glamorgan was completed; the engine and passenger coach remaining at Glamorgan for the night in the exclusive custody and control of Taylor, with no reason whatever for him to expect any one to come about them. There was no regular roundhouse for the protection and care of this one engine, and in the performance of his duties in cleaning said engine and getting the same ready for duty on the road early next morning it became necessary to use kerosene oil, and for this purpose there was kept in the passenger coach a five-gallon can of such oil, which Taylor, the night watchman, would use and then return to its place in the passenger coach. The road being new and the grounds muddy, it frequently became necessary for the night watchman in the performance of his duties to detach the engine and take it to a certain switch in the yard, where, on account of the increased width of the level space at the switch, he could stand the engine and more easily and with less contact with the mud get around it and do the necessary cleaning and other work upon it. After the necessary cleaning and oiling was done the night watchman would take the engine back down the main track, respectively, to the places where he could sand, coal, and oil it and then attach it to the passenger coach, to be followed by sweeping out the passenger coach and otherwise putting it in proper condition for the first passenger run, leaving Glamorgan about 7 o'clock the next morning; the night watchman remaining in charge until the next morning, when he delivered the engine and coach to the crew which made the runs between Glamorgan and Norton, said crew including the plaintiff, McCormick, who had no duties or business on the engine or coach from about 7:30 o'clock p. m. the previous evening until 7 o'clock the next morning. When the night watchman would get his engine clean and start it back for sand, water, and coal, and to be attached to the passenger coach, he would of necessity place the oil can on a certain step affixed to the rear end of the tender of the engine and extending entirely across the tender, which was, according to the evidence, the only place where the oil can could be safely placed while carrying it back to its final destination in the passenger coach, and it was the custom to so carry it from the passenger coach to the point where the engine was cleaned and oiled, and back to the passenger coach when the work of cleaning and oiling the engine had been done. Of the two keys to the passenger coach mentioned, the watchman had one, and it was therefore no impediment to him in the discharge of his duties, if McCormick, the plaintiff, did not deliver the other key

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to him when he went off duty until the next morning; hence there was no actual necessity for McCormick, when he went off duty, to give the key he held to the night watchman, and the only reasons for his doing so were (1) that he would be observing the rules, and (2) that there would be less risk of some outsider getting hold of the key, if given to the night watchman, who remained on duty and awake all night. There were no lights on the rear or tender of the engine, and none were necessary, as no one was expected or allowed to attempt to get on the engine while it was off duty and in the charge of the night watchman. As there was but one engine to move in the yard, there was no danger of a collision by reason of the absence of lights or "markers" on it, and therefore the reason why standard roads with a number of engines and trains constantly moving have these lights or "markers" did not apply. The step that ran across the rear end of the tender, and on which the oil can was usually placed, as stated, was a board about 9 inches wide, and about 1½ inches thick, and about 17 or 18 inches high from the track, and some 8 or 9 inches higher than the usual height of such steps. Just why this was so the evidence does not disclose, but it does appear that the danger in attempting to board the engine by getting on said step would be far greater than if it had been of the ordinary height, 8 or 9 inches, a fact which, by reason of his experience, was well known to McCormick. The engine while in use on the road was not fully equipped with an air brake, though the tender was so equipped, and from this the air could be made to operate and control the other parts of the train, and, as no great speed was required or attained in the handling of the defendant company's trains, this equipment was all that was necessary, but after the day's work was over even the air brake on the tender was not required nor used, and the air valve was cut off and the engine controlled in the few movements it made on the yard during the night by the steam brake and reverse lever. This was customary with all roads, and was uniformly followed in the handling of the engine in question on the yard of the defendant company, and that there was no real necessity to use air brakes when being so handled is apparent.

On July 6, 1903, the last passenger run from Norton to Glamorgan was made, and the engine, as usual, turned over to the night watchman, Taylor, in its usual condition; i. e., with the air valve closed. McCormick, however, for some reason forgot to turn over to Taylor the key to the passenger coach that was in his possession, and which it was his duty to have delivered to Taylor on the completion of the run, about 8 o'clock p. m., and which duty McCormick generally performed and had been remiss in doing but a few times before. In his examination in chief in this case he started out to excuse his omission on this occasion by the statement that on arriving at Glamorgan and going off duty for the night he did not see Taylor, but on cross-examination he frankly admits that he simply "forgot" it. He claims that he occupied the time between 8 o'clock p. m. and midnight

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in writing two letters and in reading a newspaper, when he discovered that he had failed to deliver the key to Taylor, as he should have done on arrival of the train, and that he then had it in his pocket, and, although there was no necessity for his doing so, so far as enabling Taylor to get into the coach was concerned, he started out in quest of Taylor to deliver to him the key.

Taylor, as usual, had taken the engine up to the switch above referred to for the purpose of cleaning and oiling it, and McCormick claims that, when he came down looking for Taylor to give him the key, he went up to the engine and could not discover him there. He does not claim to have called for Taylor, but only that he glanced around to see if he was at the engine. After failing to see Taylor on the engine, McCormick went down the track to a point under or near what is known in the record as the "Larry Trestle," and there, observing that the engine was rolling towards him, he stopped in the middle of the track for the purpose of boarding the tender (which was in front, as the engine was moving backward) by getting on the step across the same, and when the tender rolled on down he made the attempt to so board the tender, but in doing so, as he claims, his foot struck the oil can which Taylor had placed on the step, and it caused him to fall under the tender, and the tender and engine ran over him inflicting such injuries that his right arm and right leg had to be amputated. He claims that, when he saw he was falling, he commenced hallooing, that he caught with his hands on the end of the tender and was dragged a few feet, when his hold broke and the tender and the engine passed over him, the latter passing him a few feet before it stopped; but he does not undertake to state definitely the distance the engine ran after he fell or after the accident, which was quite natural under the circumstances.

The theories upon which the plaintiff grounds his claim to damages were (1) that Taylor, the night watchman, was incompetent to perform the duties intrusted to him; (2) that Taylor was negligent in placing the oil can on the step across the front of the tender; (3) that the engine was not suitably equipped with air brakes and was not properly lighted; and (4) that Taylor did not stop the engine as soon as he ought to have done after plaintiff fell under it.

There was practically no effort made in the introduction of the evidence to sustain the allegation of the declaration that the defendant company was negligent in using a secondhand engine, nor as to the incompetency of Taylor, the night watchman. With reference to the placing of the oil can on the step, or the lack of lights or air brakes on the engine, there is absolutely no evidence in the record from which to impute to the defendant company any negligence whatever. Therefore the instructions to the jury, from 1 to 9, inclusive, given for the plaintiff, all of which were in one form or another predicated upon the supposed

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negligence of the defendant company in the respect mentioned upon familiar principles, ought not to have been given.

It is a fundamental principle of negligence that one charged therewith must have done something which he knew or had reason to believe might cause an injury to some one else, and unless this is proven negligence cannot be imputed.

In addition to plaintiff's own evidence, showing conclusively that no one had any business on the step or footboard across the rear end of the tender after the train came in and the engine was turned over to Taylor, the uncontradicted statement of Taylor is that no one had any business there, so far as he knew, and therefore he was not looking for anybody about the engine or on the track.

At one point it is alleged and argued that the negligence of the defendant company with respect to the oil can consisted in a violation of a rule against putting such an obstruction on the step of the engine, and at another that the negligence consisted in not having such a rule. Either contention might have been plausibly made, if the accident out of which this suit arises had occurred at a time and place when and where there was any reason whatever to expect that any one would attempt to get upon the step or footboard of the engine in question; but that is not the case here. Moreover, the plaintiff himself testifies that he had with him a regular railroad lantern, which he admits afforded him sufficient light to see the small iron handhold on the end of the tender, which he got hold of or attempted to get hold of; yet he tries, as it would seem, to leave the impression that the lantern did not afford him sufficient light to see the five-gallon oil can on the step, and, accepting this as true, it but adds to the strength of the proof his evidence affords of his own gross negligence, proximately causing the injuries for which he sues, or at least contributing thereto.

It is also shown in the evidence that, while the engine is moving to and fro at work on the yard at night, colored lights are set back on the tender, so that the edge of the tender throws a shadow down immediately around the tender and no light is thrown on the step or footboard. These lights are only put on the engine as "markers"; i. e., for the purpose of indicating to people and trainmen the location of the engine, and not for the purpose of enabling them to get upon the engine. Their absence from the engine on the night of this accident, even if under the circumstances they should have been there, could not by any possibility have contributed to the accident, since the plaintiff himself testifies that he both heard and saw the engine coming towards him. It also clearly appears, there being really no evidence to the contrary, that with the air valve shut off, which was the case, the engine could have been stopped without the air brakes as quickly and within the same distance by reversing and giving the engine steam.

A number of witnesses were permitted to give opinions in answer to hypothetical questions which assumed facts concern-

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ing the speed of the engine at the time the plaintiff was injured, and within what distance it could have been stopped after Taylor had notice of the plaintiff's peril, when these facts had not been and never were proved in the case; but we deem it unnecessary to comment on this evidence further than to say that it was, under the circumstances, irrelevant and incompetent. The speed at which a train was moving or within what distance it could be stopped are questions of actual facts, and expert testimony thereon can under no circumstances be introduced, unless based upon the operation of cars or engines of a similar construction and equipment and under like conditions. *Richmond Pass., etc., Co. v. Rack's Adm'r*, 101 Va. 487, 7 R. R. R. 615, 30 Am. & Eng. R. Cas., N. S., 615, 44 S. E. 709.

The remaining question in the case is whether or not Taylor, after he knew or had notice of plaintiff's peril, exercised ordinary care to prevent the injuries to him?

We do not attach any importance to the question whether the plaintiff was upon the track of the defendant company on the night of his accident as an employee, or a stranger, or a trespasser. Conceding that it was his duty, as is so earnestly contended, to deliver the key to Taylor when he found it in his pocket several hours after he should have so delivered it, and that he was properly in the yard of the defendant company for that purpose as an employee, the question remains whether there was reasonable and proper cause for him to step in the middle of the track to await the approach of the engine to him and then attempt to mount the step across the front of the tender from the middle of the track, without sufficient light to enable him safely to do so, as he insists.

It was neither reasonably necessary nor proper for him to take the risk in the performance of the duty resting upon him to deliver the key to Taylor. *Thomp. Neg.* §§ 3748, 3749, 4988; *Bertha Zinc Works v. Martin*, 93 Va. 791, 22 S. E. 869. He admits that, if he had safely gotten upon the step, he could not have delivered the key from there to Taylor, who was in the cab of the engine, but would have had to ride on the step down to where the engine was to stop at the coach, a distance less than 200 feet, before he could accomplish his purpose. Obviously, he could have avoided the hazardous and dangerous undertaking to board this engine, as he did, by walking down to where the engine was to stop, as he knew, and it is conceded that he might have gotten upon the step of the tender from the side of the track, or could have stood outside of the track, clear of all danger, and handed the key to Taylor as he passed. His only excuse for not pursuing one or the other of these obviously safe courses is that there was a ditch on each side of the track in which there was some water. Yet, on cross-examination, when pressed to answer whether, in crossing this ditch to get in the middle of the track, he did not get mud on his feet which caused him to slip and fall when he attempted to board the engine, he stated, "No"; that he "stepped" over the ditch.

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No principle of law is better established than that "where an employee is confronted with two methods of performing work, the one safe and the other dangerous, he owes a positive duty to his employer to pursue the safe method, irrespective of the degree of danger which may be involved in the unsafe method, and any departure from the path of safety will prevent his recovery, if he is injured." *Street's Adm'r v. N. & W. R. Co.*, 101 Va. 746, 9 R. R. R. 43, 32 Am. & Eng. R. Cas., N. S., 43, 45 S. E. 284, and authorities cited; *Newport News, etc., Co. v. Beaumeister*, 102 Va. 678, 47 S. E. 821.

Accepting his statement as true, notwithstanding the strong proof to the contrary, that he was sober when he attempted to board the engine as he did, the fact of the plaintiff's gross negligence so clearly appears that his case is put beyond the possibility that reasonably fair-minded men might differ as to whether or not his negligence contributed directly to his own injury.

This being the situation at the beginning of the occurrences, when plaintiff attempted to board the engine and fell under it, the law is equally well settled as to the liability of nonliability of the defendant company for the injuries he sustained.

"One who is injured by the mere negligence of another cannot recover any compensation for his injury, if he by his own ordinary negligence or willful wrong contributed to produce the injury of which he complains, so that, but for his concurring and co-operating fault, the injury would not have happened, except where the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence." *Dun v. S. & R. R. Co.*, 78 Va. 645, 49 Am. Rep. 388.

The opinion in that case, by Lacy, J., says: "That a person who by his own default has brought upon himself a loss or an injury can claim no loss or compensation for it from another is a principle of universal application; and it is equally true that, if his imprudence or negligence has so materially contributed to the loss or the injury that, but for such imprudence or negligence, it would not have occurred, he can claim no recompense from another who has been instrumental in causing it, unless the latter, upon the discovery of the danger into which the party had brought himself by his own fault, could, by the use of such diligence as the extent of the danger and the nature of the threatened injury required, have avoided the occurrence. *Hutchinson on Carriers*, pp. 502, 505."

This principle of law is clearly discussed, and many of the authorities bearing upon it reviewed, in the opinion by Buchanan, J., in the late case of *Richmond Pass., etc., Co. v. Gordon*, 102 Va. 498, 11 R. R. R. 260, 34 Am. & Eng. R. Cas., N. S., 260, 46 S. E. 772.

The principle was applied in *Dun v. S. & R. Rd. Co.*, *supra*, where the suit was by a passenger suing for an injury sustained while rightfully on board of one of the defendant's passenger trains, and to whom the defendant owed the highest degree of

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care, and what was said in the opinion and by the text-writer cited applies with greater force to a case such as we have under consideration, since, although conceding that the plaintiff was in the line of his duty when he went to deliver the key to Taylor, the night watchman, the well-established principle that in entering the employ of the master he assumed the risks ordinarily incident to the duties to be performed also applies, and also the further principle that it is as much the duty of the servant to provide for his own safety from such dangers as are known to him, or are discernible by ordinary care on his part, as it is the master's duty to provide for him (*Russell Creek C. Co. v. Wells*, 96 Va. 416, 31 S. E. 614), and that where an employee is confronted with two methods of performing work, the one safe and the other dangerous, he owes a positive duty to his employer to pursue the safe method, irrespective of the degree of danger which may be involved in the unsafe method, etc. (*Street's Adm'r v. N. & W. R. Co.*, supra; *Bowers v. Bristol Gas & Elec. Co.*, 100 Va. 533, 42 S. E. 296, and authorities cited).

"The extent of a person's duties is to be determined by a consideration of the circumstances in which he is placed. The law imposes duties upon men according to the circumstances in which they are called to act." It is true that, "when the facts are disputed, the question of negligence is a mixed question of law and fact. The jury must ascertain the facts, and the judge must instruct them as to the rule of law which they are to apply to the facts as they may find them. Where, however, the direct fact in issue is ascertained by undisputed evidence, and such fact is decisive of the case, a question of law is raised, and the court should decide it. The jury has no duty to perform. The issue of negligence comes within the rule." *Dun v. S. & R. R. Co.*, supra.

If we concede that the tenth instruction, given for the plaintiff with the view of submitting to the jury the question whether or not Taylor failed to perform his duty after the plaintiff fell under the engine, fairly and correctly propounded that question, although it failed to tell the jury that the defendant company was not liable unless Taylor failed to do his duty after he knew or had notice of plaintiff's peril, we are still of opinion that the verdict of the jury should have been set aside on the ground that it is without evidence to trace actionable negligence to the defendant company.

As to what transpired after the plaintiff fell under the engine and before the engine was stopped, which required but a moment of time, there is but little evidence. The engine, including its tender, was about 30 feet long, and one of the plaintiff's witnesses, who evinced intelligence to form a correct opinion on that subject, testified that it could not have been stopped in less than a length and a half of itself, which would mean 45 feet, and in any view of the plaintiff's evidence it did not run over 50 feet after the plaintiff fell, to run which distance, if going the speed claimed by the plaintiff, from $2\frac{1}{2}$ to 3 miles per hour, required but a few

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seconds. The engine was unquestionably stopped within the distance of 45 feet, or about that distance. The plaintiff's statement is that he tried to get on the engine "right under the Larry Trestle," fell, and "commenced hollowing before he hit the ground"; that he hollowed "a dozen times, I expect," holding on to the step "for 15 feet or more," and was "hollowing for him to stop all the time"; and he is corroborated as to "hollowing" by several witnesses, one of them about 150 yards away and another in the power house with several engines in motion, but quite naturally neither of these witnesses stated that Taylor heard or could have heard the "hollowing," as they did not know and could not have known the conditions surrounding Taylor. Taylor was in the cab, and the engine was "drifting" along, making "no noise" other than that that is usual when an engine is so moving. He says that he first heard the man "hollow" right under the trestle, right under his feet, and about the time he heard his voice he felt the wheels hitting him, and frankly admits that, when he heard the man under the wheels of his engine, he became "rattled and excited," and that it was a moment or two before he could think, but insists that he stopped the engine as soon as it was possible for him to have done so, and there is not the slightest evidence tending to prove that he was unduly excited, or to contradict the statement that he did all he could to stop the engine after hearing the man under it. To hold, according to plaintiff's view, that Taylor heard him "hollowing" to "stop the engine" and paid no heed to his cries would be to impute to Taylor a criminal intent to inflict an injury to a man known to be in peril under his engine, when, too, Taylor was uninformed as to the position of the man, and could not know what was necessary to be done for his protection. Such an imputation could not be justified, except upon the clearest and strongest proof, while here it finds no justification whatever, although we may accept as true the statement of the plaintiff's father that Taylor told him "that when he heard him hollow he thought of the oil can that was sitting on the footboard; he said that was the first thing that came into his mind when he heard him hollow."

Ordinarily it is the party injured who invokes the doctrine sanctioned by this court in *Richmond Ry. & Elec. Co. v. Hudgins*, 100 Va. 409, 41 S. E. 736, that "one may not, by his own negligence or want of proper care, place another in a perilous situation, and, when sued for injuries resulting therefrom, put the burden on the plaintiff of showing that he acted with reasonable care. Persons in great peril are not required to exercise the presence of mind required of prudent men under ordinary circumstances"; but, as it seems to us, no good reason can be given why the converse of the proposition is not equally sound. Here the party doing the injury—i.e., the watchman, or acting engineer, Taylor—claims, and as we think properly, that, having been suddenly put into an emergency by the negligence of the plaintiff, the latter could not require of him the wisest possible action. In other words, if the view of the plaintiff in this case

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be correct, A. by his gross negligence may require action on the part of B. to save him from the consequences of his own fault, and if B. does not automatically and instantly do that which will conduce to his safety B. is liable. Having no reason whatever to expect that the plaintiff, or any one else, would on a dark night attempt to mount the engine in his charge from the middle of the track in front, or be on the track where the engine could inflict an injury upon him, Taylor was, by the negligence of the plaintiff, suddenly put into an emergency when and where the wisest possible action on his part could not be reasonably required of him. "It would violate every principle of justice or law if the defendant were compelled to foresee and provide against that which reasonable men would not expect to happen." *Con. Brewing Co. v. Doyle*, 102 Va. 404, 46 S. E. 390.

It was a matter of pure speculation or conjecture as to what Taylor could or should have done after the plaintiff had by his own gross negligence gotten beneath the moving engine, since the evidence fails utterly to point out any negligence on Taylor's part intervening between the accident and the negligence of the plaintiff.

"The existence of negligence must not be left entirely to conjecture, and courts cannot uphold the tentative conclusions of jurors, based upon no sure grounds of inference." *N. & W. R. Co. v. Cromer*, 101 Va. 671, 8 R. R. R. 371, 31 Am. & Eng. R. Cas., N. S., 371, 44 S. E. 898.

This is therefore, clearly a case where the acts of the plaintiff and the conduct of Taylor were so substantially concurrent as to render it impossible to separate the conduct of the former from the injury itself, whereby plaintiff's right of recovery is precluded. *Seaboard, etc., R. Co. v. Hickey*, 102 Va. 394, 46 S. E. 392; *Richmond Trac. Co. v. Martin* (Va.) 9 R. R. R. 817, 32 Am. & Eng. R. Cas., N. S., 817, 45 S. E. 886, and other authorities cited above.

For these reasons, we are of opinion that the lower court erred in overruling the motion of the defendant company to set aside the verdict, and its judgment must be reversed, and the case remanded for a new trial.

CHICAGO, B. & Q. R. Co. v. WEBER.

(Supreme Court of Illinois, Dec. 20, 1905.)

[76 N. E. Rep. 489.]

Evidence—Documentary—Papers of Corporation.—Hurd's Rev. St. 1903, c. 51, § 15, provides that papers, entries, and records of any corporation may be proved by a copy thereof, certified under the hand of the secretary, clerk, cashier, or other keeper thereof, to which the seal of the corporation shall be affixed. Held, that the papers therein mentioned are thereby made original, and not secondary, evidence.

Same.—A copy of a lease by a railroad company of its lines, certified as required by Hurd's Rev. St. 1903, c. 51, § 15, and bearing

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the seal of the corporation, is admissible as a paper of the corporation.

Railroads—Operation—Companies Liable for Injuries—Evidence.—In an action for personal injuries against a railroad company, a folder issued after an alleged lease by it of its lines, not issued by the defendant nor authorized by it, but issued by the lessee company, which was not a party to the suit, is inadmissible to contradict defendant's evidence that it had leased its lines prior to the time of the injury, and leaves the question as to such lease one of law for the court.

Same—Process—Service.*—Though a lessor railroad company may be liable for the negligence of the servants of a lessee railroad in operating it under the lease, it does not make the servants of the lessee railroad servants of the lessor railroad for the purpose of accepting service, and service of summons on an agent of the lessee is not service against the lessor.

Magruder, J., dissenting.

Appeal from Appellate Court, Third District.

Action by Arthur A. Weber, administrator of Frederick Weber, against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

On September 29, 1903, appellee, as the administrator of the estate of Frederick Weber, sued appellant in an action on the case for an injury resulting in the death of his decedent by such decedent being struck by a locomotive and train of cars on appellant's railroad near Quincy, at the crossing of a public highway. The declaration counts directly upon the negligence of appellant and its servants. The summons bears the date of bringing the suit, and the sheriff's return thereon was in words following: "Not being able to find the president of the within-named the Chicago, Burlington & Quincy Railroad Company, I have served the within summons on the within-named the Chicago, Burlington & Quincy Railroad Company by reading the same and delivering to E. F. Bradford, agent of the said Chicago, Burlington & Quincy Railroad Company, a true copy of the within, this second day of October, 1903." Appellant is incorporated under the laws of the state of Illinois as the Chicago, Burlington & Quincy Railroad Company, and will be hereafter referred to as the railroad company. There is also a corporation incorporated under the laws of the state of Iowa and doing business in this state under the name of Chicago, Burlington & Quincy Railway Company, which will be hereinafter referred to as the railway company. The defendant (appellant) filed its duly verified plea in abatement, averring that at the time of the serving of said summons upon the defendant the said Bradford was not the agent at Quincy or elsewhere, and prayed that the writ be quashed. Appellee replied, tendering issue upon the

*For the authorities in this series on the question who are, and are not, the employees of a railroad company, see foot-note appended to *Parrott v. Chicago Great Western Ry. Co.* (Iowa), 16 R. R. R. 253, 39 Am. & Eng. R. Cas., N. S., 253; foot-notes appended to *Atlanta & W. P. R. Co. v. West* (Ga.), 14 R. R. R. 548, 37 Am. & Eng. R. Cas., N. S., 548.

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above plea, and upon a trial by a jury the issue was found for the plaintiff, and his damages were assessed at \$6,000, and the court, after overruling a motion for a new trial, entered judgment upon the verdict. Appellant prosecuted an appeal to the Appellate Court for the Third District, where the judgment below was affirmed, the Appellate Court requiring a remittitur of \$2,000, and appellant prosecutes this appeal.

Under the plea in abatement three witnesses testified for appellant that they were acquainted with both the railroad and railway companies. E. F. Bradford, upon whom the summons was served, testified that he was the general agent in the traffic department for certain territory in Illinois of the railway company; that he had been the agent from about 1887 to December, 1901, of the railroad company, which up to the latter date had operated the railroad upon which the appellee's decedent was alleged to have been injured; that on December 21, 1901, the railroad changed hands, and that from that time to the time of said trial the railway company had operated said railroad; that said latter company, from the date last foresaid, controlled all trains running on said road, employed, paid, and discharged all employees, and that all remittances of money, as the receipts for business of said railroad, were made to said railway company; and that on October 2, 1903, when the summons in this case was served on him, he was not the agent of the railroad company. The witness produced, and there was offered in evidence, without objection, a circuit letter marked "No. 1," dated December 16, 1901, and received by him December 21, 1901, signed by the president of the railway company, notifying the witness, as an agent and employee of the railroad company, that the railway company, as lessee, had taken over and would operate the properties owned and otherwise controlled by the railroad company, and that upon receipt of that letter he proceeded at once to change the stationery, billheads, and everything of that kind, by using a stamp and stamping them to read "railway" where the word "railroad" appeared, so as to read "The Chicago, Burlington & Quincy Railway Company," under instructions received so to do from said railway company until new supplies were furnished. The witness further testified that since December 21, 1901, the railroad company had no office in Quincy, nor had it any agent there, and that from the date of the receipt of the circular No. 1 he had acted as the agent of the railway company, and not the agent of the railroad company. Appellant also introduced Alvin C. Anders, the freight agent of the railway company at Quincy, who testified that before the change in the companies he was the freight agent of the railroad company, but that in December, 1901, he received notice of the change of companies, and from that time on acted as the agent of the railway company, and that from that time on, and at the time of the injury complained of, and at the time of bringing the suit in question and service of the summons, the railroad was being operated by the railway company; that he stamped the waybills

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and other blanks and stationery in his office in December, 1901, so as to read "railway company" instead of "railroad company," and that the railroad company had no agent at Quincy after December, 1901; that he was paid by the railway company and remitted all the money to it. In fact, his testimony was substantially like that of the witness Bradford, and need not be further averted to. Alfred S. Ellis, the ticket agent for the railway company at Quincy, testified that he had known the railroad for 20 years, during all of which time he had acted as ticket agent; that he acted for the railroad company up to December, 1901, and for the railway company from that time to the time of giving his testimony. He testified with reference to the notification of change and receiving a stamp to change the tickets by the use of the stamp so as to read "railway company," that from December, 1901, to the time of testifying he was paid by the railway company for his services and made all remittances of money to the railway company, and other details upon the same line, and as fully as did the witness Bradford. All three of the witnesses testified that the railroad company had no agent or office in Quincy at any time after December, 1901, and that the railroad company had an office in Chicago from December, 1901, to the time of testifying, where George B. Harris, the president of the railroad company, had his headquarters and could be found. Appellant also offered, and there was admitted in evidence over the objection of appellee, what purported to be a certified copy of a lease from the railroad company to the railway company of all the railroad company's lines in the state of Illinois and other states, which purported to run from November 20, 1901, for a period of 99 years, which said supposed copy of the lease was duly certified by T. S. Howland, secretary of the Chicago, Burlington & Quincy Railroad Company, and affixed thereto was the corporate seal of said company.

The only evidence offered by appellee as tending to dispute or contradict the evidence of these witnesses was a folder of the "Burlington Route" bearing date October 4, 1903. It was such a folder as is usually found in stations and hotels, advertising the road, containing a map and list of the stations, officers, and time-cards for the various divisions of the road in this and other states. On the margin of the first page of this folder was stamped in very small letters, with red ink, "Chicago, Burlington & Quincy Railroad Company, owner," and in the list of officers as representing the Burlington Route was "W. A. Lalor, assistant general passenger agent C., B. & Q. R. R., Chicago, Ill." On page 11 there was a notification in regard to the redemption of tickets, in which it was said that they would be redeemed by presentation at the offices of the "C., B. & Q. R. R., Chicago, and B. & M. R. R., Omaha." On page 19 was a time-card of the Galesburg & Quincy route, which bore the heading "Chicago, Burlington & Quincy R. R." On page 15 appeared the time-cards of the Aurora, Ottawa & Streator Division and of other divisions, and was originally headed "C., B. & Q. R. R." Where

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the letters "R. R." were originally printed were three or four stamps, in red letters, of the words "railway" and "railway company." Appellee proved by witness Bradford that this folder was a regular monthly folder issued by the Chicago, Burlington & Quincy Railway Company, and that the railroad company had nothing to do with it.

At the close of all the evidence counsel for appellant, limiting their appearance for that purpose, moved the court to direct the jury to find a verdict for it, which motion was denied. Among other instructions given at the request of appellee was the following: "(2) If the jury find, from the evidence herein, that the defendant, the Chicago, Burlington & Quincy Railroad Company, was the owner of and operating a railroad known as the 'Chicago, Burlington & Quincy Railroad' for many years immediately before December 21, 1901, and that at about the date last aforesaid the said railroad company, as lessor, leased its railroad and the operation thereof to the Chicago, Burlington & Quincy Railway Company as lessee, and that continuously thereafter to the present time said lessee, by its servants and agents, had the exclusive management and control of said railroad and its operation, then the agents and servants of any such lessee would be the agents and servants of this defendant for the purpose of service of summons in this case."

Appellee assigns as cross-error the admission of the copy of the lease.

Joseph N. Carter and Matthew F. Carrott (Chester M. Dawes, of counsel), for appellant.

Vandeventer & Woods, for appellee.

RICKS, J. (after stating the facts). Many errors are assigned by appellant and argued by its counsel, but as we view the case it is unnecessary for a proper disposition of it to consider but two matters urged by the appellant. The controlling and important questions, as we think, arise from the refusal of the court to give the peremptory instruction directing a verdict for appellant, and the giving by the court of instruction No. 2 given at the request of appellee. Preliminary to the consideration of these questions we should, perhaps, consider the cross-error assigned by appellee upon the admission by the trial court of the certified copy of the lease from appellant to the railway company.

Appellee states that the admission of this evidence was error, and cites and relies upon *Chicago, Wilmington & Vermilion Coal Co. v. Moran*, 210 Ill. 9, 71 N. E. 38. We have examined that case, and find that it contains a construction of section 18 of the statute in regard to evidence and depositions. *Hurd's Rev. St.* 1903, p. 937. Section 14 of that chapter relates to the admission of papers and records, etc., of cities and villages. Section 16 is as to the form of the certificate. Section 17 relates to the manner of certifying the records of justices of the peace, and section 18, which was considered in the case cited, reads: "Any such papers, entries, records and ordinances may be proved by

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copies examined and sworn to by credible witnesses." The language of section 16 is peculiar, and states that the certificate of the clerk of a court or village, city or town, shall certify that he is the keeper thereof, and if there is no seal shall so state. All the sections of that act from 10 to 18, inclusive, except section 15, which will be hereafter noticed, were part of an act appearing in the Revision of 1845, and when the language of section 16 is considered, that "if there is no seal" the clerk "shall so state," the meaning and purpose of section 16 are made quite apparent. Section 15 was not passed until 1853, and was no part of the act at the time that sections 16 and 18 were passed. Section 15 reads: "The papers, entries and records of any corporation or incorporated association may be proved by a copy thereof, certified under the hand of the secretary, clerk, cashier or other keeper of the same. If the corporation or incorporated association has a seal the same shall be affixed to such certificate." This section was doubtless placed by the revisers or editors of the statutes as section 15 of the act for the purpose of giving effect to section 18 in a case, where the corporation had no seal. The language of section 15 is clear, unambiguous, and direct, and, if effect is to be given to it, the only inquiry that can arise under it is as to what is meant by the language "the papers, entries and records" of such corporation or association.

No reason has been suggested why section 15 should not be given effect, other than that in the case cited by appellee it is held that a contract between a certain miners' union and a certain coal company was not properly admitted in evidence by merely proving a copy thereof by the testimony of a credible witness. In that case it appears that no proof was made that the corporation or association had no seal, nor was there any certificate to that effect, as required by section 16 of the act. We think the case relied upon has no application to the question before us, as in the case at bar the copy is certified by the proper officer, and in compliance with the statute the seal of the corporation is affixed to the certificate. This section of the statute was considered by this court in *Mandel v. Swan Land Co.*, 154 Ill. 177, 40 N. E. 462, 27 L. R. A. 313, 45 Am. St. Rep. 124, and it was there held that by virtue of it the papers, etc., that were admissible under its provisions are original and not secondary evidence. It remains, then, to determine whether the lease is such a paper as is contemplated by the language of said section 15. Whether that section applies to all papers, such as contracts between a company and its employees or for materials, or other ordinary matters between it and third persons, need not be and is not now considered or decided.

The lease in question is a most important paper in the business of the appellant corporation. It evidences the leasing by it to the railway company of over 5,000 miles of railroad, traversing a number of states, with the stations, yards, side tracks, shops, equipment of engines, cars, machinery, tools, furniture, and franchises, except its franchise to be a corporation, for a period of

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practically a century. That the preservation of such an instrument is of first importance to appellant can be neither doubted nor questioned. The courts must also take knowledge of the fact that under the laws of this state appellant, as lessor, does not escape the risk of frequent litigation arising from the operation of the road by its lessee, and that it would be most hazardous if it were possible that the original instrument be produced at each trial and introduced in evidence, and held by the court or some competent officer until a record should be made, and perhaps by order of the court certified to courts of appeal. We cannot be unmindful of the fact that there may be a number of suits pending against appellant and for hearing at the same time in different courts, in which case it would be practically impossible, if not totally so, to have the same instrument in various courts at the same time and to be used as evidence. These considerations doubtless appealed to the Legislature in enacting the law, and as no reason has been suggested, and none suggests itself to our minds, why the statute in question may not and should not be given full effect, we are disposed to give it effect, and to hold that the lease in question is such an instrument as is contemplated by the provision of the statute, and that the court did not err in the admission of the copy so certified as evidence.

Appellee urges that this evidence is incompetent and that this court should so hold, and that if it does so hold there is no competent evidence in the record to support the plea in abatement, as it is said by appellee that the only legal evidence of the leasing of the railroad by appellant to the railway company is a written lease, and that no such lease was in evidence. If the question were as to the contents of the lease or its provisions, and as between the parties to it, the position taken by appellee would certainly be sound. But such is not the situation, as we view it. The terms and conditions of the lease were not material or controlling. The fact that the railroad was being operated, at the time of the injury complained of, by a railroad company other than the appellant, was the material question that arose under that plea, and it would seem clear that anybody having knowledge and who was familiar with the railroad corporations, and who knew that up to a given time one of them operated the road and after that time the other operated it, could testify, and the evidence would be competent and material. Three witnesses did testify, and they show by their testimony that they had absolute knowledge, as they were employees originally of the appellant company and from 1901 were employees of the railway company, and their business and duties were of such a character and their relation to the two companies such that they could not be mistaken upon the fact as to who was actually operating the railroad.

Appellee strenuously insists that the questions of fact as to what company was operating the railroad at the time of the injury is foreclosed by the finding of the jury and the judgment of the Appellate Court. Under the request to direct the jury to find

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a verdict for appellant a question of law, and not a question of fact, arose, and that question of law is preserved and open to our consideration. If there is evidence in the record which, taken as true, together with all the reasonable legal inferences that may arise therefrom, tends to support the position of appellee that the railroad was being operated by appellant, and not by the railway company, or if, under the law, although the railway company may have been operating the railroad, service upon the agent of the railway company was legal service as to the railroad company, then the trial court was warranted in refusing the instructions as asked; otherwise not. As is pointed out in the statement of the case, the only evidence tending to show that the railroad company was operating the railroad at the time of the injury was the folder offered by appellee; but in offering that evidence appellee inquired of the witness Bradford, and elicited from him the statement that that circular or folder was issued by the railway company, and not by the railroad company. Furthermore, it is not shown that the railroad company had at any time such a stamp as that which was impressed on the first page of the folder, or that it was placed there by any person in authority of the railroad company. In the absence of such proof, and with the proof called forth by appellee clearly showing that the folder was not a folder issued by appellant, but by the railway company, it, with any inference that could be drawn from it, amounted to a mere scintilla of evidence at the very most. It went to the jury and to the court absolutely discredited and absolutely shown not to be the document or act of appellant, but that of another company not a party to the suit. It did not amount to any legal evidence, or was not such evidence as comes within the requirement that it shall be such evidence as, with all the reasonable inferences that shall be drawn from it, fairly tends to support the contention of the party relying upon it, so that unless service upon the servants of the railway company can be held to be service upon appellant the instruction should have been given.

Since 1855 the statute of this state has permitted railroad companies organized under the laws of this state to lease their railroads to corporations organized in this and other states. Hurd's Rev. St. 1903, c. 114, par. 44. But, following what seemed to this court to be a sound doctrine, we have uniformly held that a railway company cannot absolve itself from the performance of duties imposed upon it by its charter or any general law of the state, or relieve itself from liability for the wrongful acts or omission of duties of persons operating its road, by transferring its corporate powers to other parties or by leasing its road to them; and so we held in *Balsley v. St. Louis, Alton and Terre Haute Railroad Co.*, 119 Ill. 68, 8 N. E. 259, 59 Am. Rep. 784, that the lessor company was liable for the destruction of property by fire caused by neglect upon the part of the lessee company to keep its track and right of way clear and free from dead grass and dry weeds, etc., and in *Pennsylvania Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559, it was held that the lessor company

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practically a century. That the preservation of such an instrument is of first importance to appellant can be neither doubted nor questioned. The courts must also take knowledge of the fact that under the laws of this state appellant, as lessor, does not escape the risk of frequent litigation arising from the operation of the road by its lessee, and that it would be most hazardous if it were possible that the original instrument be produced at each trial and introduced in evidence, and held by the court or some competent officer until a record should be made, and perhaps by order of the court certified to courts of appeal. We cannot be unmindful of the fact that there may be a number of suits pending against appellant and for hearing at the same time in different courts, in which case it would be practically impossible, if not totally so, to have the same instrument in various courts at the same time and to be used as evidence. These considerations doubtless appealed to the Legislature in enacting the law, and as no reason has been suggested, and none suggests itself to our minds, why the statute in question may not and should not be given full effect, we are disposed to give it effect, and to hold that the lease in question is such an instrument as is contemplated by the provision of the statute, and that the court did not err in the admission of the copy so certified as evidence.

Appellee urges that this evidence is incompetent and that this court should so hold, and that if it does so hold there is no competent evidence in the record to support the plea in abatement, as it is said by appellee that the only legal evidence of the leasing of the railroad by appellant to the railway company is a written lease, and that no such lease was in evidence. If the question were as to the contents of the lease or its provisions, and as between the parties to it, the position taken by appellee would certainly be sound. But such is not the situation, as we view it. The terms and conditions of the lease were not material or controlling. The fact that the railroad was being operated, at the time of the injury complained of, by a railroad company other than the appellant, was the material question that arose under that plea, and it would seem clear that anybody having knowledge and who was familiar with the railroad corporations, and who knew that up to a given time one of them operated the road and after that time the other operated it, could testify, and the evidence would be competent and material. Three witnesses did testify, and they show by their testimony that they had absolute knowledge, as they were employees originally of the appellant company and from 1901 were employees of the railway company, and their business and duties were of such a character and their relation to the two companies such that they could not be mistaken upon the fact as to who was actually operating the railroad.

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a verdict for appellant a question of law, and not a question of fact, arose, and that question of law is preserved and open to our consideration. If there is evidence in the record which, taken as true, together with all the reasonable legal inferences that may arise therefrom, tends to support the position of appellee that the railroad was being operated by appellant, and not by the railway company, or if, under the law, although the railway company may have been operating the railroad, service upon the agent of the railway company was legal service as to the railroad company, then the trial court was warranted in refusing the instructions as asked; otherwise not. As is pointed out in the statement of the case, the only evidence tending to show that the railroad company was operating the railroad at the time of the injury was the folder offered by appellee; but in offering that evidence appellee inquired of the witness Bradford, and elicited from him the statement that that circular or folder was issued by the railway company, and not by the railroad company. Furthermore, it is not shown that the railroad company had at any time such a stamp as that which was impressed on the first page of the folder, or that it was placed there by any person in authority of the railroad company. In the absence of such proof, and with the proof called forth by appellee clearly showing that the folder was not a folder issued by appellant, but by the railway company, it, with any inference that could be drawn from it, amounted to a mere scintilla of evidence at the very most. It went to the jury and to the court absolutely discredited and absolutely shown not to be the document or act of appellant, but that of another company not a party to the suit. It did not amount to any legal evidence, or was not such evidence as comes within the requirement that it shall be such evidence as, with all the reasonable inferences that shall be drawn from it, fairly tends to support the contention of the party relying upon it, so that unless service upon the servants of the railway company can be held to be service upon appellant the instruction should have been given.

Since 1855 the statute of this state has permitted railroad companies organized under the laws of this state to lease their railroads to corporations organized in this and other states. Hurd's Rev. St. 1903, c. 114, par. 44. But, following what seemed to this court to be a sound doctrine, we have uniformly held that a railway company cannot absolve itself from the performance of duties imposed upon it by its charter or any general law of the state, or relieve itself from liability for the wrongful acts or omission of duties of persons operating its road, by transferring its corporate powers to other parties or by leasing its road to them; and so we held in *Balsley v. St. Louis, Alton and Terre Haute Railroad Co.*, 119 Ill. 68, 8 N. E. 259, 59 Am. Rep. 784, that the lessor company was liable for the destruction of property by fire caused by neglect upon the part of the lessee company to keep its track and right of way clear and free from dead grass and dry weeds, etc., and in *Pennsylvania Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559, it was held that the lessor company

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was liable for the death of one caused by the negligence of the operating company. It is there said (page 659 of 132 Ill., and page 560 of 24 N. E.): "The law has become settled in this state by an unbroken line of decisions that the grant of a franchise giving the right to build, own, and operate a railway carries with it the duty to so use the property and manage and control the railroad as to do no unnecessary damage to the person or property of others; and where injury results from the negligent or unlawful operation of a railroad, whether by the corporation to which the franchise is granted or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable." In the more recent case of *Chicago & Grand Trunk Railway Co. v. Hart*, 209 Ill. 414, 70 N. E. 654, 66 L. R. A. 75, we held that the lessor company was liable to the servants of the lessee company for injuries received by the breaking of a worn or defective axle or journal on a switch engine upon which such servant was employed. Among other things it is there said (page 417 of 209 Ill., and page 655 of 70 N. E. [66 L. R. A. 75]): "While the duty which rests upon the lessor companies to operate their roads is an obligation which they owe to the public, the permission given by the Legislature, as the representative of the public, to perform that duty through lessees, has no effect to absolve such companies from the duty of seeing that the lessee company provides and maintains safe engines and cars, and that the employees of the lessee companies to whom is intrusted the operation of their roads are competent, and that they perform the duties devolving upon them with ordinary care and skill; for upon the character and condition of safety of such engines and cars and on the competency and care of such employees depend the lives and property of the general public. As a matter of public policy such lessor companies are to be charged with the duty of seeing that the operation of the road is committed to competent and careful hands." The doctrine that a railroad company cannot escape liability for injuries resulting from negligence by leasing their roads or permitting other companies or persons to operate the same is neither new nor modern, but was early announced in *Leshner v. Wabash Navigation Co.*, 14 Ill. 85, 56 Am. Dec. 494.

The cases above cited, and many more announcing the same principle, are cited by appellee; and his insistence is, as we understand it, that inasmuch as the law is that the lessor company is liable for the negligence of the lessee company, therefore the lessee company is in law the agent and servant of the lessor company, and, being such agent or servant, service upon the lessee company is a compliance with the law in regard to the service of process in such cases; and if we understand counsel for appellee correctly, their contention goes further, and to the extent that the agents and servants of the lessee company are the agents and servants of the lessor company as to the public and third parties. As applied to the question of liability for

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negligence, and confined exclusively to that question, it is doubtless true that this court has gone so far as to say that the public and third persons may look to the corporation to which a franchise has been granted, and that for that purpose a company which such original company permits to use its tracks, and likewise the servants and employees of such lessee company, will be regarded as the servants and agents of the owner. The doctrine of agency and liability has not been carried beyond that class of actions arising from the negligence or willful failure to perform a duty springing from the chartered powers and owing to the public. It has not gone to the extent of liabilities arising from contracts, or even the torts of the lessee company, if they are not made or committed in the discharge of and in connection with the public duty arising from an obligation springing from the chartered privileges or chartered powers of said company. *Anderson v. West Chicago Street Railroad Co.*, 200 Ill. 329, 65 N. E. 717. The fact that the lessee company and its servants and agents may, as a matter of public policy, be held the servants and agents of the lessor company in actions for negligence arising in the exercise of the chartered powers of the lessor company, does not also require or authorize the holding that such servants and agents, for the purpose of liability, shall also be held as the servants and agents of the lessor company for other purposes. It would hardly be contended that, if the lessee company makes purchases of supplies, machinery, rolling stock, or the many other things necessary in the operation of a railroad, the lessor would be liable therefor upon any principle of agency or upon the principle of agency declared in the cases above cited and quoted from. Nor would the lessor company be liable in an action of tort, in replevin, or in trover for the unlawful taking or holding of property by the lessee company or its agents. The question of liability of the principal for acts that it cannot delegate to others is a question wholly distinct from the question of agency.

The statute regulating the practice and procedure in courts of record provides that "an incorporated company may be served with process by leaving a copy thereof with its president, if he can be found in the county in which the suit is brought; if he shall not be found in the county, then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent or any agent of said company found in the county, and in case the proper officer shall make return upon such process that he cannot in his county find any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent or any other agent of said company then such company may be notified by publication and mail in like manner and with like effect, as is provided in sections twelve (12) and thirteen (13) of an act entitled 'An act to regulate the practice in courts of chancery,' approved March 15, 1872." Laws 1871-72, p. 331. *E. F. Bradford*, upon whom service was attempted to

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be or was made as the supposed agent of appellant, testified, and was supported by two other witnesses, the evidence of each of whom was uncontradicted, that at the time of said service he was not the agent or servant of appellant and had not been since 1901—almost two years prior to the time of service. He was the agent of the railway company. He was not acting for appellant, was not employed by it, was not paid by it, and received no directions from it. It had no control over him. He made no reports to it, and it could not discharge or relieve him from his position. He owed it no duty, and could not, except in a sense of liability for negligence in the discharge of its chartered powers, be regarded in any manner as the agent of appellant. As a servant or agent he would owe a duty to his principal, and if served with process in actions against his principal his duty naturally would be to forward the copy to his principal or advise his principal of the service thereof, and upon his failure to do so his principal would have the remedy to discharge him, while appellant would have no remedy. Bradford owed no such duty to appellant, but was interested in the welfare of the railway company, of which he was a servant, and if he consulted the interests of his principal he might well conclude that he subserved them by silence as to such service. The lessor and lessee are alike responsible for the actions of negligence of the servants of the lessee, and if the rule contended for is sound, an action may be brought against both and service had upon the agent of the lessee, who owes no duty to advise the lessor of the bringing of such suit or the service upon him of the process, and whose interest lies with the lessee, and the interests of the latter may be that judgment shall go against the lessor, so that a judgment by default may go against the lessor without any knowledge that it has been sued. Of course, this could make no difference if the person served was in fact the agent or any one of the persons named in the statute upon whom service might be made, as the courts do not inquire into the discharge of the duty of the agent to his principal, as that is a matter between them; and if the service is good, in the absence of an appearance the court will enter a default, and such default will stand whether the principal received notice of the service or not. This and many other situations clearly not contemplated by law could readily arise which should make the process of courts a mere pretense, and for all practical purposes the defendant had as well be served by notice of publication in a newspaper in some foreign country as to assume a service such as is here contended for. The language of the statute in this provision as to who may be served requires no nicety of construction. It is plain and simple and is to be given its ordinary meaning. The question has arisen in other courts, and so far as we know there is but a single case in a court of review in all the states that in any reasonable degree sustains appellee's position. That case is *Van Dresser v. Oregon Railroad & Navigation Co.* (C. C.) 48 Fed. 202. It bears little analogy to the case at bar, and if it were in point we would not be disposed to fol-

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low it, as it is contrary to the general rules of construction of statutes and the spirit of our law as we interpret it.

By section 1 of the practice act (Hurd's Rev. St. 1903, c. 110, par. 2) railroad companies may be sued where the principal office is located or in any county through which the railroad runs, and by section 4 of the act (Id. par. 5), as we have already pointed out, service may be had in those counties where no agent or clerk or other person authorized by the statute to be served in such cases is kept, by publication in the same manner as in suits in chancery. The law, therefore, furnishes a remedy, and, though it may not be the most satisfactory or convenient, we are not authorized to enter the field of legislation and add to the statute still a further provision for the benefit of those in the appellee's situation. We think the service was not a valid or legal one, that the peremptory instruction directing a verdict for appellant should have been given, and that the court erred in giving the second instruction given at the request of appellee. The judgment is therefore reversed, and the cause is remanded to the circuit court of Adams county for further proceedings in conformity with this opinion.

Reversed and remanded.

MAGRUDER, J., dissents.

 PAUL v. SALT LAKE CITY R. CO.

(Supreme Court of Utah, Nov. 27, 1905.)

[83 Pac. Rep. 563.]

Carriers—Street Railroads—Injuries to Passengers—Alighting from Moving Car—Instructions.—In an action for injuries to a passenger in alighting from a street car, the court charged that if plaintiff, in the exercise of due care and prudence on her part and while the car was standing still, was in the act of getting off, and the car was started before she had a reasonable opportunity to do so, etc., she was entitled to recover. Another instruction charged that, though the conductor failed to stop the car when requested while in its usual stopping place, such failure did not justify plaintiff in attempting to leave the car while in motion, and if she did so she assumed the risk, and her injury by reason of such attempt was contributory negligence barring a recovery; also, that if plaintiff, "without waiting for the car to come to a full stop, undertook to and did step from the car while in motion, and as a natural result thereof was injured, she could not recover." Held, that such instructions were erroneous as in effect charging that plaintiff was guilty of contributory negligence as a matter of law if she attempted to alight from a moving car.

Same—Failure to Stop.—Where the operatives of a street car, after having diminished its speed in response to a passenger's notice of her desire to alight, suddenly increased the speed while she was making an effort to alight, by which she was thrown and injured, the carrier was liable for the injuries so sustained.

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Same—Care Required.*—A street railway company engaged in the carriage of passengers is bound to the exercise of the highest degree of care, prudence, and foresight consistent with the practical operation of its road, or the utmost skill, diligence, and care consistent with the business in view of the instrumentalities employed and the dangers naturally to be apprehended.

Same—Res Ipsa Loquitur.†—Where a street car passenger was injured by being thrown from the car by the sudden acceleration of the speed thereof, after its speed had been slackened in response to her notice that she desired to alight, the happening of the accident was sufficient to raise a presumption of negligence on the part of the carrier.

Appeal from District Court, Salt Lake County; S. W. Stewart, Judge.

Action by Louisa B. Paul against the Salt Lake City Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

S. P. Armstrong, for appellant.

Young & Moyle, for respondent.

STRAUP, J. 1. This was an action brought by appellant against respondent to recover damages for an injury alleged to have been sustained by her while she was a passenger on a street car operated by respondent. On the part of the appellant it was shown that she had notified the conductor when he collected her fare that she desired to leave the car on the north side of a certain street, a usual stopping place; that the car

*For the authorities in this series on the subject of the degree of care required of a carrier of passengers, see foot-note appended to *Denham v. Washington Water Power Co.* (Wash.), 17 R. R. R. 689, 40 Am. & Eng. R. Cas., N. S., 689; foot-notes appended to *Atchison, etc., Ry. Co. v. Holloway* (Kan.), 17 R. R. R. 648, 40 Am. & Eng. R. Cas., N. S., 648; *Blake v. Camden Interstate Ry. Co.* (W. Va.), 17 R. R. R. 619, 40 Am. & Eng. R. Cas., N. S., 619; foot-notes appended to *Little Rock Traction & Elec. Co. v. Kimbo* (Ark.), 17 R. R. R. 501, 40 Am. & Eng. R. Cas., N. S., 501; *Western Md. R. Co. v. Shivers* (Md.), 17 R. R. R. 34, 40 Am. & Eng. R. Cas., N. S., 34; foot-notes appended to *Abbott v. Oregon R. Co.* (Ore.), 16 R. R. R. 52, 39 Am. & Eng. R. Cas., N. S., 52; *South Covington & C. St. Ry. Co. v. Smith* (Ky.), 16 R. R. R. 26, 39 Am. & Eng. R. Cas., N. S., 26.

†See foot-notes appended to *State v. United Rys. & Elev. Co.* (Md.), 17 R. R. R. 624, 40 Am. & Eng. R. Cas., N. S., 624; *Blake v. Camden Interstate Ry. Co.* (W. Va.), 17 R. R. R. 19, 40 Am. & Eng. R. Cas., N. S., 619; *Patterson v. San Francisco, etc., Ry. Co.* (Cal.), 17 R. R. R. 552, 40 Am. & Eng. R. Cas., N. S., 552; *Lincoln Traction Co. v. Heller* (Neb.), 17 R. R. R. 368, 40 Am. & Eng. R. Cas., N. S., 368; *Western Maryland R. Co. v. Shivers* (Md.), 17 R. R. R. 34, 40 Am. & Eng. R. Cas., N. S., 34; *Georgia Ry. & Elec. Co. v. Reeves* (Ga.), 17 R. R. R. 26, 40 Am. & Eng. R. Cas., N. S., 26; foot-note appended to *Minaham v. Grand Trunk W. Ry. Co.* (C. C. A.), 16 R. R. R. 562, 39 Am. & Eng. R. Cas., N. S., 562; *Price v. St. Louis, etc., Ry. Co.* (Ark.), 16 R. R. R. 534, 39 Am. & Eng. R. Cas., N. S., 534; foot-note appended to *Fagan v. Rhode Island Co.* (R. I.), 16 R. R. R. 22, 39 Am. & Eng. R. Cas., N. S., 22.

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stopped at said place, and whilst she was in the act of getting off the car was suddenly and without warning started, whereby she was thrown to the ground and injured. The respondent admitted that the appellant had given timely notice to have the car stopped at said place; it claimed, however, the conductor gave the signal to the motorman to stop, when the front end of the car (20 to 30 feet in length) was at the north side of the street, but because of the downgrade, wet rails, and the trolley off, the motorman was unable to stop the car until it had reached the south side of the street, and claimed that the plaintiff attempted to alight from the car while it was in motion.

Among other things the court charged the jury:

"(5) It is the duty of a common carrier of passengers to give such passengers a reasonable opportunity to alight from its car, before starting the car; and if you find from the evidence that plaintiff, in the exercise of due care and prudence on her part, and while the car was standing still at a place where passengers might reasonably get off, was in the act of getting off from said car, and that the defendant, by its servants, started the car while plaintiff was so getting off, and before she had a reasonable time to do so, and without notice to her that the car was about to start, and thereby plaintiff was injured, then the defendant would be liable for the injury thus sustained by plaintiff.

"(6) You are instructed that even if you believe from the evidence in this case that the conductor failed or neglected to stop the car where requested by the plaintiff, or at its usual stopping place, still such failure or neglect would not justify the plaintiff in attempting to leave the car while it was in motion; and if you believe from the evidence that the plaintiff did attempt to leave the car while it was in motion, she did so at her own risk, and if she was injured by reason of such attempt, then she was guilty of contributory negligence, and cannot recover.

"(7) If you believe from the evidence that the plaintiff had notified the conductor to stop on the upper side of Fourth street, and that the conductor rang the bell for that purpose, and that the car immediately began to slow down, but that the plaintiff, without waiting for the car to come to a full stop, undertook to and did step from the car while in motion, and as a natural result thereof was injured, then your verdict must be for the defendant."

A verdict resulted in favor of the company, and the plaintiff appeals. Error is assigned with respect to the last two instructions.

2. We think them erroneous because of their effect in charging that one is guilty of negligence as matter of law in attempting to alight from a moving street car. The law has become well settled to the contrary. "If a passenger attempts to leave a moving car running at a high rate of speed, the attempt will be so obviously dangerous that he cannot recover for injury occasioned thereby. It cannot be said, however, as matter of law, that it is negligent to alight from a moving car or to board it

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while in motion. The circumstances attending the act and the speed of the car make it a question of fact for the jury." *Nellis St. Rd. Acc't L.* p. 190, citing numerous cases from courts of many states. Respondent in its brief conceded this to be the law, but contends that the instructions did not so charge. It is clear the effect of the charge is, that if the plaintiff attempted to leave the car while it was in motion, or if she stepped from it before it came to a full stop, she was guilty of negligence, and to leave to the jury only to determine whether such act was a proximate cause of her injury. Such effect was charged in express terms by paragraphs 6 and 7. It was emphasized in paragraph 5 where the liability of the defendant was confined to its starting the car without notice while the plaintiff was alighting from the car standing still. Appellant cannot complain of paragraph 5 as far as it went, but it did not go far enough. The defendant would not only be liable under the facts therein stated, but likewise would be liable if, the car having slowed down in response to her notice of a desire to leave the same, plaintiff attempted to alight, and the speed and the surrounding conditions were such that the jury found it was not negligence to do so, and while making such effort to alight, the speed of the car was suddenly increased, by reason whereof she was thrown, and injured. Under the facts in the case it was not only the province of the jury to determine whether the act of the plaintiff in attempting to alight was a proximate cause of injury, but also to determine whether it was an act of negligence.

3. Appellant requested the court to charge: "That it is the duty of a street railway company engaged in operating street cars for the carrying of passengers to exercise a high degree of care and diligence to prevent accident to its passengers; that is, it must use the highest degree of care and diligence which is reasonably practicable under the circumstances of the case," etc. The court declined to give the request, and wholly failed to charge that such degree of care and diligence is owing by a common carrier to his passengers. The degree of care charged was only that of ordinary care; that is, "negligence consists in the doing of some act, or the omission to do some act or perform some duty which a reasonable and prudent person ought or ought not to do," and that "reasonable care and precaution, as mentioned in these instructions, means that degree of care and caution which might reasonably be expected from an ordinarily prudent person," etc. So far as the degree of care required of a common carrier of passengers, the jury was not given to understand that it was any greater than that required to be exercised by the defendant towards persons not passengers, or any greater than ordinary care. Street railway companies are common carriers of passengers, and, as such, are bound to exercise for the safety of their passengers more than ordinary care. The many different forms of expression used in the text-books, and by the courts, in stating the rule as to the degree of care required of a carrier in conveying passengers, all recognize sub-

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stantially the same test; that is the highest degree of care, prudence, and foresight consistent with the practical operation of its road; or, as it is sometimes expressed, the utmost skill, diligence, care, and foresight consistent with the business, in view of the instrumentalities employed, and the dangers naturally to be apprehended, and that the carrier is held responsible for the slightest neglect against which such skill, diligence, care, and foresight which might have guarded. 3 Thomp. Com. L. of Neg. §§ 2722 to 2729; 2 Shear. & Redf. § 495; 5 Am. & Eng. Enc. L. 558; Nellis St. Rd. Acc't L. § 6; Booth St. Rys. § 328. Appellant was entitled to have the law given to the jury substantially as in the request stated.

4. Complaint is also made because of the court's giving the following charge: "No presumption arises against the defendant from the mere happening of the accident to the plaintiff. The happening of the accident to the plaintiff and the injuries resulting therefrom are not any evidence of negligence on the part of the defendant." Such a charge may properly be given in many cases of negligence, especially those involving only ordinary care, and when the circumstances of the accident as described do not raise any presumption of negligence. But this is a case where the relation of carrier and passenger is shown to exist, and where the former owes the latter the highest degree of care, and where it is held responsible for slight negligence. "The happening of the accident to the plaintiff," as described by her; that is, an injury visited upon her by a sudden start or jerk of the car while she, as a passenger, was alighting therefrom, after it had stopped, in obedience to her request, to enable her to do so, constituted prima facie evidence of negligence under the rule "res ipsa loquitur," and cast upon the defendant the burden of showing that the accident took place either without its fault, or through the contributory negligence of the plaintiff. In speaking of presumptions as to negligence, and of the application of this rule, Mr. Nellis says: "A prima facie case of negligence is made out by testimony of the plaintiff, that being a passenger on defendant's street car, she indicated her desire to leave it, which stopped to enable her to do so, and that while she was in the act of leaving, and before she could place herself safely on the ground, it started, and threw her." Nellis, St. Rd., etc., 576; 3 Thompson Com. Neg. § 2830; United Rys. & Elec. Co. v. Beidelman, 95 Md. 480, 52 Atl. 913; Consol. Tract. Co. v. Thalheimer, 59 N. J. Law, 474, 37 Atl. 132; Whalen v. Consol. T. Co. (N. J. Err. & App.) 40 Atl. 645, 41 L. R. A. 836, 68 Am. St. Rep. 723; Lincoln St. Ry. v. McClellan, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 736; N. Y. C., etc., R. R. v. Blumenthal, 160 Ill. 40, 43 N. E. 809; Leeds v. Camden & Atl. R. Co., 53 N. J. Law, 233, 23 Atl. 169; Pres., etc., Balto. & Yorktown T. R. v. Leonhardt, 66 Md. 70, 5 Atl. 346; Phila., Wilm. & Balto. R. R. v. Anderson, 72 Md. 519, 20 Atl. 2, 8 L. R. A. 673, 20 Am. St. Rep. 483; B. & O. R. R. v. State; 21 Am.

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& Eng. Ry. Cas. 202; *Doolittle v. So. Ry.*, 62 S. C. 130, 40 S. E. 133; *Cooper v. Ga., etc., Ry.*, 61 S. C. 345, 39 S. E. 543; *Ky. & Ind., etc., Co. v. Quinkert* (Ind. Sup.) 28 N. E. 338; *Tex. & P. Ry. Co. v. Nunn*, 98 Fed. 963, 39 C. C. A. 364; *Bosqui v. Sutro R. R. Co.*, 131 Cal. 390, 63 Pac. 682; *In Bridges v. North London Ry. Co.*, L. R. 6 Q. B. 377; *Patterson, Ry. Acc't.* 438.

Of course a mere fall of a passenger from a street car, or from the platform or steps of a car, without any evidence to show how it was occasioned, raises no presumption of negligence on the part of the street car company. But that was not the "happening of the accident to the plaintiff" as described by her. She gave evidence to show how her fall was occasioned, a sudden start or jerk of the car while she was alighting therefrom. In case of a carrier and passenger the rule of "*res ipsa loquitur*" applies not only to cases of collision, derailing, and upsetting of coaches, breaking of machinery, appliances, and the like, but also to the doing of acts by the servants operating the machinery, and to the management of instrumentalities over which the carrier has control, and for the management of which he is responsible. This rule was recognized by the court in paragraph 5 where its principles to some extent on the facts were charged, but were too narrowly confined. If the two charges be not inconsistent with each other, they certainly are misleading and confusing to the jury; for in the one instance the jury are told no presumption of negligence on the part of the defendant arises, while in the other they are told actual negligence appears from substantially the same things. In other words, in stating the case abstractly, the court said there was no presumption of negligence, while, in stating it concretely, there was not only a presumption of negligence, but actual negligence. Upon the plaintiff's theory of the case, the happening of the accident as described by her raised a presumption of negligence on the part of the defendant, and the court erred in instructing the jury otherwise.

For these reasons, the judgment of the court below is reversed, and a new trial granted; costs to be taxed against the respondent.

BARTCH, C. J., and McCARTY, J., concur.

LOUISVILLE & N. R. Co. v. BOARD.

(Court of Appeals of Kentucky, Feb. 8, 1906.)

[90 S. W. Rep. 944.]

Carriers—Injury to Passenger—Negligence—Evidence—Questions for Jury.*—Testimony of a passenger on a freight train, riding in the car with his stock, that he was thrown from it while in motion by two persons unknown to him, raises a presumption of negligence on the part of the carrier; and whether it was overcome by the testimony of the conductor and brakemen on the train that they had nothing to do with his being thrown off, and did not know of it till long after its occurrence, is a question for the jury.

Trial—Order of Admitting Evidence.—Admission on rebuttal of evidence in chief is in the discretion of the court, and ground for reversal only on manifest abuse of the discretion, where a party was prejudiced thereby.

Appeal from Circuit Court, Warren County.

"Not to be officially reported."

Action by Lem Board against the Louisville & Nashville Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

James A. Mitchell and Benjamin D. Warfield, for appellant.

Proctor & Herdsman and Green & Van Winkle, for appellee.

O'REAR, J. This is the second appeal in this case. The opinion on the former appeal is found in 80 S. W. 218, 25 Ky. Law, Rep. 2180. Appellee alleged in his petition that, while a passenger on a freight train, "defendant and his agents and servants in charge of said train with gross negligence threw or permitted the plaintiff to be thrown from said cars." Appellee was in charge of a car of live stock, and was accepted and carried as a passenger on a freight train, riding in the car with his stock. During the nighttime, and while he was asleep, he was thrown from the train while it was running, as he testifies, by two persons unknown to him and was seriously injured. Appellant introduced the conductor and the three brakemen of that train, who each testified that he had nothing to do with it, that he did not throw or assist in throwing appellee from the train, and was not aware of it until long after it had occurred. Appellant did not show at the trial who else, if any one, was on the train,

*For the authorities in this series on the question whether a presumption of negligence is created by the fact that a passenger is injured, see foot-notes appended to *State v. United Rys. & Elec. Co.* (Md.), 17 R. R. R. 624, 40 Am. & Eng. R. Cas., N. S., 624; foot-notes appended to *Blake v. Camden Interstate Ry. Co.* (W. Va.), 17 R. R. R. 619, 40 Am. & Eng. R. Cas., N. S., 619; *Patterson v. San Francisco & S. M. Elec. Ry. Co.* (Cal.), 17 R. R. R. 552, 40 Am. & Eng. R. Cas., N. S., 552; *Lincoln Traction Co. v. Heller* (Neb.), 17 R. R. R. 368, 40 Am. & Eng. R. Cas., N. S., 368; foot-note appended to *Minahan v. Grand Trunk Western Ry. Co.* (C. C. A.), 16 R. R. R. 562, 39 Am. & Eng. R. Cas., N. S., 562; *Fagan v. Rhode Island Co.* (R. I.), 16 R. R. R. 22, 39 Am. & Eng. R. Cas., N. S., 22.

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whether employees or others. Appellee was admittedly a passenger, and entitled to the protection and care due to him as such. Appellant was bound to use the highest degree of care to protect its passengers from injury, either at the hands of its own employees or at the hands of others, when it had reason to believe that the passenger was in danger from such. *K. C. R. R. Co. v. Thomas' Adm'r*, 6 Ky. Law Rep. 599; *L. & N. R. R. Co. v. Kingman*, 35 S. W. 264, 18 Ky. Law Rep. 82; *Ohio Val. Ry. Co. v. Watson's Adm'r* (Ky.) 21 S. W. 244, 19 L. R. A. 310, 40 Am. St. Rep. 211; *L. & N. R. R. Co. v. Bell*, 100 Ky. 203, 38 S. W. 3; *C. & O. Ry. Co. v. Jordan*, 76 S. W. 145, 25 Ky. Law Rep. 574; *Memphis & C. Packet Co. v. Buckner*, 108 Ky. 701, 57 S. W. 482.

It is argued for appellant that, inasmuch as appellee was unable to identify his assailants, there was a failure of proof of negligence against the carrier. The carrier is bound to use the highest degree of care to carry the passenger safely. When the passenger shows that while under the care of the carrier he has been injured without fault on his part, and under circumstances which, unexplained, show that the carrier has not fully discharged the duty it has undertaken, there is a presumption of negligence on the part of the carrier, which it must overcome by proof satisfying the jury. *L. & N. R. R. Co. v. Reynolds*, 71 S. W. 516, 24 Ky. Law Rep. 1402. Upon appellee's evidence this legal presumption was raised against appellant, and the burden imposed upon it to explain this injury to the passenger in its charge. That it has partially done so does not prove necessarily that it has entirely done it. Whether the explanation was such as to satisfy the burden was a question for the jury. In the face of two verdicts in this case, we are not prepared to say that the verdict should be disturbed.

The rules of the company admitted in rebuttal on behalf of appellee were probably immaterial upon the issue, but, if material, were evidence in chief. It is not necessarily reversible error to admit evidence in chief in rebuttal. The matter is vested in the sound discretion of the trial court. Only upon its manifest abuse, where it has resulted prejudicially to the party complaining, will a reversal be allowed. We do not deem the practice in this case of sufficient importance to have affected any substantial right of appellant.

Judgment affirmed, with damages.

O'DEA v. MICHIGAN CENT. R. CO.

(Supreme Court of Michigan, Dec. 15, 1905.)

[105 N. W. Rep. 746.]

Carriers—Injuries to Passengers—Negligence—Question for Jury.*

—Plaintiff arrived at her destination before the conductor had taken her ticket, and when the station was announced she started to get off the train; but the stop was too short, and the train being started with a jerk before she had time to alight, without the operatives ascertaining that persons were not in the act of alighting, plaintiff was thrown to the ground and injured. Held, that such facts did not show an absence of negligence on the part of the carrier as a matter of law.

Same—Contributory Negligence.—Plaintiff in so endeavoring to alight was not guilty of contributory negligence as a matter of law.

Damages—Evidence—Physical Condition—Pain and Suffering.—In an action for personal injuries, plaintiff may testify fully as to her condition, pain, and suffering, and its duration.

Evidence—Statements to Physician.†—Where plaintiff, after being injured while attempting to alight from defendant's railroad train, called defendant's physician in order to substantiate her claim for injuries against defendant, her complaints of present sufferings to such physician were not mere natural expressions, but were hearsay, and inadmissible.

Same—Complaints of Pain.†—In an action for personal injuries, certain witnesses, who during the period succeeding the injury heard plaintiff complain of pain and suffering, were properly permitted to testify to the fact that she complained, and of what she complained, as distinguished from her language used in making such complaints.

Damages—Personal Injuries—Evidence.—In an action for injuries, evidence as to what plaintiff's weight had been before the accident was admissible.

Evidence—Competency—Results of Experiments.‡—In an action for injuries to a passenger by the sudden starting of the train before she had time to alight, it was not error to exclude evidence of a subsequent test to determine the length of time that the engineer probably took to oil his engine at the point in question on the occasion of the accident.

Appeal—Instructions—Harmless Error.—At the close of the trial the court stated that he declined to give certain requests asked by defendant, but that, though he was still of the opinion that the requests were erroneous, he would give them at the instance of plaintiff's attorney, whereupon the requests were read to the jury, and the court then charged that they should regard the instructions in connection with the facts, the same as though they were originally given. Held,

*For the authorities in this series on the subject of the care due in discharging passengers, see foot-notes appended to *Little Rock Traction & Elec. Co. v. Kimbro* (Ark.), 17 R. R. R. 501, 40 Am. & Eng. R. Cas., N. S., 501; foot-notes appended to *Willworth v. Boston Elev. Ry. Co.* (Mass.), 16 R. R. R. 69, 39 Am. & Eng. R. Cas., N. S., 69.

†For the authorities in this series on the question, when, and when not, evidence of complaints of pain are admissible, see *McCormick v. Detroit, etc., Ry. Co.* (Mich.), 17 R. R. R. 516, 40 Am. & Eng. R. Cas., N. S., 516; *Birmingham Ry., L. & P. Co. v. Enslen* (Ala.), 17 R. R. R. 127, 40 Am. & Eng. R. Cas., N. S., 127; *Kansas City, etc., R. Co. v. Matthews* (Ala.), 17 R. R. R. 79, 40 Am. & Eng. R. Cas., N. S., 79; *Fishburn v. Burlington & N. W. Ry. Co.* (Iowa), 16 R. R. R. 444, 39 Am. & Eng. R. Cas., N. S., 444.

‡See extensive note appended to *Louisville Ry. Co. v. Hoskins' Adm'r* (Ky.), 17 R. R. R. 484, 40 Am. & Eng. R. Cas., N. S., 484.

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that the court's error in so charging the requests was not prejudicial to defendant, in so far as it related to such of the requests as defendant was not entitled to have given.

Trial—Argumentative Instructions.—In an action for injuries to a passenger while attempting to alight, an instruction that it was her duty to be observant and to heed what was going on around her, to notice whether or not the train was stationary, to observe when it started and to protect and assist herself by the hand rails of the car, and be vigilant and see that no sudden movement would trip or throw her if she could prevent it, and if she failed to use due and ordinary precaution, etc., she could not recover, was objectionable, as argumentative.

Error to Circuit Court, Shiawassee County; Stearns F. Smith, Judge.

Action by Margaret O'Dea against the Michigan Central Railroad Company. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Argued before MOORE, C. J., and CARPENTER, GRANT, MONTGOMERY, and HOOKER, JJ.

O. E. Butterfield (John T. McCurdy, Henry Russel, and Ashley Pond, of counsel), for appellant.

Watson & Chapman, for appellee.

HOOKER, J. The defendant has appealed from a judgment rendered against it on a charge of negligence. The plaintiff, a married woman of 55 years of age, and her brother, some years older, took defendant's evening train at Owosso for Henderson, the first station north of Owosso. According to her undisputed testimony the station (Henderson) was announced from the forward door of the coach, and as the train was slowing up the conductor entered, and the train stopped as he approached them. He did not take or ask for the tickets, but passed on, and the plaintiff then said to her brother, who, like herself, had remained seated until the conductor had passed: "Get up! He has gone by." She also testified that she supposed that he was coming for the tickets, and that she said to her brother, who was behind her: "This is the place to get off. Come on, he aint going to take up the tickets." She then went out, and while upon the platform or steps the train started with a jerk, and she was thrown to the ground and injured. She also stated that they "just raised up as the conductor came to the seat, because we thought he wasn't going to stop for the tickets." The tickets were not surrendered. The brother did not get off from the train at that time, and the train was afterwards stopped a few rods north of the station for him to alight. These are substantially the main facts in the case, and there is no serious dispute about them. The defendant offered no testimony as to what occurred in the car or at the steps. There were two engines upon the train, and the engineers and firemen were sworn as to the length of the stop at Owosso, and this is the disputed fact in the case. There is no evidence as to the whereabouts of the conductor or

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brakeman when she sought to alight, nor is there any testimony tending to show whether either of them knew that she and her brother intended or tried to get off at Henderson. Nor is there evidence that any other passenger stopped there. Upon this state of facts the defendant contends that there is no evidence of negligence, for the reason that these parties neither tendered their tickets nor informed the conductor of their intention to leave the train there. We are of the opinion that the managers of a train should use some diligence to ascertain whether there are persons in the act of leaving a train before starting it, especially when the stop is so short as to make haste necessary. There is evidence in this case indicating that the stop was brief, and we cannot say, as matter of law, either that there was an absence of negligence on the part of defendant's agents, or that plaintiff was guilty of contributory negligence.

The plaintiff testified fully as to her condition, pain, and suffering, and its duration. This it was competent for her to do. In addition to her testimony, her counsel called a number of witnesses, who were allowed to testify to her complaints, not what she said in her own language (which we do not imply would have been admissible), but the fact that she complained of this or that. She sent for Dr. Hume, not for the purpose of giving treatment, but because he was the company's physician at Owosso. She declined medical assistance at Henderson, saying she wanted to wait and send for the railroad physician in Owosso, so they could see if she was hurt, if they wanted to settle; that she had a claim against the company (for the injury), and wanted to get her proof together—wanted the railroad doctor, so that they would know that she was hurt. The physician was allowed to testify: "The patient complained of tenderness over the hip joint—that is, on pressure—and she also complained of some soreness in moving one shoulder." This testimony was not admissible under the rule laid down in *G. R. & I. R. Co. v. Huntley*, 38 Mich. 544, 31 Am. Rep. 321; *McKormick v. West Bay City*, 110 Mich. 270, 68 N. W. 148; and *Comstock v. Georgetown* (Mich.) 100 N. W. 788. The plaintiff's own testimony shows that the witness was asked to call for the purpose of making testimony, and the fact that he did not come in response to the call, but for other reasons, is not important. It is the design of the plaintiff to make communications for the purpose of affecting her claim that makes them inadmissible, for the reason that they are not natural expressions of present sufferings, but voluntary statements for an ulterior purpose, and therefore not within the exception to the hearsay rule.

Dr. Wilson testified: "She complained of pain in the left hip, and in the left side of the back between the shoulder and the spinal column, on motion of the shoulder, and some headache. I do not remember about pain, but she complained of soreness at the point of bruise." John Carmody, plaintiff's son-in-law testified as to the next Sunday (eight days after the accident): "Q. State to the jury whether or not that she complained of

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slight or severe pain, at this time that you have described, in these parts of her body. A. Severe. Q. You may state to the jury whether or not she complained of any sickness or suffering in the stomach at the time. A. She did." And as to a week later still as follows: "Q. How did she appear to you as to whether or not she was suffering pain? A. She did appear to be suffering pain. I heard her make complaints of suffering present pain in her head, left limb, left side. Q. Did she, or did she not, make complaints of suffering any pain in her back? A. She complained of her back being lame. Q. Did she complain of suffering any headache at that time? A. She did." And as to twenty-three days after the accident: "Q. State to the jury whether or not upon this occasion Mrs. O'Dea still complained of suffering present pain. A. She did. Q. State in what parts of her body at this time she complained of suffering pain? A. She complained of her left side, limb, shoulder, and back." This witness stated that he saw her at least once in two weeks for some months, and the following was permitted: "Q. What complaints, if any, does she make when she goes upstairs as to its hurting her, causing her pain—that is, at the time she was doing it, present pain? A. She complained of her left leg and back. Q. Mr. Carmody, state to the jury whether or not, as you have observed her going upstairs at that time, she complained of suffering present pain at that time in walking. A. She did. Q. At what point of her body did she complain that it hurt her to go upstairs? A. In her left limb and side. Q. Mr. Carmody, what can you say as to whether or not at the time you have seen your mother-in-law, whether or not these complaints that you have described to the jury in the various parts of her body have continued over the whole space of time; that is, the time you have seen her? A. They have. Q. What can you say as to whether or not she appears to you to be getting better or worse of this lameness? A. She doesn't appear to be getting any better." Plaintiff's husband and daughters, and Lena Washburn and Matilda Boyce, near neighbors, were allowed to give similar testimony. This testimony is hearsay testimony, but much, if not all, of it is admissible, unless it is subject to the same infirmity that is found in that of Dr. Hume. See *Hyatt v. Adams*, 16 Mich. 200; *Will v. Mendon*, 108 Mich. 251, 66 N. W. 58; *Strudveon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616; *Mott v. Railroad*, 120 Mich. 136, 79 N. W. 3; *Johnson v. McKee*, 27 Mich. 473; *G. R. & I. Co. v. Huntley*, 38 Mich. 543, 31 Am. Rep. 321. It may reasonably be suggested that plaintiff's attempt to make testimony for herself would not be likely to end with Dr. Hume, and such suggestion was a pertinent one to make to the jury, whose duty to consider the question of simulation is thereby emphasized, but, in the absence of something specific indicating the connection of an improper purpose with such statements, it was proper to leave the testimony to the jury under appropriate instructions.

Defendant's complaint that counsel for plaintiff were permitted

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to show what her weight before the accident had been is without merit. We also think that the court did not err in refusing to admit testimony of a subsequent test to determine the length of time that the engineer probably took to oil his engine at Owosso on the occasion of this accident.

The court charged the jury that: "Gentlemen of the Jury: On my judgment, some requests that were handed up on the part of the defendant I declined to give. They were marked 'C,' 'D,' and 'E.' The attorney for the plaintiff thinks, perhaps, I might have made a mistake, although I am still of the same opinion, but at his suggestion and his request I give these three requests on the part of the defendant, which are as follows." These requests were as follows: "(C) I charge you that if you find the train on which plaintiff claims she was injured stopped at Henderson a reasonable length of time for plaintiff to have alighted therefrom in safety, if she had moved with reasonable diligence in so alighting from the train, then she cannot recover in this case, as there is no evidence that any person in charge of said train saw her in the act of alighting therefrom, and defendant is not guilty of negligence in starting its train. (D) I charge you in this case that the jury may and should consider all the testimony offered by the defendant showing or tending to show how long the train remained standing at the station on the night in question. The fact, if you find it is a fact, that one of the engines attached to said train was partially disabled, and that one of the engines belonging to said train was running hot, and the engineer of said engine was on the ground at said station, and was inspecting and oiling the journals of said engine on each side thereof, and the length of time that was necessarily consumed thereby, and if the jury believes that the train stopped at said station for a period of time from three to four minutes, or a sufficient length of time for plaintiff to have alighted from it in safety by being diligent and expeditious in alighting therefrom, and she did not, then plaintiff cannot recover. (E) I charge you that it was plaintiff's duty to be observant and to heed what was going on around her, to notice whether or not the train was stationary, and to observe when it started, and, when alighting, it was her duty to protect herself and assist herself by the hand rails on the car platform and running down the steps of the car, which were prepared for that purpose, and to be vigilant and see that no sudden movement would trip or throw her if she could prevent it; and, if plaintiff failed to use due and ordinary precaution that a prudent person would under the circumstances, and was injured in consequence of such failure to protect herself from injury as a prudent person would have done, then she cannot recover in this action."

Counsel for plaintiff then said: "You stated to the jury that it was against your honor's judgment to give them. I wish you would instruct the jury that they are not to regard that remark. The Court: No; you are to regard these instructions. I give these instructions to you to consider in connection with the facts,

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just the same as though I had given them in the first place." This was error. It was harmless, however, as to the first two requests, which defendant was not entitled to have given. The third was argumentative, and we should hesitate to reverse the case for the omission to give it.

The judgment is reversed, and a new trial ordered.

MCDONALD v. CENTRAL R. CO. OF NEW JERSEY *et al.*

(Court of Errors and Appeals of New Jersey, Nov. 20, 1905.)

[62 Atl. Rep. 405.]

Carriers—Ejection of Passengers.—The plaintiff, before purchasing a ticket at Elizabeth, inquired of the agent if a certain train stopped at Chester, was answered in the affirmative, and given a time-table showing that the train was scheduled to stop. Held, that the plaintiff had by the contract a right to have the train stop at Chester, and that his ejection at the last preceding station was wrongful.

Same—Passenger—What Constitutes.*—The plaintiff was familiar with the route, his ticket was a coupon ticket, of which certain coupons purported to be issued by the Central Railroad Company as agent, and he did not deny that he knew that the Central Railroad Company acted as agent only as to points beyond its own road. Held, that the relation of carrier and passenger did not exist between the plaintiff and the Central Railroad Company after the train left the Central road.

Same.—Little v. Dusenberry, 46 N. J. Law, 614, 50 Am. Rep. 445, distinguished.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Alexander McDonald against the Central Railroad Company of New Jersey and the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendants bring error. Reversed.

George Holmes and William A. Barkalow, for plaintiff in error
Central R. Co. Vredenburg, Wall & Van Winkle, for plaintiff
in error *Baltimore & Ohio R. Co.*

John K. English, for defendant in error.

SWAYZE, J. This is an action of tort. The first count of the declaration is for negligently misinforming the plaintiff as to the train which he should take to go from Elizabeth to Chester, Pa. The second count is for a wrongful ejection of the plaintiff at

*For the authorities in this series on the question who are, and are not, passengers, see foot-notes appended to *Atchison*, etc., Ry. Co. v. *Holloway* (Kan.), 17 R. R. R. 648, 40 Am. & Eng. R. Cas., N. S., 648; *Sprigg v. Rutland R. Co.* (Vt.), 17 R. R. R. 628, 40 Am. & Eng. R. Cas., N. S., 628; foot-notes appended to *McCarter v. Greenville Traction Co.* (S. Car.), 17 R. R. R. 5, 40 Am. & Eng. R. Cas., N. S., 5; foot-note appended to *Kroeger v. Seattle Elec. Co.* (Wash.), 16 R. R. R. 689, 39 Am. & Eng. R. Cas., N. S., 689; foot-notes appended to *St. Louis*, etc., Ry. Co. v. *Reed* (Ark.), 16 R. R. R. 541, 39 Am. & Eng. R. Cas., N. S., 541.

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Philadelphia. The plaintiff recovered damages for the ejection, and judgment was entered against both companies.

Whether the ejection of the plaintiff was wrongful depends upon the contract. The material facts are as follows: Just before buying a ticket from Elizabeth to Chester, he inquired of the ticket agent at Elizabeth whether the train, which he afterward took, stopped at Chester, and was informed that it did. He then asked for a time-table and ticket and received both. The time-table purported on its face to be one of the Royal Blue Line, and bore the names of the Central Railroad of New Jersey, the Philadelphia & Reading Railway, and the Baltimore & Ohio Railroad. There was no other proof as to the company by which it was issued. The time-table showed that the train stopped at Chester. No question arose until just before the train reached Philadelphia, when the conductor of the Philadelphia & Reading Railway informed the plaintiff that the train did not stop at Chester, and that he would have to change cars at Philadelphia. When the train reached the station in Philadelphia, the conductor of the Baltimore & Ohio Railroad took charge. He came into the car with two policemen, inquired for the man who wanted to go to Chester, and told the plaintiff he would have to get off; to which the plaintiff replied that he would have to use force. The conductor grabbed the plaintiff by the shoulder, and the plaintiff thereupon left the car. The plaintiff had been in the habit of taking the same train, which had previously stopped at Chester.

It was not questioned on the trial or on the argument here that the ticket agent in Elizabeth was authorized to sell tickets from Elizabeth to Chester over the Central Railroad of New Jersey, the Philadelphia & Reading Railway, and the Baltimore & Ohio Railroad. The ticket appears on its face to be issued by the Central Railroad, and has attached three going and three returning coupons in the usual form of a coupon ticket. The coupons between Bound Brook and Philadelphia purport to be issued on account of the Philadelphia & Reading, and the coupons between Philadelphia and Chester on account of the Baltimore & Ohio. It is not necessary to decide that the terms of the published time-table became by mere fact of publication a part of the contract, as was held by the majority of the Court of King's Bench in *Denton v. Great Northern Railway*, 5 Ellis & Blackburn, 860, and decided by the Court of Appeals in *Le Blanche v. London & Northwestern Railway Company*, 6 R. 1 C. P. D. 268, 45 L. J. C. P. 521, 5 English Ruling Cases, 392. The difficulty suggested by Mr. Pollock (*Pollock on Contracts* [7th Eng. Ed.] 18) does not arise in this case; for the stopping of the train at Chester was an express condition upon which the plaintiff bought his ticket, and the time-table showing that the train made the stop at Chester was handed him with the ticket. The fact that a time-table furnished by the Baltimore & Ohio Railroad to the conductor (but not, as far as the case discloses, to the public or to the ticket agent at Elizabeth) showed that the train did not stop at Chester in no

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way alters the case. The train had been in the habit of stopping, and the time-tables of the ticket agent at Elizabeth bearing the name of the Baltimore & Ohio, and not denied to have been authorized by that company, showed such a stop. While the authority of the ticket agent to make the contract in question might be modified to correspond with the time-table furnished the conductor, there is no proof that it had been so modified. Whether it had been so modified was within the knowledge of the Baltimore & Ohio, and the failure to prove it justifies the inference that there had been no modification. The plaintiff had the right to assume that the train would stop at Chester as his contract required, and was not bound to believe the assertion of the conductor. He was entitled to make reasonable efforts to exercise his right. *Runyan v. Central R. R. Co.*, 65 N. J. Law, 228, 232, 47 Atl. 422. He did no more than to require the conductor to make use of slight physical force, and yielded immediately, and left the car. We think the conduct of the conductor was actionable.

The question remains whether both defendants are liable. The conductor was in the employ of the Baltimore & Ohio Railroad Company, and it is liable for his acts on the principle respondent superior. The other conductor, whose route ended at Philadelphia, was in the employ of the Philadelphia & Reading Railway Company. The only fact in the case to indicate liability on the part of the Central Railroad Company is the issue of the ticket. The plaintiff's case does not rest upon a tort of the ticket agent at Elizabeth, but upon the theory that the agent at Elizabeth had the right to make the contract and was therefore guilty of no wrong. The Central Railroad would be liable for a violation of its duty as a common carrier, if that relation existed at the time between the plaintiff and the company. *Haver v. Central Railroad Company*, 62 N. J. Law, 282, 41 Atl. 916, 43 L. R. A. 84, 72 Am. St. Rep. 647. Whether that relation existed depends on whether the Central contracted for the carriage of the plaintiff beyond its own line as principal or agent. The ticket states that in selling the ticket to points on other roads the company assumes no responsibility beyond its own road. It may be questioned whether this provision was assented to by the plaintiff, and if so, whether it operates to exempt the Central Railroad from its common-law liability, or only to negative the assumption of any further liability beyond its own road. This need not be determined, since the other facts sufficiently prove that the Central Railroad was, to the knowledge of the plaintiff, contracting only as agent as to transportation beyond its own road. The facts that there were separate coupons for different portions of the journey, that they bore the names in plain type of the connecting companies, and purported on their face to be issued, as far as the connecting roads were concerned, by the Central Railroad as agent only, and that the plaintiff was familiar with the route, justify the inference, in the absence of any denial from the plaintiff, that he knew that the Central Rail-

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road was acting as agent only. The relation of common carrier and passenger did not exist as between the plaintiff and the Central Railroad Company after the train left the Central's road. The case differs from *Little v. Dusenberry*, 46 N. J. Law, 614, 50 Am. Rep. 445, and *Dunn v. Pennsylvania R. R. Co.*, 71 N. J. Law, 21, 58 Atl. 164. In both those cases the relation of carrier and passenger existed between the parties at the time of the injury. The case resembles rather *Alabama, etc., R. R. Co. v. Holmes*, 75 Miss. 371, 23 South. 187. There is no evidence that the Central Railroad took any part in the management of the train beyond Bound Brook. As far as the case indicates, the Baltimore & Ohio Railroad was in sole charge of the train at the time the plaintiff was ejected. The legal position of the Central Railroad was similar to that of the Pennsylvania Railroad Company in *Pennsylvania R. R. Co. v. Jones*, 155 U. S. 333, 15 Sup. Ct. 136, 39 L. Ed. 176. There should have been a nonsuit as to the Central Railroad.

It is assigned as error that the court allowed the jury to award damages for the indignity and consequent injury to his feelings. This is the settled law in case of an unlawful eviction. *Allen v. C. & P. Ferry Company*, 46 N. J. Law, 198; *D. L. & W. R. R. v. Walsh*, 47 N. J. Law, 548, 4 Atl. 323. The case differs from the cases cited in the briefs for the plaintiffs in error. The present plaintiff had in his possession and showed the conductor a ticket which entitled him to be carried to Chester, and a time-table, apparently authorized by the company, which showed that the train was scheduled to stop at Chester. On the face of it, he was entitled to be let off at Chester, and the reason for the decision in the cases cited, growing out of the propriety of the conductor having evidence of the plaintiff's right, is wanting in the present case.

The judgment, however, is a joint judgment, and indivisible; and, since it must be reversed as to the Central Railroad Company, it must be reversed in toto. *Peterson v. Middlesex & Somerset Traction Co.*, 71 N. J. Law, 296, 59 Atl. 456.

BOURLAND v. CHOCTAW, O. & G. RY. CO.

(Supreme Court of Texas, Jan. 4, 1906).

[90 S. W. Rep. 483.]

Carriers—Delay in Delivery—Notice of Special Damages from Failure to Deliver.*—Where cattle feed had been shipped and carried to its point of destination, and the consignee, after its arrival, applied to

*See generally, foot-note appended to *American Express Co. v. Jennings* (Miss.), 16 R. R. R. 546, 39 Am. & Eng. R. Cas., N. S., 546; foot-note appended to *Choctaw, O. & G. Ry. Co. v. Rolfe* (Ark.), 16 R. R. R. 525, 39 Am. & Eng. R. Cas., N. S., 525; *Crutcher v. Choctaw, O. & G. R. Co.* (Ark.), 16 R. R. R. 661, 39 Am. & Eng. R. Cas., N. S., 661.

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the carrier's agent and stated to him that he was out of feed, and that his failure to get it would mean a great loss to him, because he had no other feed for his cattle, and delivery was not made, solely through the fault of the agent, the consignee was entitled to recover special damages, although notice of the peculiar facts was not given before or at the time of the making of the contract of carriage.

Same—Instructions.—In an action by the consignee of cattle feed for special damages, the court instructed that the special damages might be recovered if defendant's agent at the point of destination of the feed was advised by plaintiff, "before or at the time of the arrival of said feed" at said station, that it was necessary for it to be promptly delivered, or damage would result. The evidence showed that the feed was ready for delivery when such notice was given, and that the failure to deliver was solely because of the agent's fault. Held, that the instruction referring to notice before the arrival of the feed could have caused no misunderstanding or injury to defendant.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by R. M. Bourland against the Choctaw, Oklahoma & Gulf Railway Company. From a judgment for plaintiff, defendant appealed to the Court of Civil Appeals, where the judgment was reversed. 87 S. W. 173. Plaintiff brings error. Judgment of Court of Civil Appeals reversed. Judgment of district court affirmed.

Potter & Potter, for plaintiff in error.

N. H. Lassiter, Robert Harrison, and Browning, Madden & Truelove, for defendant in error.

WILLIAMS, J. Plaintiff in error recovered in the district court a judgment against defendant in error for damages resulting to his cattle from delay on the part of the railway company in delivering at destination cottonseed cake, purchased by plaintiff in error at Little Rock, Ark., and shipped over the line of defendant in error to Washita, Okl. T., to be fed to the cattle which were being fattened at the latter point. On the appeal of defendant the Court of Civil Appeals held that the character of damages stated was not recoverable, reversed the judgment of the district court, and rendered judgment in favor of plaintiff in a small amount for the value of some of the cake ruined in transportation.

The facts alleged and proved by plaintiff to sustain his claim are that he was fattening for market 612 beef cattle near Washita, and, anticipating that his supply of feed would soon be exhausted, he purchased and delivered to defendant on the 18th day of April, 1902, at Little Rock, two car loads of cottonseed cake for transportation to Washita. No notice was given to defendant, at that time, of the purpose for which the cake was needed, and of the damage to result from delay in delivering it at Washita; but the cars were promptly carried, and arrived at Washita on the 21st day of April, and up to this point in the transaction there is no complaint of the action of defendant. The uncontradicted evidence is to the effect that on the 21st of April, the day on which the cars reached Washita, an agent of plaintiff applied to defendant's station agent there for the cake, and stated to him that

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"they were clean out of feed, and that they had to have the cottonseed cake, as they had about 600 cattle on full feed, and it meant a great loss to them by not receiving the cottonseed cake as ordered." The witness who testified to this fact stated that the conversation was between plaintiff's agent, the station agent, and "the conductor," and other parts of the record indicate that the conductor referred to was the one in charge of the train in which the cars in question were carried, from which the inference arises that the cake was then at the point where it should have been delivered, and in control of defendant's agent there. It was not delivered, owing, no doubt, to the fact shown, that this agent absconded on the same day. By some mistake the cars were sent out on another railroad, and were not recovered, and the cake was not delivered until May 16th, notwithstanding plaintiff and his agent, from day to day, repeated the notice given and the demand for delivery. The plaintiff's supply of food for the cattle was exhausted about the time the cake should have been delivered, and he could not otherwise obtain sustenance for the animals, in consequence of which they were greatly depreciated in value. The trial court instructed the jury in substance that the loss thus sustained might be recovered, "if defendant's agent at said station of Washita was advised by plaintiff or his agent, before or at the time of the arrival of said cottonseed cake at said station, and while the same was still in charge of the agent at said station of Washita, that said cottonseed cake was being shipped for the purpose of feeding said cattle, and that it was necessary for it to be promptly delivered, or said cattle would be without feed, and that damage would result to plaintiff therefrom," and if defendant negligently failed to make the delivery after receiving such notice, limiting the damages to such as accrued after the time, subsequent to the receipt of the notice when defendant could have made the delivery by the use of ordinary care.

The Court of Civil Appeals felt constrained by the decisions of this court in the case of *Missouri, Kansas & Texas Railway Company v. Belcher*, 88 Tex. 549, 32 S. W. 518, Id., 89 Tex. 428, 35 S. W. 6, Id., 92 Tex. 593, 50 S. W. 559, to hold that damages of the character claimed were not recoverable, because notice of the peculiar state of facts under which they might arise as a consequence of delay in the transportation and delivery was not given to the defendant before or at the time of the making of the contract of carriage. It is true that the statement, in *Hadley v. Baxendale*, and in the many cases following it, of the rule for the recovery of damages of a special or exceptional kind for the breach of a contract for the delivery of property, includes, as essential to liability therefor, notice, at the time of the making of the contract, to the party bound to deliver, of the peculiar conditions under which such damages are likely to result from the breach; and the formula seems sometimes to have been applied as rigidly as if it were a rule prescribed by legislative act. Its operation has generally been wise and just, and it is only when

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it is made the exclusive rule in cases in which the reasons underlying it do not make it applicable that it fails to meet the demands of substantial justice. The truth that it is not to be regarded as an exclusive rule for the measure of damages in all cases of breach of contract for the delivery of property has been expressed many times by eminent jurists. Thus, in *Newport Dock Company v. Wilson*, L. R. 1 Exc. 177, Chief Baron Pollock said of it: "It is quite true that the case is not applicable to, and does not decide, every case. No rule, no formula, could do that. No precise, positive rule can embrace all cases."

In most of the decisions the question as to the exact time when the notice should have been given has not received much attention; there being no difficulty arising from the fact that it was given after the contract was made, but before the damage resulted. But in some cases it has been attempted to establish the right to damages beyond those which would ordinarily arise from the breach of the contract in the particular case, by showing notice of the special circumstances after the making of the contract and before the breach, and, although there was an intimation by one of the judges in *Gee v. L. & V. Ry. Co.*, 6 H. & N. 217, that such notice ought to be held to be effectual for the purpose, the decisions have been to the contrary in cases of this character which have come to our attention, where it became necessary to pass upon the point. *Jordon v. Patterson*, 67 Conn. 473, 35 Atl. 521; *Ligon v. Mo. Pac. Ry. Co.*, 3 Willson, Civ. Cas. Ct. App. § 1; 1 Sedgwick on Damages, § 158. The principle of these decisions is that the party undertaking the delivery is held to assume, when he makes his contract, a liability only for those damages which would, in the usual and ordinary course of things, result from his failure to perform, because it is only these that he is required to foresee, unless it is shown that knowledge of an unusual situation of the other party, in which extraordinary injury may be caused by nondelivery, has been brought to his attention, and that he has contracted with reference thereto. In other words, it is held that the rights and liabilities of the parties are fixed by the contract and the circumstances known to them when it is made, and cannot be increased by notice of other facts subsequently given. The reasons which have been given for this are well condensed by Judge Denman in the *Belcher Case*, 89 Tex. 428, 35 S. W. 6. The notice relied on in such cases subsequent to the contract appears to have been given at a time when its effect, if held sufficient, would have been to impose an additional liability, resulting from the contract itself, to that within the contemplation of the parties when they made it. In none of them were the facts like those in the present case, in which the contract to carry to Washita had been fully performed, and the property was at the point of destination, and could have been delivered, when the notice was given. All that remained to be done was to make delivery, and this it was then in the power of the carrier to do at once. It had no right to demand extra compensation for a transportation already performed, for making delivery;

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nor had it the right to refuse or delay delivery because of the conditions of which it then received notice. No extra or unusual preparations were necessary for delivery, or, if they were, the defendant was, at the time, in as good a position to make them as it would have been, had the notice been given when the contract was made. The simple fact is that it held so much of plaintiff's property of which he desired, and was entitled to immediate possession, for a special purpose and for the lack of which, defendant was then fully informed plaintiff was in danger of suffering the loss for which compensation is now sought, which loss could have been prevented by mere delivery of the property. In such a case, knowledge of these facts, when the contract for transportation was made, appears to us to be unessential. None of the reasons exist for which such notice has been required in other cases. The plaintiff's loss did not arise from delay in transportation, nor from any cause for the prevention of which notice at the time of the contract was important, but from the failure to perform the simple duty to deliver the property, due to the faithlessness of defendant's agent, at a time when the probable consequences thereof were fully disclosed. There would, in our opinion, be manifest injustice in requiring the plaintiff rather than the defendant to bear the loss arising from this fault of the agent. The facts of the Belcher Case, as presented in the certificate, on which the two first opinions of this court were based, brought it within the principle of *Hadley v. Baxendale*, and what we have said sufficiently shows the differences regarded as decisive between that case and this.

The rule requiring notice at the time of the contract could not, with any justice, be made to fit the facts of this case, and the application of it would be inappropriate and merely arbitrary. No other damages but those which plaintiff suffered by being deprived of the cake as food for his cattle could be shown. He could not have supplied himself with other food, and have made defendant liable for the difference between the cost of it and of the cake, because there was no accessible market in which he could have bought. If the value of the use of the cake during its detention be looked for, the use is found to have had no value, except to supply the cattle with sustenance, and the injury to them is the only way of measuring the value of this use to plaintiff. Either that loss must be compensated, or the plaintiff must be restricted to the recovery of interest, during the delay, on the money invested in the property, or to nominal damages; and neither of the latter results could be regarded as less than a defeat of justice. In the case of *Rogan v. Wabash Railway Co.*, 51 Mo. App. 677, the distinction we make, with a much broader application, is recognized in an opinion by Judge Seymour D. Thompson, and the Court of Civil Appeals of the Third District announces the same doctrine in *Wells, Fargo & Co. v. Battle* (Tex. Civ. App.) 24 S. W. 353.

The charge of the trial court, when applied to the evidence,

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was substantially correct, and stated the rule which we regard as controlling this case. It refers, it is true, to notice given to the agent at Washita before the arrival of the cars containing the cake, and, if there were anything in the case requiring the distinction between notice before arrival and that given while the cars were at Washita, questions might arise which we find it unnecessary to determine at this time. The first notice given was on the very day when the cars reached Washita and were ready for delivery. The charge requires that the freight should have been within the control of the agent when the facts making the delivery so important were brought to his knowledge, and evidently refers to the one transaction which took place on the 21st of April, and means that the notice then given might have been either before or after the arrival of the cars, so that the agent knew the facts while controlling them. It is apparent, therefore, that the language referred to could have caused no misunderstanding or injury to the defendant. The judgment of the Court of Civil Appeals will be reversed, and that of the district court affirmed.

Judgment of Court of Civil Appeals reversed. Judgment of district court affirmed.

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(Supreme Judicial Court of Massachusetts, Bristol, Dec. 1, 1905.)

[76 N. E. Rep. 219.]

Carriers—Injuries to Passengers—Misconduct of Servants.*—A carrier is absolutely liable for injuries to a passenger caused by the misconduct of its servants while engaged in the performance of the contract of carriage.

Same—Different Crews.*—The conductor of one of defendant's cars in sport threw a dead hen at the motorman of the car on which plaintiff was riding. The hen missed the motorman, struck the window of the car near where plaintiff was sitting, and injured her. Held, that the fact that the conductor was a member of the crew of another car than that in which plaintiff was riding did not exempt defendant from liability for such injuries.

Exceptions from Superior Court, Bristol County; Lloyd E. White, Judge.

Action by Lila D. Hayne against the Union Street Railway Company. A verdict was rendered in favor of defendant, and plaintiff brings exceptions. Sustained.

Gay & Keen, for plaintiff.

Oliver Prescott, Jr., and *John H. Clifford*, for defendant.

*See foot-notes appended to *Western Md. R. Co. v. Shivers* (Md.), 17 R. R. R. 34, 40 Am. & Eng. R. Cas., N. S., 34; foot-notes appended to *Abbott v. Oregon R. Co.* (Ore.), 16 R. R. R. 52, 39 Am. & Eng. R. Cas., N. S., 52; foot-note appended to *South Covington & C. St. Ry. Co. v. Smith* (Ky.), 16 R. R. R. 26, 39 Am. & Eng. R. Cas., N. S., 26.

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KNOWLTON, C. J. The plaintiff was a passenger on the defendant's street car, and was riding near the front window, on a seat in the corner of the car. The car entered upon a turnout to pass two other cars, going in the opposite direction, which were waiting there for the plaintiff's car to go by. The conductor of one of these cars, who had picked up a dead hen on the beach near the road, threw the hen in sport at the motorman on the car on which the plaintiff was riding. He missed the motorman, and his missile struck the window, broke the glass, and thereby injured the plaintiff. This suit is brought to recover compensation for the injury.

We will assume in favor of the defendant that there was no evidence to warrant a finding that the conductor who threw the hen was acting within the scope of his employment, and therefore, under the rules of law applicable to the ordinary relations of master and servant, the defendant would not be liable for the servant's act. But the plaintiff invokes a special rule applicable to common carriers. A common carrier of passengers impliedly agrees to exercise the utmost care and diligence, consistent with the proper management of his business, to protect his passengers from injury through the misconduct of other persons, while he is performing his contract for their transportation. They necessarily submit themselves in a large degree to his care and control, and he undertakes to provide for their safety in all those particulars which ought to be under his direction and management. Among these, to a certain extent, are the kind of persons permitted to approach the passengers on the carrier's premises, and the rules and regulations which govern the conduct of the carrier's servants and others, while the contract for carriage is being performed. While the carrier does not guaranty perfection in these particulars, he is under an obligation of implied contract, and consequent legal duty, to use a very high degree of care to prevent injuries that might be caused by the negligence or willful misconduct of others. This rule prevails generally in the American courts. *Simmons v. New Bedford, etc., Steamboat Company*, 97 Mass. 361, 93 Am. Dec. 99; *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311; *New Jersey Steamboat Company v. Brockett*, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049; *Goddard v. Grand Trunk Railway Company*, 57 Me. 202, 2 Am. Rep. 39; *Stewart v. Brooklyn & Crosstown Railroad Company*, 90 N. Y. 588, 43 Am. Rep. 185; *Dwinelle v. New York Central & Hudson River Railroad Company*, 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611; *Haver v. Central Railroad Company*, 62 N. J. Law, 282-284, 41 Atl. 916, 43 L. R. A. 84, 72 Am. St. Rep. 647; *Chicago & Eastern Illinois Railroad v. Flexman*, 103 Ill. 546-550, 42 Am. Rep. 33; *Fick v. Chicago & Northwestern Railroad Company*, 68 Wis. 469, 32 N. W. 527, 60 Am. Rep. 878; *Indianapolis Union Railway Company v. Cooper*, 6 Ind. App. 202, 33 N. E. 219; *Terre Haute & Indiana Railroad Company v. Jackson*, 81 Ind. 19. In the application of the rule to injuries caused by servants of the carrier while engaged in the

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performance of his contract of carriage, it is held that he is liable absolutely for their misconduct. This part of the rule was discussed particularly in *Bryant v. Rich*, *ubi supra*, as the more general doctrine was discussed in *Simmons v. New Bedford, Vineyard & Nantucket Steamboat Company*, 97 Mass. 316, 13 Am. Dec. 99.

Under the authorities, it is plain that, if the wrongful act which caused the injury in the present case had been done by the conductor or motorman of the car on which the plaintiff was riding, the defendant would be liable. The only question upon which there is ground for any doubt is whether the rule applies to an injury done by a servant who was engaged in the same general service, but was employed upon another car, and was not charged directly and primarily with any duty to provide for the safety of the plaintiff. We are of opinion that the liability of the defendant is the same as if the conductor who threw the hen had been in charge of the plaintiff's car. The rule of liability in such cases is made absolute. The reason for the rule applies as well when the servant is employed upon another car as when he is working on the car upon which the injury occurs. If one of the reasons for the liability is that the servant, through his relation to his master, owes a duty to protect the passenger from injuries by others, and a *fortiori* from injuries by himself, this duty, so far as it relates to the last branch of the obligation, is not confined to servants, the nature of whose service requires them to give personal attention to the passenger in reference to possible injuries from others, but it includes those employed in the general business of transportation, and involves a duty to refrain from doing injury to any of the master's passengers, whether in the special charge of the servant or not. It would be too strict and narrow a rule to hold that this liability of the master extends only to injuries by servants especially charged with the duty of protecting passengers from injury. In *Bryant v. Rich*, 106 Mass. 180, 3 Am. Rep. 311, it was said that "in respect to such treatment of passengers, not merely the officers, but the crew, are the agents of the carriers." The great diligence and learning of the defendant's counsel have discovered for our enlightenment no case in which it has been held that the carrier was not liable, because the servant, at the time of his wrongful act, was not directly employed in carrying the passenger injured, if he was engaged in the general business of which the transportation of the passenger was a part. Of course, if he was at the time in a position wholly disconnected with his duties to the carrier, as, if his misconduct was away from his place of employment at an hour of the day when he was at liberty to go where he pleased, the master would not be liable. But the mere fact that he was on one car and his wrongful act was directed to a passenger on another car, should make no difference with the master's liability. In *Dwinelle v. New York Central & Hudson River Railroad Company*, 120 N. Y. 117, 24 N. E. 519, 8 L. R. A. 224, 17 Am. St. Rep. 611, a case somewhat different from the present

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one, the court used this language: "While the general duty rested upon the defendant to protect the person of the passenger during the entire performance of the contract, it signifies but little or nothing whether the servant had or had not completed the temporary or particular service, or was performing or had completed the performance of it, when the blow was struck. That blow was given by the servant of the defendant while the defendant was performing its contract to carry safely and to protect the person of the plaintiff, and was a violation of such contract." In *Atlanta Con. Street Railway v. Bates*, 103 Ga. 333, 30 S. E. 41, the court said: "When this injury occurred, the defendant company was under a legal obligation to use extraordinary diligence to protect the life and person of the plaintiff. We know of no rule of law that would necessarily restrict this doctrine to the agents of the company having in charge the particular car upon which the plaintiff had taken passage." In *Planz v. Boston & Albany Railroad Company*, 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835, the following sentence appears: "The cases which hold that a carrier of passengers is always liable for willful and wanton injuries inflicted by its servants upon those who are being carried by it, are not applicable." See, also, *Birmingham Railway & Elevator Company v. Baird*, 130 Ala. 334-344, 30 South. 456, 54 L. R. A. 752, 89 Am. St. Rep. 43; *White v. Norfolk & S. Railroad Company*, 115 N. C. 631, 20 S. E. 191, 44 Am. St. Rep. 489; *Gillespie v. Brooklyn Heights Railroad Company*, 178 N. Y. 347, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503. We are of opinion that the defendant is liable for the misconduct of the conductor, although he was not employed upon the car in which the plaintiff was riding.

Exceptions sustained.

ALABAMA GREAT SOUTHERN R. CO. v. QUARLES & COUTURIE.

(Supreme Court of Alabama, Jan. 30, 1906.)

[40 So. Rep. 120.]

Carriers—Lost Goods—Defenses—Acts of God—Availability.*—

Where a carrier retained in its possession cotton received for transportation for a period of 11 days, without forwarding the same, and on the eleventh day the cotton was destroyed by a cyclone which practically destroyed the town from which the cotton was to be shipped, the carrier was guilty of negligence in failing to transport the cotton within a reasonable time, and was therefore precluded from claiming that the cotton was destroyed by an act of God in defense of an action for loss thereof.

*For the authorities in this series on the question as to what delays will render the carrier liable for loss or injury to freight, see foot-note appended to *St. Louis, etc., Ry. Co. v. Moss* (Ark.), 16 R. R. R. 66, 39 Am. & Eng. R. Cas., N. S., 66; foot-note appended to *Bibb Broom Corn Co. v. Atchison, etc., Ry. Co.* (Minn.), 14 R. R. R. 407, 37 Am. & Eng. R. Cas., N. S., 407.

For the authorities in this series bearing on the subject act of God

Alabama Great So. R. Co. v. Quarles & Couturie

Appeal from Circuit Court, Greene County; S. H. Sprott, Judge.

"To be officially reported."

Action by Quarles & Couturie against the Alabama Great Southern Railroad Company. From a judgment for plaintiffs' defendant appeals. Affirmed.

A. G. & E. D. Smith, for appellant.

De Graffenried and Evans, for appellees.

TYSON, J. Only one question is presented by the record in this case. It is this: Whether the defendant as a common carrier can avail itself of the defense of the act of God under the facts upon which the case was tried. The facts may be stated as follows: The plaintiffs were cotton buyers, doing business in Eutaw, Ala. On January 11, 1904, they bought at Moundville, Ala., six bales of cotton from one Findlay, which he delivered to defendant at that place on that day for shipment, and received from defendant's agent its bill of lading therefor, consigning the cotton to plaintiffs at Eutaw. The defendant was at that time and at the time of the trial a common carrier, operating between Moundville and Eutaw, stations on its line situated 20 miles apart.

as a defense in negligent cases, and using the term *eo nomine*, see *Orient Ins. Co. of Hartford, Conn. v. Northern Pac. Ry. Co.* (Mont.), 16 R. R. R. 207, 39 Am. & Eng. R. Cas., N. S., 207 (act of God is a defense which must be pleaded); *San Antonio & A. P. Ry. Co. v. Kiersey* (Tex.), 16 R. R. R. 10, 39 Am. & Eng. R. Cas., N. S., 10 (overflow from construction of trestle over bayou, negligence distinguished from act of God). *Southern Pac. Co. v. Schuyler* (C. C. A.), 17 R. R. R. 674, 40 Am. & Eng. R. Cas., N. S., 674 (court sufficiently charged the rule with reference to a carrier of passengers' liability); *Broom Corn Co. v. Atchison, etc., Ry. Co.* (Minn.), 14 R. R. R. 407, 37 Am. & Eng. R. Cas., N. S., 407 (carrier liable where delayed goods are damaged by act of God; and proximate cause where delayed freight is injured by act of God); *Jones v. Minneapolis, etc., R. Co.* (Minn.), 11 R. R. R. 661, 34 Am. & Eng. R. Cas., N. S., 661 (act of God the proximate cause where train was caught in blizzard, and cattle froze to death); *Henry Sonneborn & Co. v. Southern Ry. Co.* (S. Car.), 8 R. R. R. 318, 31 Am. & Eng. R. Cas., N. S., 318 (an act of God means an inevitable accident, without the intervention of man or the public enemy); *Herring v. Chesapeake & W. R. Co.* (Va.), 9 R. R. R. 262, 32 Am. & Eng. R. Cas., N. S., 262 (carrier of freight assumes all risks except those from act of God or public enemy); *Henry Sonneborn & Co. v. Southern Ry. Co.* (S. Car.), 8 R. R. R. 318, 31 Am. & Eng. R. Cas., N. S., 318 (act of God no defense where any negligence in exposing baggage to rain); *Southern Pac. Co. v. Schoer* (C. C. A.), 3 R. R. R. 254, 26 Am. & Eng. R. Cas., N. S., 254 (act of God excusing performance of duty to servant); *Chicago, etc., R. Co. v. Shaw* (Neb.), 1 R. R. R. 428, 24 Am. & Eng. R. Cas., N. S., 428 (act of God when relied on as a defense must be specially pleaded); note 1 R. R. R. 7, 24 Am. & Eng. R. Cas., N. S., 7 (nature of carrier of passengers liability); note appended to *Wald v. Pittsburg, C. C. & St. L. R. Co.* (Ill.), 5 Am. & Eng. R. Cas., N. S., 70 (whether floods are acts of God); *Norfolk & W. R. Co. v. Marshall* (Va.), 2 Am. & Eng. R. Cas., N. S., 220 (liability of carrier of passengers for); *Missouri, K. & T. Ry. Co. v. Truskett* (Ind. Ter.), 17 Am. & Eng. R. Cas., N. S., 273 (heavy dew not an act of God excusing carrier of freight for delay).

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The cotton was never delivered by the defendant to the plaintiffs. On the morning of the 22d day of January, 1904, a cyclone of great violence passed through the town of Moundville, practically destroying it, killing and wounding many people, and destroying the cotton, but did not pass through Eutaw. It will be noted that the delay in shipping the cotton was about 11 days after it was received by the defendant, and this is the fact relied upon as precluding the defendant from asserting that the cyclone, which confessedly was an act of God, was the cause of the loss in order thereby to relieve itself of all liability for its failure to safely deliver the cotton at Eutaw.

As a general rule the undertaking of a common carrier to transport goods to a particular destination includes the obligation of a safe delivery of them, within a reasonable time, to the consignee. And the contract of carriage is one of insurance against every loss or damage, except such as may be occasioned by the act of God or the public enemy or the fault of the owner of the goods or his agent. And in this state the shipper makes a *prima facie* case against the carrier when he shows the goods were not delivered, and, in order for the carrier to relieve itself of the absolute liability for their loss as an insurer, it must bring itself within the exception relied upon as an excuse for its failure to deliver. *Grey's Ex'r v. Mobile Trade Co.*, 55 Ala. 387, and cases there cited. Has the defendant done this, when it appears that it was in default in not carrying out its contract by not shipping the cotton within a reasonable time, as it obligated itself to do, and which if it had done the cotton would not have been destroyed by the cyclone? In other words, will it be allowed to invoke the act of God which destroyed the cotton as an excuse for the failure to deliver it, when, if it had discharged its duty, the cotton would not have been destroyed?

This precise question has arisen and been adjudicated in other states. In some of them the question has been answered in the affirmative, and in others in the negative. The appellate courts of New York and Pennsylvania were the first to lead off on this question. The New York court held the carrier liable, and the Pennsylvania court held that it was not. When the question arose in other jurisdictions, some of the courts followed the lead of the New York court, and others that of the Pennsylvania court, so that the decisions of these two states may be regarded as the leading ones, pro and con, upon the question here presented. The cases in New York are *Michaels v. N. Y. C. R. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415, and *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426. The Pennsylvania case is *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695. The New York cases held, and we think correctly, that, where a carrier is intrusted with goods for transportation and they are lost, the law holds him responsible for the loss unless exempted by showing that the loss was caused by the act of God or the public enemy. And to avail himself of such exemption he must show that he was free from fault at the time. In other words, when there is an unrea-

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sonable delay on the part of the carrier in forwarding the goods and they are destroyed by the act of God during this delay, that he is not excused for the reason that it was by his fault that they were exposed to the peril. Says the court in *Read v. Spaulding*, quoting the language of Gould, J., in *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235: "It is a condition precedent to the exoneration of the carriers that they should have been in no default, or, in other words, that the goods of the bailee should not have been exposed to the peril or accident, by their own misconduct, neglect, or ignorance. For, though the immediate or proximate cause of the loss, in any given instance, may have been what is termed the act of God, or inevitable accident, yet, if the carrier unnecessarily exposes the property to such accident by any culpable act or omission of his own, he is not excused." In line with this holding may be found the courts of Kentucky, Missouri, Illinois, and Tennessee. *Hernsheim Bros. & Co. v. Newport News & M. Val. Co.*, 35 S. W. 1115, 18 Ky. Law Rep. 227; *Armentrout v. St. Louis, K. C. & N. Ry. Co.*, 1 Mo. App. 158; *Pruitt v. Hannibal & St. J. R. Co.*, 62 Mo. 527; *Wald v. Pittsburg, C., C. & St. L. R. Co.*, 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332; *Southern Exp. Co. v. Womack*, 1 Heisk. (Tenn.) 256.

On the other hand, as approving the doctrine of *Morrison v. Davis* (Penn. case), may be found the courts of Michigan, Mississippi, Ohio, Massachusetts, and the Supreme Court of the United States. *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 15; *Merchants' Wharfboat Ass'n v. Wm. Wood & Co.*, 64 Miss. 669, 2 South. 76, 60 Am. Rep. 76; *Yazoo & M. V. R. Co. v. Millsaps*, 76 Miss. 855, 25 South. 672, 71 Am. St. Rep. 543; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Denny v. New York Cent. R. Co.*, 13 Gray (Mass.) 481, 74 Am. Dec. 645; *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Memphis & Charleston R. Co. v. Reeves*, 10 Wall. (U. S.) 176, 19 L. Ed. 909. It must be admitted that in all these cases, except the cases reported in 13 Gray, 74 Am. Dec., and 64 Miss., 2 South., 60 Am. Rep., the principles declared in the *Morrison v. Davis* Case were directly involved and that they are in direct conflict with our views and with our own case of *L. & N. R. R. Co. v. Gidley*, 119 Ala. 523, 24 South. 753. In those two cases (13 Gray, 74 Am. Dec., and 64 Miss., 2 South., 60 Am. Rep. the defendants were bailees, and their liability was, of course, predicated upon negligence. And while the Massachusetts court in that case approved what was said in *Morrison v. Davis* upon the point that the delay in the transportation of the goods was not the proximate cause of their injury, it cannot be held to have approved the proposition that a defendant, when liable as an insurer, being at fault at the time the act of God caused the loss, could invoke that act as a defense. That case, therefore, cannot be regarded as authority on the point under consideration. For the same reason the case in 64 Miss. cannot be regarded as authority. And in our opinion the fallacy of the

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doctrine in *Morrison v. Davis* is made apparent, when we view the liability of the carrier from the standpoint of an insurer, and not that of a bailee for hire.

Adverting again to our case of *L. & N. R. R. Co. v. Gidley*, supra, we need only to state what was there held to see that it supports the position we have taken. In that case the plaintiff delivered to the defendant, a common carrier, on Saturday, at Gadsden, some leather to be shipped to Philadelphia, and received from it a bill of lading limiting defendant's liability to due care and reasonable diligence in protecting it from loss by fire. The leather was received in time for shipment on the same day over a line connecting with defendant's road, five miles from Gadsden, but it was held for shipment over defendant's usual route, by way of Calera, on Monday morning following; no freight train running on Sunday. It was held that as matter of law defendant was not justified in delaying the shipment, and its failure to ship on the day the leather was received rendered it liable for its loss by fire which occurred on the night of the day the leather was received. This holding, it seems to us, clearly put this court in line with the New York cases. For undoubtedly the principle which must control is the same whether the carrier undertakes to exempt itself from liability as an insurer by the act of God or the public enemy, or by contract against fire not occasioned by its own neglect. *Steele v. Townsend*, 37 Ala. 247, 253-256, 79 Am. Dec. 49. In this case (*Steele v. Townsend*), on page 256 of 37 Ala. (79 Am. Dec. 49), will be found this quotation, which seems to be approved, from 1 Smith's Leading Cases, directly on the point here involved: "The true view is not that the carrier discharges his liability by showing an act of God and is then responsible, as an ordinary agent, for negligence, but that the intervention of negligence breaks the carrier's line of defense, by showing that the injury or loss was not directly caused by the act of God, or, more correctly speaking, was not the act of God."

While this may be dictum, it is in accord with our views and those expressed in cases upon which we rely, and clearly indicates the views of this court at that time upon the question here under consideration.

Affirmed.

DOWDELL, SIMPSON, and ANDERSON, JJ., concur.

PENDLETON'S ADM'R v. RICHMOND, F. & P. R. Co.

(Supreme Court of Appeals of Virginia, Jan. 18, 1906.)

[52 S. E. Rep. 574.]

Trial—Demurrer to Evidence.—Evidence, on demurrer thereto, must be taken as true.

Carriers—Duty of Passenger—Ordinary Care.*—The fact that one

*For the authorities in this series on the question of the care required of a passenger for his own protection, see foot-note appended to *Parks v. St. Louis & S. Ry. Co. (Mo.)*, 14 R. R. R. 387, 37 Am. & Eng. R. Cas., N. S., 387.

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waiting at a railroad station is to be regarded as a passenger, and entitled to that high degree of care for his protection due from a common carrier of passengers, does not relieve him of the duty of exercising ordinary care for his own safety.

Same—Contributory Negligence—Evidence.—In an action against a railroad for wrongfully causing the death of decedent, evidence that decedent was waiting at defendant's station for a train, was familiar with the locality and with the position of the tracks, knew that the train was approaching, had an unobstructed view thereof, and was struck while crossing the track to the opposite platform, and while walking with his head down and seemingly in a state of abstraction, showed contributory negligence on decedent's part.

Error to Law and Equity Court of City of Richmond.

Action by Pendleton's administrator against the Richmond, Fredericksburg & Potomac Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

John A. Lamb and Meredith & Cocke, for plaintiff in error.

Leake & Carter, for defendant in error.

KEITH, P. This action was instituted to recover damages for the death of Thomas C. Pendleton, who died from injuries received at the town of Ashland, Va., while crossing the track of the defendant in error in order to take a train to the city of Richmond.

Upon the trial there was a demurrer to the evidence, and the judgment of the law and equity court upon that demurrer was for the defendant.

The railroad tracks at Ashland run about north and south. There are three tracks—that on the west, over which trains pass moving to the south; immediately to the east of that track, one over which trains pass moving north; and still further to the east a side track, which is next to the station house.

The injury complained of occurred on the 15th of October, 1903, about 10 o'clock in the evening. The train which caused the accident was about 10 minutes late, and there is evidence which tends to prove (and which, upon the demurrer to the evidence, must be held to have proved) that the train was running at a greater rate of speed than that prescribed by the ordinance of the town of Ashland; that it gave no warning of its approach by blowing its whistle or ringing its bell; and that the headlight upon the engine was feeble and dim. The railroad company, under these circumstances, it may be conceded, would be liable for damages, unless it can be shown that its negligence was not the proximate cause of the injury inflicted upon plaintiff's intestate, but that he was guilty of contributory negligence.

The decedent, upon the night in question, was at the depot awaiting with others the approach of the south-bound train, intending to take passage for Richmond. It was, as we have said, about 10 minutes late, and when those who were waiting for it became aware of its approach, they left the depot, crossed the side track, the north-bound track, and the south-bound track, in order to be in a position to board the train upon its arrival. Pendleton was somewhat in the rear of the party, and it appears

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from the testimony of eyewitnesses to the occurrence, that when last seen he was between the two principal tracks, with one foot raised over the east rail of the south-bound track; but whether with the intention of stepping forward or moving back the witness was unable to say. There was no obstruction to his view, the approaching train was plainly visible for a distance of not less than ——— feet, and, while the evidence shows that the headlight was an indifferent one, it also appears that the train could plainly be seen. The deceased when last observed was approaching the south-bound track diagonally; that is to say, the track running north and south, while he was moving toward the southwest. This is shown by the testimony, and by the injuries which he received, which were upon the right side and shoulder, and to the rear. It appears that he was walking along with his head down, and seemingly in a state of abstraction. He knew the train was coming. He was going to meet it. It was plainly visible. He had but to lift his eyes and it could have been seen and the accident have been avoided.

It was earnestly argued that his attention had been disarmed and his vigilance lulled to sleep by a colored man in the employment of the railroad, with whom he had conversed as to the train, its detention, and probable time of its arrival. The duty of this employee was to take the mail bag, carry it across the tracks, and put it upon the train; and when the south-bound train approached, he with others passed in safety from the depot, and the decedent, following this employee and others, who were, like himself, intending to take passage upon the train, received the injuries of which he died.

These seem to us to be the controlling facts. There is much other evidence in the case, but it was introduced to prove the negligence of the road, which is conceded, or circumstances which we deem to be immaterial. The controlling facts in the situation are that this unfortunate young man, who was entirely familiar with the locality, with the position of the tracks, and with the approach of the train, undertook to pass where others had passed in safety, and, taking no thought for his own protection, walked heedlessly into the peril which he could so easily have avoided.

We have frequently held that when the question arises on a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined, until one or the other of these conclusions has been drawn by the jury; that the inference to be drawn from the evidence must be either certain and incontrovertible, or it cannot be decided by the court; and that negligence cannot be conclusively established by a state of facts upon which fair-minded men will differ.

This case is so plain as to its facts that there can be no diversity of opinion as to them, and there is as little difficulty about the law. The deceased is to be regarded as a passenger and entitled to that high degree of care for his protection which is

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due from a common carrier of passengers; but this did not relieve him from the duty of exercising ordinary care for his own safety, and this it is manifest he did not do.

We are of opinion that there is no error in the judgment complained of, which is affirmed.

CARDWELL, J., absent.

MAULDIN v. SEABOARD AIR LINE RY.

(Supreme Court of South Carolina, Nov. 14, 1905.)

[52 S. E. Rep. 677.]

Pleading—Demurrer—Second Trial.—Where a case is tried on the merits, it sufficiently shows that the judge who tried it overruled a demurrer, on the ground that the complaint did not state a cause of action, so that a succeeding judge on a second trial cannot consider it.

Pleading—Objections—Waiver.—Defendant cannot complain of evidence received in support of allegations in the complaint to which he did not object.

Evidence—Best and Secondary.—In an action for failure to furnish cars to plaintiff on which to ship goods ordered, evidence of verbal orders for the goods is not objectionable, because they were subsequently followed by written orders to the same effect.

Same—Opinion—Damages.—In an action for failure to deliver cars to a manufacturer in which to ship special orders, the item of damage must be shown, and plaintiff cannot estimate the amount in a lump sum.

Carriers—Failure to Deliver Cars—Punitive Damages.—Where a carrier is unable to furnish cars because of an unprecedented amount of business, such failure is no ground for punitive damages.

Same—Defenses.*—A shipper, in the absence of special contract, is not entitled to damage for failure to carry his freight, caused by a sudden press of business which could not have been reasonably anticipated.

Appeal from Common Pleas Circuit Court of Hampton County; Klugh, Judge.

Action by Joab Mauldin against the Seaboard Air Line Railway. Judgment for plaintiff. Defendant appeals. Reversed.

Lyles & McMahan and Jas. W. Moore, for appellant.

Lyles & McMahan, for respondent.

WOODS, J. The plaintiff alleged he was engaged in the manufacture of lumber at Duke's siding, on the line of defendant's railroad, "solely on bills and orders for special sizes, lengths, and quality, and to be delivered to plaintiff's customers and to markets aforesaid under contract, at and by special and stated times," and although the defendant was notified of the character of his busi-

*For the authorities in this series on the question as to what delays will render the carrier liable for loss or injury to freight, see foot-note appended to *St. Louis, etc., Ry. Co. v. Moss* (Ark.), 16 R. R. 66, 39 Am. & Eng. R. Cas., N. S., 66; *Bibb Broom Corn Co. v. Atchison, etc., Ry. Co.* (Minn.), 14 R. R. R. 407, 37 Am. & Eng. R. Cas., N. S., 407.

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ness and of his contracts for lumber being overdue, and although frequent demands were made for cars to ship lumber on these contracts, yet the defendant willfully, maliciously, wantonly, and negligently, failed and refused to furnish the cars required. The items of damage set up were: (1) Expense and inconvenience of piling the accumulating lumber; (2) depreciation of value of lumber; (3) cancellation of orders making sales necessary at reduced price; (4) loss of custom. On the first trial of the cause, plaintiff obtained a verdict for \$1,400, but a new trial was ordered by his honor, Judge Aldrich, unless the plaintiff would remit all the recovery above \$600, and plaintiff elected to take a new trial rather than remit \$800 of his verdict. On the second trial before Judge Klugh, the verdict was for \$850, and judgment was entered accordingly.

1. The first question made by the appeal is whether Judge Klugh was right in finding, as a matter of fact, that Judge Aldrich, at the former trial, had overruled the written demurrer submitted to him, on the ground that the complaint failed to state facts sufficient to constitute a cause of action; and as a matter of law that this decision of Judge Aldrich was binding on him, though not reduced to writing and signed. Inasmuch as it was admitted by counsel that the demurrer was presented to Judge Aldrich, and he subsequently proceeded with the trial of the cause, it necessarily follows he overruled the demurrer. It is true, the decision as to the demurrer should have been given in writing and signed, as required by section 289 of the Code of Procedure. But an order of this kind does not dispose of the cause, and no formal judgment is entered on it; and hence, if counsel do not request that it be reduced to writing, the requirement of the statute may well be deemed waived. After the demurrer had been overruled by Judge Aldrich, it could not again be considered by Judge Klugh. *Turner v. Association*, 51 S. C. 33, 27 S. E. 947.

2. The plaintiff having alleged in his complaint loss of custom as an item of damage arising out of defendant's failure to furnish cars, and no motion having been made to strike out this allegation, the defendant cannot be heard to complain that evidence was introduced on this subject. *Martin v. Railway Co.*, 70 S. C. 8, 48 S. E. 616.

3. There was no error in refusing the motion to strike out plaintiff's evidence as to the verbal orders for lumber received by him, made on the ground that the written orders following the verbal were the best evidence of the orders which plaintiff alleged he was prevented from filing. Most probably these verbal orders at the time they were received, became the main factors which influenced the conduct of plaintiff's business rather than the subsequent confirmatory written orders.

4. The sixth exception alleges error in allowing the plaintiff to give in a lump sum his estimate of the aggregate damages sustained by reason of the failure of the railroad company to furnish cars. The general rule is that the opinions of witnesses

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as to the quantum of damages are not admissible. 3 Elliott on Evidence, § 2006. One recognized exception to this rule is thus stated in 1 Wharton on Evidence, § 511, quoted with approval in *Jones v. Fuller*, 19 S. C. 66, 69, 45 Am. Rep. 761: "When the thing damaged is one of every day use, whose depreciation an ordinary observer can estimate, then such an observer may be called to express his opinion of the extent of the damage sustained. If the facts which form the basis of such an opinion can be specified, then they must be stated; if the conclusion is one which the jury can draw, then to the jury must be left the drawing the conclusion. But when, as is often the case, these facts can be best expressed by the damage they cause, then this damage and its extent may be testified to by the witness." Under this exception it was competent for the witness to describe the condition of the lumber due to exposure to weather and give his estimate of the depreciation, and so with the other separate items of damage; but it was not quite competent to give a lump estimate of the total damage without indicating the items which entered into it, for the reason that it was impossible for the jury to separate the items of damage which, under the instruction of the court, could be considered the proximate result of defendant's alleged breach of duty, and for which it might be liable from those items of alleged damage which, under the instruction of the court, would be too remote to enter into the verdict.

5. The circuit judge refused to charge the request that there was no evidence to warrant a verdict for punitive damages. Not only was there no evidence offered of malicious, willful or reckless refusal to furnish cars for plaintiff's lumber, but it was stated by plaintiff himself that there was a "tie-up of the cars." The uncontradicted testimony on behalf of the defendant was that this "tie-up" was due to an abnormal demand for cars of all kinds, especially flat cars, that it was impossible for defendant to get orders for cars filled or to get them from other roads, and frequently impossible to get defendant's own cars on other roads returned. Some cars were furnished for plaintiff's lumber, and there was no evidence whatever of any intentional discrimination against him. The local agent assured plaintiff he would get cars as soon as possible, and the mere failure in the circumstances to answer a telegram or a letter asking for cars is no evidence of willful disregard of plaintiff's rights. There was, therefore, no ground for refusing to charge that the defendant had not incurred liability for punitive damages.

6. Another request erroneously refused was as follows: "The obligation to furnish cars in this case is an obligation imposed by law, and is not as binding as if the defendant railroad had contracted to furnish the cars. In this case the defendant is not liable if it has shown a reasonable excuse for failure to furnish the cars; heavy and unprecedented traffic, not reasonably to be expected and prepared for, would excuse the railroad for a deficiency of cars." If a common carrier assumes a contractual obligation outside of and beyond the duty imposed by public

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policy, it must perform the contract or pay the damages, unless it can show circumstances which relieve from the performance of contracts generally, and unexpected emergencies in its business would not be sufficient to excuse it. 4 Elliott on Railroads, § 1473. Here, however, the claim is not based on a contract, but on the ordinary public duty of the carrier to receive and transport promptly all freight offered. Promptness in transportation is of great and increasing importance, and hence common carriers should be required to use every reasonable means and to take every reasonable precaution to insure it. They should not only have ample rolling stock for the prompt dispatch of all passenger and freight business usually to be expected, but they should by all reasonable forethought and effort prepare for unusual demands for transportation. And such forethought requires not only a study of their own business, but of the industries, the development and the progress of the country whose carrying business they undertake. But this duty does not extend to the acceptance and immediate transportation of freight at all hazards and in all circumstances. The true rule is thus stated in 5 A. & E. Ency. Law, 168: "Where there is a sudden and unusual press of business, arising from exceptional causes, and which the company could not reasonably be expected to have anticipated, it is not liable for the delay thereby necessitated, unless it had specially contracted to furnish such transportation; it is bound to provide facilities for such transportation only as might reasonably have been anticipated." *Porcher v. Railroad Co.*, 14 Rich. Law, 181; *Ayres v. Railway Co. (Wis.)* 37 N. W. 432, 5 Am. St. Rep. 226; *Railway Co. v. Rae*, 68 Am. Dec. 574; 4 Elliott on Railroads, §§ 1470, 1473; 6 Cyc. 373.

The judgment of this court is that the judgment of the circuit court be reversed, and the case be remanded for a new trial.

POPE, C. J., did not participate in this opinion because of illness.

BEVARD v. LINCOLN TRACTION CO.

(Supreme Court of Nebraska, Nov. 11, 1905.)

[105 N. W. Rep. 635.]

Carriers—Injury to Passengers.*—In order to render a street railway company liable for injuries received by a person traveling upon one of its cars, the negligence of its servants, either alone or in concurrence with the negligence or wrongful act of other persons, must be the proximate cause of the injuries.

Same—Tort of Stranger.*—The wrongful act of a stranger is not sufficient to make it liable, unless it might reasonably have been foreseen and guarded against by the carrier.

(Syllabus by the Court.)

*For the authorities in this series on the subject of the degree of care required of a carrier of passengers, see foot-note appended to *Denham v. Washington Water Power Co. (Wash.)*, 17 R. R. R. 689, 40 Am. & Eng. R. Cas., N. S., 689; foot-notes appended to *Atchison*,

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Commissioners' Opinion. Department No. 1. Error to District Court, Lancaster County; Frost, Judge.

Action by Hanna Bevard against the Lincoln Traction Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Fredk. Shepherd, for plaintiff in error.

Clark & Allen, for defendant in error.

LETTON, C. This is an action for negligence against the defendant as a common carrier of passengers. The material allegations of the plaintiff's petition are that on the 4th of July, 1903, "the plaintiff was a passenger on the city-bound car over the last particularly described track, and, having paid her fare, was, without negligence or fault on her part, seated in a regular seat provided for passengers, on the right-hand side of said car; that at about the corner of F and Seventeenth streets, about as the car was rounding a curve, there was an explosion under the same, caused by the wheel coming in contact with an explosive on the rail, whereby the trap in the floor of the car was forced up and open at the side and close to the plaintiff, and flame and smoke came through from beneath with such suddenness and in such quantity as to terrify and bewilder plaintiff and benumb her faculties, and plaintiff, wholly without negligence on her part, but involuntarily and unavoidably, started to her feet in the instinct of self-preservation, and by the motion of the car, and by reason of the said involuntary and unavoidable start, was instantly thrown to the pavement, striking on her head and left shoulder, and sustaining painful and permanent injuries of the nature and extent hereinafter shown; that the day on which the said accident occurred was a national holiday, and that during all of said day, and all over the system of the defendant, its cars were constantly exploding torpedoes and other explosives placed on the rails for the purpose of making noise, and that the defendant knew this, and had notice of the danger to the plaintiff and to its other passengers at the time and place above mentioned; that the defendant provided no broom or sweep to said

etc., *Ry. Co. v. Holloway* (Kan.), 17 R. R. R. 648, 40 Am. & Eng. R. Cas., N. S., 648; *Blake v. Camden Interstate Ry. Co.* (W. Va.), 17 R. R. R. 619, 40 Am. & Eng. R. Cas., N. S., 619; foot-notes appended to *Little Rock Traction & Elec. Co. v. Kimbro* (Ark.), 17 R. R. R. 501, 40 Am. & Eng. R. Cas., N. S., 501; *Western Md. Ry. Co. v. Shivers* (Md.), 17 R. R. R. 34, 40 Am. & Eng. R. Cas., N. S., 34; foot-notes appended to *Abbott v. Oregon Ry. Co.* (Ore.), 16 R. R. R. 52, 39 Am. & Eng. R. Cas., N. S., 52; *South Covington & C. St. Ry. Co. v. Smith* (Ky.), 16 R. R. R. 26, 39 Am. & Eng. R. Cas., N. S., 26.

For the authorities in this series on the subject of the duty of the carrier to protect its passengers against strangers and other passengers, see foot-note appended to *Nashville, etc., Ry. Co. v. Flake* (Tenn.), 16 R. R. R. 552, 39 Am. & Eng. R. Cas., N. S., 552; foot-note appended to *Bosworth v. Union Ry. Co.* (R. I.), 15 R. R. R. 9, 38 Am. & Eng. R. Cas., N. S., 9; foot-note appended to *Miller v. West Jersey & S. R. Co.* (N. J.), 14 R. R. R. 267, 37 Am. & Eng. R. Cas., N. S., 267.

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car so as to have removed any explosive matter from the rail; that the defendant failed to provide a floor to said car of sufficient strength and construction to prevent the said trap from flying up and open, and so endangering plaintiff in the manner described; that defendant did not provide any watchman or guards to prevent the explosive from being placed upon the rail, and that it did not provide any guard rail or other means to keep plaintiff upon the car; and that in all of these respects defendant was negligent." The defendant filed a general denial, and also pleaded contributory negligence on the part of the plaintiff. At the close of the testimony the defendant moved the court to direct a verdict in its favor, which was done, and the case dismissed.

The evidence shows that the plaintiff, who is a single woman 49 years old and residing in the city of Lincoln, had gone to the suburb of Normal on the cars of the defendant company about 2 or 3 o'clock in the afternoon; that there were many explosions upon the rail, apparently of torpedoes, as she went out; that she returned about 10 o'clock at night upon one of the cars of the defendant, taking the front seat on the right-hand side of the car, a little in front of the trucks. The car was an open one, with a guard rail on one side; the other side being left open for access and egress. On the way home, and at or near the curve at the corner of Seventeenth and F streets, the plaintiff testifies that a violent explosion took place upon the track, and smoke and flame came up around the seat, and around a trapdoor which was situated just back of the plaintiff's seat, by which she was greatly frightened and alarmed. She testifies that she jumped to her feet, and the next thing she knew she was upon the pavement. There were several other passengers upon the car who testified as to the violence of the explosion, and that it startled them, but no one except the plaintiff rose to his feet until after the car stopped. One of the passengers testified that the plaintiff rose to her feet, hesitated a moment, and then jumped off the car, and that the conductor called to her not to jump. The car stopped almost immediately, and the plaintiff was picked up and was taken to her home. It appears that during the day the company had been much annoyed in the business part of the city, about six or eight blocks from this point, by the placing of torpedoes or other explosives upon the track by boys and men, and that its manager had attempted to put a stop to this by requesting individuals to desist, by appealing to the police for protection, and upon one line by fastening gunny sacks in front of the car wheels in such a manner as to brush the explosives off the rails. This, however, proved ineffectual, by reason of boys and men running up and cutting the sacks off while the motorman and conductor were engaged. The manager of the company testifies that there were no explosions during the day upon the tracks on that part of the line where the accident occurred, while two residents of that locality testified that there were many small explosions during the afternoon near this point; one of these witnesses testifying that there was a much louder explosion than any of the

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others late in the evening after he had gone to bed, sufficiently loud to wake him up and make him get up and go to the window. There is no evidence of any explosion either at this point or elsewhere during the day of the volume of sound of this one, or causing smoke and flame within the car such as this one caused.

The plaintiff bases her right to recover upon the general principle that a street railway company is a common carrier of passengers, and therefore bound to exercise extraordinary care and the utmost skill, diligence, and human foresight, and are liable for the slightest negligence. It is argued that the defendant, though knowing the likelihood of dynamite and explosives being placed upon the track, did nothing to protect the passengers; that it did not patrol the track, nor provide a sweep, nor fasten down the trap in the floor of the car; and that any one of these precautions would have prevented the injury to the plaintiff. The principles thus asserted as governing the liability of street railway companies to their passengers are undoubtedly the law in this state, and this is conceded by the defendant. If the defendant had, in the exercise of the greatest care, reasonable grounds to believe that violent explosions would occur such as were liable to frighten its passengers to such a degree that under the influence of a temporary loss of self-control thus caused the operation of the car might cause them injury, it would be negligence upon the part of the company to omit to take all reasonable precautions to protect its passengers against the probability of such injury.

The carrier, however, is not an insurer against accidents, and while it is liable for the concurrent negligence of its servants and third parties, or the negligence of its servants in combination with the torts of third parties which result in personal injuries to passengers, yet it is only liable when its servants have been guilty of negligence. The element of negligence on its part or on the part of its servants must exist. The wrongful act of a third party alone is not sufficient to make it liable. If the fact that an explosion of the violence of that which frightened the plaintiff could reasonably have been foreseen by the carrier as one of the incidents liable to occur during her transportation, it would have been guilty of negligence in failing to protect her against liability to suffer any personal injuries of which it might be the proximate cause, but so far as the evidence shows such explosions as had occurred during the day, though annoying, were petty in their nature compared to this, and not such as might reasonably cause the carrier to anticipate one of such great violence. Even against such petty explosions, however, the evidence shows that the carrier had appealed for police protection, and that from the number of miles of track which it was operating it was impossible for it to procure men enough to patrol the same. The plaintiff asserts that the defendant, by the use of sweeps extending in front of each truck, might have removed explosives from the rail, but the evidence shows that it would take from two to three hours to equip each car with sweeps, and that in the summer time their use produced such a cloud of dust as to make it almost impossible

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to carry passengers. So far as the evidence shows, an explosion of the violence of the one complained of was unprecedented in the operation of the defendant's railway, and it had no reasonable grounds to anticipate the occurrence of the same. The act was the wrongful act of third parties, over whom it had no control, and whose operations it could not reasonably foresee.

Under these circumstances we can see no reason for holding the defendant liable for plaintiff's injuries, and recommend that the judgment of the district court be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be affirmed.

SEEGERS BROS. v. SEABOARD AIR LINE RY.

(Supreme Court of South Carolina, Nov. 13, 1905.)

[52 S. E. Rep. 797.]

Constitutional Law—Claims against Carriers—Uniformity.*—24 St. at Large, p. 81, § 2, providing that every claim for loss or damage to property in possession of a common carrier shall be adjusted and paid within a specified time, and if not then paid the carrier should be liable to a penalty, is not unconstitutional as in violation of the equality clause of the fourteenth amendment of the United States Constitution, and a similar clause of Const. S. C. art. 1, § 5.

Appeal—Review—Findings.—A finding of a magistrate as to amount of damages, affirmed by the circuit court, cannot be reviewed on appeal, if there is any evidence to support it.

Appeal from Common Pleas Circuit Court of Chesterfield County; Watts, Judge.

Action by Seegers Bros. against the Seaboard Air Line Railway. From a judgment reversing the judgment of a magistrate, plaintiffs appeal. Affirmed.

W. P. Pollock, for appellants.

Stevenson & Mathison and *Edward McIver*, for respondent.

JONES, J. This action was commenced in a magistrate court for the county of Chesterfield to recover \$1.75 for loss or damage to freight, a bunch of bananas, shipped August 31, 1903, to plaintiffs at McBee, S. C., from Columbia, S. C., over defendant's line, and for \$50 penalty for failure to adjust and pay the said loss or damage within 40 days, as required by the statute. The magistrate rendered judgment for the whole amount claimed, including the penalty. On appeal to the circuit court, Judge Watts modified the judgment of the magistrate by reducing the amount to \$1.75 and costs, holding that the statute imposing the

*For the authorities in this series on the subject of the constitutionality of statutes prescribing penalties to compel common carriers to perform their duties and discharge their obligations, see foot-note appended to *Lexington Grocery Co. v. Southern Ry. Co.* (N. Car.), 14 R. R. R. 349, 37 Am. & Eng. R. Cas., N. S., 349.

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penalty is unconstitutional, under the rule stated in *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666. From this judgment, plaintiffs appeal, and the main question presented is the constitutionality of said statute.

1. The statute in question is entitled "An act to regulate the manner in which common carriers doing business in this state shall adjust freight charges and claims for loss or damages to freight," and was approved February 23, 1903. 24 St. at Large, p. 81. Section 2 of said act, which more particularly concerns the present controversy, is as follows:

"Sec. 2. That every claim for loss of or damage to property while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this state, and within ninety days, in case of shipments from without this state, after the filing of such claim with the agent of such carrier at the point of destination of the shipment: Provided, that no such claim shall be filed until after the arrival of the shipment or of some part thereof at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee or consignees aggrieved in any court of competent jurisdiction: Provided, that unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid: Provided, further, that no common carrier shall be liable under this act for property which never came into its possession, if it complies with the provisions of section 1710, vol. 1, of the Code of Laws of South Carolina, 1902."

This section was under consideration in the case of *Best v. Seaboard Air Line Railway*, 72 S. C. —, 52 S. E. 223, filed October 20, 1905, in which the question presented was whether an action could be maintained for the penalty alone, when there had been voluntary payment and receipt of the loss or damage before suit, but after the expiration of the time named in the statute. This court held that such action could not be maintained. The court used this language: "The object of the statute was not to penalize the carrier for merely refusing to pay a claim within the time required, whether just or unjust, but the design was to bring about a reasonably prompt settlement of all proper claims; the penalty, in case of a recovery in court, operating as a deterrent of the carrier in refusing to settle just claims, and as compensation of the claimant for the trouble and expense of the suit which the carrier's unreasonable delay and refusal made necessary." Under this view the common carrier is made liable for a penalty only in the event of a refusal to pay a claim for loss

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or damage to goods while in his possession; the bona fides and justice of the claim being established by a court of competent jurisdiction. The present controversy requires the court to go more fully into the consideration of the purpose of the legislation in question, with a view to ascertain the reasonableness of the classification of common carriers as objects of this particular legislation. Common carriers receive from the state the right to carry on business in the state as such. They are by the state endowed with special powers and privileges—which call for special duties and obligations to the public. It is a duty which a common carrier owes, not only under his contract, but under general law, to promptly and safely deliver goods consigned to him for transportation, and he is liable for all loss or damage to such goods while in his possession, not occasioned by the act of God or the public enemy. The duty to make prompt settlement for loss or damage to goods is but an incident of the duty to transport and deliver safely and with reasonable diligence. The statute in question was designed to effectuate an important public purpose, viz., to compel the common carrier to perform with reasonable diligence the duty which peculiarly appertains to his business as a carrier of freight. The penalty is but a means to that end. Whether the adoption of such means is wise, *politic*, or adequate, is exclusively a legislative question, for the *courts have nothing* to do with the policy, wisdom, or expediency of legislation. A statute cannot be declared void unless it manifestly violates some constitutional principle.

This statute is assailed as violative of the equality clause of the fourteenth amendment of the Constitution of the United States, and a similar provision in article 1, § 5, of the Constitution of this state. The respondents in argument here, and the circuit judge, relied on the *Ellis Case*, *supra*, to sustain the position that the statute is unconstitutional. The Texas statute which was declared void in that case was as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas, that after the time that this act shall take effect, any person in this state having a valid bona fide claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this state, and the amount of such claim does not exceed \$50, may present the same, verified by his affidavit, for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any

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court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorney's fees: Provided, he has an attorney employed in his case, not to exceed \$10, to be assessed and awarded by the court or jury trying the issue." Laws 1889, p. 131, c. 107.

The difference between the Texas statute and our statute is manifest. The Texas statute subjects railway companies to a penalty, when successfully sued "on a claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company," etc. The relation of the railroad company to those who render it services or labor is the ordinary relation of employer and employee, and it may with some reason be said that there is no sufficient ground for making a distinction, such as would compel a railroad company to pay such ordinary claims for services within a given time under penalty, when no such obligation is imposed upon other employers to whom similar services are rendered. So the claims for damages may include claims not substantially different from claims for damages against individuals and corporations generally. So, also, when there was no statute in Texas requiring railroad companies to fence their track against stock, it may be that it would be unreasonable to impose a liability for such acts different from, or greater than, the liability which should attach to the injury of stock by any other person or class. But we venture to say if the Texas statute had been confined to the regulation of some duty which particularly appertains to common carriers as such, and imposed a penalty as a means of securing the performance of that duty, the decision of the court would have been different. The Supreme Court of Texas had considered the statute as a whole, and had declared it was intended to compel the payment of debts. So, considering it as a whole, the court treated it simply as a statute singling out railroad corporations alone, and imposing upon them a penalty for failure to pay certain debts.

In the case of Atchison, etc., Railway Co. v. Matthews, 19 Sup. Ct. 609, 610, 174 U. S. 96, 43 L. Ed. 909, the court held that a Kansas statute requiring reasonable attorney's fee for the plaintiff, in a recovery against the railroad company for damages from fire caused by operating its train, did not violate the fourteenth amendment. In the Matthews Case the court reviewed the Ellis Case, and called attention to the fact that the Texas statute was treated as a whole by the Texas court, and was so treated by the Supreme Court of the United States. The court said: "It is true, that the Ellis Case was one to recover damages for the killing of a colt by a passing train. And so it might be argued that the protection of the track from straying stock, and the protection of stock from moving trains, would, within the foregoing principles, uphold legislation imposing an attorney's fee in actions against railroad corporations. We were not insensible to this argument when that case was considered, but we

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accepted the interpretation of the statute and its purpose given by the Supreme Court of Texas, as appears from this extract from our opinion: "The Supreme Court of the state considered this statute as a whole, and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts." The court further said: "So that, according to the interpretation placed upon the Texas statute by its Supreme Court, its purpose was generally to compel the payment of small debts, and the fact that among the debts so provided for was the liability for stock killed was not sufficient to justify us in separating the statute into fragments, and upholding one part on the theory inconsistent with the policy of the state, while, on the other hand, the purpose of this statute is, as declared by the Supreme Court of Kansas, protesting against fire—a matter in the nature of a police regulation." The court further said: "It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Thus, when the Legislature imposes on railroad corporations a double liability for stock killed by passing trains, it says, in effect, that if suit be brought against a railroad company for stock killed by one of its trains, it must enter into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit, it must pay, not only the damage which it has done, but twice that amount. If it succeeds, it recovers nothing. On the other hand, if it should sue an individual for destruction of its live stock, it could, under no circumstances, recover any more than the value of that stock. So that it may be said that in matter of liability, in case of litigation, it is not placed on an equality with other corporations and individuals; yet this court has unanimously said that this differentiation of liability, this inequality of right in the courts, is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality. Our conclusion in respect to this statute is that for the reasons above stated, giving full force to its purpose, as declared by the Supreme Court of Kansas, to the presumption which attaches to the action of a Legislature that it has full knowledge of the conditions within the state, and intends no arbitrary selection or punishment, but simply seeks to subserve the general interest of the public, it must be sustained, and the judgment of the Supreme Court of Kansas is affirmed.

In the case of *Erb, Receiver, v. Morasch*, 20 Sup. Ct. 819, 820, 177 U. S. 584, 44 L. Ed. 897, it was held that an exception of a dummy railroad operated by steam, or of an electric railroad, from an ordinance limiting the speed of railroad trains within the city, does not make an unreasonable classification in denial of the equal protection of the laws. Responding to the suggestion that there was testimony that the operation of the street

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railway was in fact more dangerous than the operation of the railroad in the hands of plaintiff, receiver, the court said: "It is not a question to be settled by the opinion of witnesses and the verdict of a jury upon the question whether one railroad in its operation is more dangerous than another. All that is necessary to uphold the ordinance is that there is a difference, and, that existing, it is for the city council to determine whether separate regulations shall be applied to the two. * * * Given the fact of a difference, it is a part of the legislative power to determine what difference there shall be in the prescribed regulations."

In the case of *Fidelity Mut. L. Ass'n v. Mettler*, 22 Sup. Ct. 662, 185 U. S. 308, 46 L. Ed. 922, over a strong dissenting opinion by Mr. Justice Harlan, in which Mr. Justice Brown concurred, pointing out that the decision was in conflict with the *Ellis Case*, the court, nevertheless, held that a Texas statute imposing upon life and health insurance companies, upon failing to pay a loss within the time specified in the policy, after demand therefor, a liability to the holder of the policy, in addition to the amount of loss, of 12 per cent. damages and reasonable attorney's fees, did not deny the equal protection of the law to such life and health insurance companies, although such an obligation was not imposed upon other classes of insurance companies or associations. This decision was reviewed in *Iowa Life Ins. Co. v. Lewis*, 23 Sup. Ct. 133, 187 U. S. 335, 47 L. Ed. 204, and the court expressed satisfaction with the case and its reasoning. In the *Mettler Case* the court said: "The ground for placing life and health insurance companies in a different class from fire, marine, and inland insurance companies is obvious, and we think that putting them in a different class from mutual benefit and relief associations doing business through lodges, and benevolent associations of the character mentioned in the Texas statute, is not an arbitrary classification, but rests on sufficient reason. The Legislature evidently intended to distinguish between life and health insurance companies engaged in business for profit (and we are not called on to define as to the distribution of such profits), and lodges and associations of a mutual benefit or benevolent character, having in mind, also, the necessity of the prompt payment of the insurance money in very many cases, in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured."

It appears to us that there is even stronger reason for sustaining a classification of all common carriers of freight for legislation with respect to their quasi public duties as such, having also in mind the necessity of the prompt payment of losses sustained by failure to perform said duty, as in many cases such losses represent food, raiment, and other necessities of life. In the case of *Farmers' and Merchants' Ins. Co. v. Dabney*, 23 Sup. Ct. 565, 189 U. S. 301, 47 L. Ed. 821, the court held valid a Nebraska statute allowing a reasonable attorney's fee to a plaintiff in case of an unsuccessful defense by an insurance company of a suit on

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a policy of insurance covering real property wholly destroyed by fire. We quote the following from that case as a complete answer to the suggestion of inequality in the case at bar in the classification of common carriers for special legislation of the kind in question, and the suggestion of inequality because the penalty falls upon the common carrier when unsuccessful in the suit, but not upon the claimant when he is unsuccessful in the suit. The court said: "All the grounds relied upon to demonstrate that the statute allowing a reasonable attorney's fee in case of the unsuccessful defense of a suit to enforce certain insurance policies is repugnant to the equality clause of the fourteenth amendment are embraced in the following propositions: First, because it arbitrarily subjects insurance companies to a liability for attorney's fees, when other defendants in other classes of cases are not subjected to such burden; second, because, whilst the obligation to pay attorney's fees is imposed on insurance companies in the cases embraced by the statute, no such burden rests on the plaintiff in favor of the insurance companies, where the suit on a policy is successfully defended; and, third, because the statute arbitrarily distinguishes between insurance policies by allowing an attorney's fee in case of a suit on a policy covering real estate, where the property has been totally destroyed, and excluding the right to such fees in suits to enforce policies on other classes of property, or where there has not been a total destruction of the property covered by the insurance. Each and all of these propositions must rest on the assumption that contracts of insurance, generally considered, do not possess such distinctive attributes as to justify their classification separate from other contracts, and that contracts of insurance, as between themselves, may not be classified separately, depending upon the nature of the insurance, the character of the property covered, and the extent of the loss which may have supervened. But the unsoundness of these propositions is settled by the previous adjudication of this court"—citing cases.

The case of *Missouri, Kansas & Texas R. R. Co. v. May*, 24 Sup. Ct. 638, 194 U. S. 267, 48 L. Ed. 971, is an interesting and striking case. In that case the court held that a Texas statute imposing a penalty in favor of contiguous landowners against railway companies for permitting Johnson grass or Russian thistle to mature and go to seed upon their road does not deny such railway companies the equal protection of the law. It might be suggested that Johnson grass is a curse or a blessing, according to the view point—a curse as to crops requiring clean cultivation, a blessing when hay is the thing wanted; or it might be suggested that Johnson grass could easily be communicated to the railway company's land or right of way by streams from bottom lands above, or that it might be propagated from seed dropped upon the ordinary highways from wagons hauling such hay, thence to lands adjoining, thence to the railway company's lands, thence to contiguous lands, but no such penalty applies against other carriers, against those in charge of ordinary highways, against a

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contiguous landowner, in favor of the railway company, or as between contiguous landowners. It will be further observed that the legislation affected the railway company in its capacity as owner or occupant of the land or right of way. But the court was guided in the decision of the case by these sound principles. "When a state Legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the courts under the fourteenth amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. * * * Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that Legislatures are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

This court, in *Simmons v. Telegraph Co.*, 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607, held that the statute making telegraph companies liable for mental anguish is not violative of the fourteenth amendment, or article 1, § 5, of the state Constitution, and in *Johnson v. Spartan Mills*, 68 S. C. 355, 47 S. E. 695, this court held that section 2719, Civ. Code 1902, making it lawful for any corporation, person, or firm to issue, pay out, or circulate for payment for the wages of labor any order, check, memorandum, token, or evidence of indebtedness, payable in whole or in part otherwise than in lawful money of the United States, except upon conditions specified in the act, did not violate the fourteenth amendment, was upon a reasonable classification, even though it contained a proviso that said section shall not apply to agricultural contracts or advances made for agricultural purposes. In the case of *Porter v. Railway Co.*, 63 S. C. 169, 41 S. E. 108, 90 Am. St. Rep. 670, this court held that the act (22 St. at Large, p. 443) imposing a penalty on common carriers for failure to pay or refuse to pay damages, etc., to freight within 60 days, does not violate those sections of the state and federal Constitutions providing for equal protection to all. This court distinguished that case from the *Ellis Case* in two particulars, viz.: (1) that the South Carolina statute of 1897 applied to all common carriers, while the Texas statute, condemned in the *Ellis Case*, was limited to one class of common carriers, railway corporations; (2) that the South Carolina statute was limited to such claims as were peculiarly incident to the business of a common carrier, but the Texas statute was not so limited. The statute considered in the *Porter Case* was, in *Johnson v. Southern Ry.*, 69 S. C. 322, 48 S. E. 260, held to be repealed by the act of 1903, which is now under consideration. But the principle decided in the *Porter Case* is just as applicable in the present case. A valid distinction cannot be based upon the difference between a requirement "to pay or refuse to pay" within a given time, as provided in the act of 1897, and a requirement "to pay" within a given time, as required in the act of 1903, for if it be unlawful to require the latter, under penalty, it must also be unlawful to require the

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former, since no other person or class is required "to pay or refuse to pay" under penalty. The decision rests upon the reasonableness of the classification of common carriers for particular legislation with respect to the performance of their duty as such, thereby subserving an important public purpose within the police power of the state.

From this review of the decisions of the Supreme Court of the United States and of this court, we think it is clear that the statute is not unconstitutional.

2. The respondent, in the event of the above conclusions being reached, has, upon notice and exceptions taken, asked that this court consider whether the judgment of the circuit court should not be affirmed upon the ground that the magistrate erred in finding judgment for the penalty, when the testimony showed that the claim filed by plaintiff for \$1.75 was made up of two items, to wit, \$1.50, the value of the property alleged to have been lost or damaged while in possession of defendant, and 25 cents, freight paid by plaintiffs for same. The magistrate having found as a fact that the amount of the loss or damage was \$1.75, as claimed, and this conclusion having been affirmed by the circuit court by sustaining the magistrate's judgment to that extent, we have no power to review or reverse such conclusion of fact, unless there was absolutely no evidence tending to sustain it. It was shown that the cost of the bunch of bananas in Columbia, S. C., was \$1.50, and the freight thereon to McBee, S. C., was 25 cents. This was certainly some evidence that the value of the bananas to plaintiffs at McBee was at least \$1.75, and that such was the amount of their loss. The magistrate having adjudged the loss to be as claimed by plaintiffs, judgment for the penalty was proper.

The judgment of the circuit court is reversed, and the judgment of the magistrate's court is affirmed.

The CHIEF JUSTICE did not participate in this opinion because of illness.

SHANNON'S ADM'R v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of Virginia, Dec. 7, 1905.)

[52 S. E. Rep. 376.]

Carriers—Injuries to Passengers—Limitation of Liability.*—Under Code 1904, p. 668, § 1294c (25), providing that "no agreement made by a transportation company for exemption from liability for injury or loss occasioned by its own neglect or misconduct as a common carrier shall be valid," a contract between an express company and its messenger, stipulating that the messenger shall exempt the company from liability for its own negligence, and undertaking to afford similar immunity to railroad companies in whose cars he might travel in the

*For the authorities in this series on the question whether the carrier can exempt itself by contract from liability for injuries to express messengers, see foot-note appended to *Kelly v. Malott* (C. C. A.), 17 R. R. R. 635, 40 Am. & Eng. R. Cas., N. S., 635.

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performance of his duties, was void, and afforded no defense in an action against a railroad company for negligence resulting in such messenger's death.

Same—Care Required as to Servants of Express Companies.†—A messenger in the employ of an express company, while engaged with the servants of a railroad company in the service of transportation on the road, is entitled to at least as high a degree of care for his protection by the railroad company as it owes to its employees.

Error to Circuit Court, Bedford County.

Action by J. Boyd Shannon, as administrator of John H. Shannon, deceased, against the Chesapeake & Ohio Railway Company. From a judgment for defendant, plaintiff brings error. Reversed.

Lee & Howard and Caskie & Coleman, for appellant.

Harrison & Long, for appellee.

WHITTLE, J. This case is controlled in all respects, except one, to which we shall presently advert, by the case of *Fisher's Administrator v. Chesapeake & Ohio Railway Company*, 52 S. E. 373, in which an opinion was handed down at the present term.

The cases arose out of a common accident, and were brought to recover damages for the deaths of Fisher and Shannon, respectively, alleged to have been caused by the negligence of the defendant. The trial court sustained a demurrer to the evidence in each case, and rendered judgment for the defendant; and the judgment in Fisher's Case was reversed by this court in the opinion referred to.

In addition to other defenses, applicable alike to both cases, in the case under review the defendant filed a special plea in which it averred "that, as a condition of its permitting the plaintiff's intestate to travel in its car over its line of railway as express messenger in the employ of the Adams Express Company in his performance of his duties as such, * * * plaintiff's intestate * * * entered into a contract in writing with said Adams Express Company, which contract was in force at the time of the death of the plaintiff's intestate, whereby, in consideration of such employment and the compensation to be paid therefor, the said plaintiff's intestate did assume all risks of death or accident or damage to him or his property, whether from negligence or otherwise, and did release and discharge the said Adams Express Company and any connecting carrier, railroad company, express company, or other person or company or connecting carrier [in this instance the defendant], in whose cars or other conveyance he might travel in the performance of his duties as aforesaid, from any and all claims, liabilities, and demands of every kind, nature, and description for or on account of his death, or any injury or damage to his person or property of any kind or nature sustained by him, whether caused by negligence of the said Adams Express Company, or any of said railroad com-

†See foot-notes appended to *Harvey v. Louisiana W. R. Co. (La.)*, 16 R. R. R. 573, 39 Am. & Eng. R. Cas., N. S., 573.

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panies or other carriers, or otherwise, and did further agree that he voluntarily assumed the risks of injury or death from said negligence or otherwise, and that none of said companies or persons should incur any further liability whatsoever than therein expressed by reason of permitting him to ride in said cars or other conveyance; * * * that at the time of the death of the plaintiff's intestate he was in an express car being transported by the defendant over its said line in pursuance of his contract with said Adams Express Company, and not otherwise."

The circuit court sustained a demurrer to the plea, and that ruling is assigned as cross-error by the defendant.

It will be observed that the precise question presented by this plea is a narrow one, and involves the validity of the contract set forth therein under section 1294c (25), p. 668, Va. Code 1904.

The section reads as follows: "No agreement made by a transportation company for exemption from liability for injury or loss occasioned by its own neglect or misconduct as a common carrier shall be valid."

The status both of the express company and the defendant as "common carriers" is fixed by the legislative declaration that the phrase shall include every railroad company and express company chartered by this or any other state and doing business in this state. Acts 1891-92, p. 971, c. 614, § 18.

The Virginia statute is merely declaratory of the common-law doctrine that contracts which stipulate for immunity from negligence are invalid as contrary to public policy, and emphasizes the legislative policy on that subject in the state. The language is so plain that an attempt at exposition would rather tend to obscure than elucidate the meaning of the statute.

In the recent case of *Norfolk & Western Ry. Co. v. Tanner*, 100 Va. 379, 41 S. E. 721, this court, in construing the foregoing section, held "that a person traveling upon a free pass is clothed with every right appertaining to a passenger for hire; and a railway company, having by virtue of the pass undertaken to carry the person to whom it is issued, is charged with the duty of transporting that person safely, even though by agreement signed by the passenger it undertook to relieve itself from the consequences of the negligence of its servants. Such an agreement, being against the policy of the state, is inoperative and void."

It is sought to withdraw this case from the precept of the statute, and the well-established rule of the common law upon which it is founded, and bring it within the influence of that line of authorities (of which the case of *B. & O. S. W. Ry. Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, is a conspicuous type) which hold that, as it is not one of the duties of a common carrier to transport for an express company its messenger and merchandise, the defendant could therefore contract with the express company for exemption from liability for the death of plaintiff's intestate, although occasioned by its own negligence; the express messenger also voluntarily entering into a contract with the express company, in consideration of his employment,

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that he would assume such risk and absolve his employer and the defendant from all liability in the premises.

It will be seen that there is a marked difference between the contract set out in the plea in this case and the tripartite agreement in the Voight Case. The only parties to this contract are the express company and its servant, and its purpose is manifest. It stipulates, in the first place, to exempt the master from liability for its own negligence to its servant, and, secondly, undertakes to afford similar immunity to the defendant for its negligence. It is plain that such contract is violative both of the letter and spirit of the statute, and illegal. Indeed, independently of statute, the almost unbroken current of authority declares such contracts void.

The Voight Case constitutes a distinct exception to the general rule, and the averments of the plea do not bring the defendant within the exception. If, notwithstanding the unmistakable policy of this state in the interest of human life and safety, we were disposed to follow that case rather than the line of authorities of which *Railroad Company v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, is an exponent, as to which no opinion is expressed, it would not be permissible to do so under the pleadings in this case.

It follows from what has been said that the demurrer to the plea in question was properly sustained.

As remarked, the case in its other aspects is ruled by the decision in the Fisher Case.

In Voight's Case, 176 U. S., at page 514, 20 Sup. Ct., at page 391, 44 L. Ed. 560, it is said of his relations as an express messenger to the railroad company: "He was there as a servant, engaged with the servants of the railroad company in the service of transportation on the road. His duties were substantially the same as those of the baggage master in the same car; the latter relating to merchandise carried for passengers, and the former to merchandise carried for the express company. His actual relations to the other servants of the railroad corporation engaged in the transportation were substantially the same as those of the baggage master."

Upon that theory, the defendant owed the plaintiff's intestate at least as high degree of care for his protection as it owed to its employee Fisher, and the judgment ought to be the same in both cases.

We are of opinion, therefore, that the circuit court erred in sustaining the demurrer to the evidence, for which error its judgment must be reversed; and this court, pronouncing such judgment as that court ought to have rendered, will overrule the demurrer to the evidence, and enter judgment for the plaintiff in error for the damages assessed by the jury.

HARRISON, J., absent.

CHICAGO UNION TRACTION CO. *v.* O'BRIEN.

(Supreme Court of Illinois, Dec. 20, 1905.)

[76 N. E. Rep. 341.]

Trial—Arguments of Counsel—Comments on Witnesses.—Counsel, in an argument before the jury, have a right to attack the testimony of witnesses as untrue, though there has been no attempt to impeach them.

Same—Instructions—Invading Province of Jury—Credibility of Witnesses.—An instruction that denunciation of witnesses by counsel should not influence the jury to disregard the testimony, if unimpeached, is erroneous.

Same.—There is no presumption of law that an unimpeached witness has testified truly, and an instruction to that effect is erroneous, as infringing on the province of the jury.

Same—Abstract Instructions.—Where an instruction states a rule of law, which, though not incorrect, does not relate to any fact in the case, it is improper.

Carriers—Injury to Passenger—Instruction.—In an action for injuries to a passenger, an instruction as to the duties of a carrier of passengers for hire is not unwarranted, though that the relation exists is denied by the carrier, where the facts alleged in the declaration, if proved, would establish such a relation.

Trial—Questions for Jury—Credibility of Witnesses.—The question of the credibility of a witness testifying in contradiction of others is for the jury.

Carriers—Who Are Passengers.*—The relation of passenger and carrier is created by contract, and does not necessarily arise from the mere fact that a person runs toward a moving car to get on board.

Appeal from Appellate Court, First District.

Action by James E. O'Brien, Jr., against the Chicago Union Traction Company. Judgment for plaintiff was affirmed by the Appellate Court (117 Ill. App. 183), and defendant brings error. Reversed.

Rehearing denied February 8, 1906.

John A. Rose and *Albert M. Cross* (*W. W. Gurley*, of counsel), for appellant.

Alexander Sullivan (*Frank C. Kriete*, of counsel), for appellee.

CARTWRIGHT, C. J. Appellee recovered a judgment for \$10,000 in the circuit court of Cook county against appellant on account of injuries received in attempting to get on a street car on West Madison street. The Appellate Court for the First District affirmed the judgment.

*For the authorities in this series on the question who are, or are not, passengers, see foot-notes appended to *Atchison*, etc., Ry. Co. *v.* *Holloway* (Kan.), 17 R. R. R. 648, 40 Am. & Eng. R. Cas., N. S., 648; *Sprigg v. Rutland R. Co.* (Vt.), 17 R. R. R. 628, 40 Am. & Eng. R. Cas., N. S., 628; foot-note appended to *McCarter v. Greenville Traction Co.* (S. Car.), 17 R. R. R. 5, 40 Am. & Eng. R. Cas., N. S., 5; *Kroeger v. Seattle Elec. Co.* (Wash.), 16 R. R. R. 689, 39 Am. & Eng. R. Cas., N. S., 689; *St. Louis*, etc., Ry. Co. *v.* *Reed* (Ark.), 16 R. R. R. 541, 39 Am. & Eng. R. Cas., N. S., 541.

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It is assigned for error that the trial court erred in giving, at the instance and request of the plaintiff, the sixth, seventh, ninth, and eleventh instructions. The declaration, as amended, contained but one count, and the only ground of liability alleged was that, while the plaintiff was in the act of getting on the car for the purpose of being carried as a passenger, the defendant negligently, suddenly, and violently started up the car with great speed and violently jerked the car and caused the same to be violently propelled, by means whereof plaintiff was thrown with great force off the car and upon the ground, and thereby he was greatly hurt, wounded, and injured. The car in question was a grip car, drawing two regular passenger cars, and the plaintiff attempted to board the car while the train was in motion in the middle of a block, between street crossings. The plea was the general issue, and the defense made was that the cable train, of which the grip car was a part, was running along at half speed between regular stopping places, at a place not designed for the reception of passengers, when plaintiff attempted to board the car, that the gripman was not advised beforehand that the plaintiff would seek to get on the car, and that the car was not suddenly started forward with a violent jerk, as alleged in the declaration. The plaintiff, a school boy 14 years old, had gone with over 40 of his schoolmates to a photograph gallery on the north side of West Madison street, about the middle of the block between Carpenter and Curtis streets, to have a class picture taken. As the boys came out of the building into the street, the cable train was approaching from the east, and a few of the boys went to the Carpenter street crossing, which was the next street east. The plaintiff and a few others approached the train nearly in front of the gallery. There was a loaded wagon on the track ahead of the train, and the train was moving slowly. The evidence for defendant was that the train was running at about half speed on account of the obstruction ahead. The evidence for the plaintiff was that it was moving very slowly, and that plaintiff attempted to get on and caught hold of the upright bar at the rear end and put one foot on the running board, and, as he raised himself from the ground, fell and was dragged a short distance, breaking one leg and bruising the other. The gripman testified that the train was running at about half speed; that, when he saw the boys running to the car, he slackened speed still further for the purpose of avoiding an accident and to permit the boys to get on the car; and that just as he did so he got an emergency signal to stop and applied the rail brake and stopped the car. Two witnesses for the plaintiff, who were on the grip car, testified that as the train approached the boys one of the witnesses spoke to the gripman to the effect that he had better be careful, and the gripman told him to go to hell and mind his own business. The gripman denied that the passenger said anything to him, or that he made the reply which had been testified to, and a conductor of the defendant, who was not employed on that train, but who was riding on the grip car, testified

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that he did not hear anything of the kind, that nothing was said by the passenger to the gripman, and that nothing could have been said without his hearing it.

The principal controverted question of fact was whether the defendant was guilty of the negligence charged against it as a basis of the action, which was the alleged sudden and violent jerking of the car while plaintiff was attempting to board it. On that question the plaintiff, the two passengers already mentioned, three of plaintiff's companions who got on the train, and three of the boys who did not become passengers, testified that as plaintiff was getting on the train the car gave a jerk, lurch or lunge forward, and one boy who testified for the plaintiff did not notice and could not tell whether the car went faster or not. On the part of the defendant the gripman, the conductor before mentioned, who was riding with him, the two conductors who were running the train, two passengers, and two bystanders testified that there was no jerk, lurch, or lunge, and no increase in the speed of the train during the occurrence. Three bystanders testified that they observed the occurrence and accident and saw no forward jerk at the time. It will be seen, therefore, that the conclusion of the jury as to a vital question in the case depended upon the credibility of witnesses who contradicted each other as to the fact, and as to the gripman and conductor on one side and the two witnesses for the plaintiff on the other there was a question of veracity concerning a matter about which neither could have been mistaken. None of the witnesses were impeached by any direct method prescribed by the law, such as an attack upon their reputation for truth and veracity, or otherwise.

The sixth instruction, given at the instance of the plaintiff, which is complained of, is as follows: "The court instructs the jury that the denunciation of witnesses by counsel, if any such was indulged in, should not influence the jury to disregard or disbelieve the testimony of any unimpeached witness. Witnesses, like all other citizens, are presumed by the law to be law-abiding citizens, and the law supplies a proper method of impeaching their evidence in cases where it can be impeached." The instruction, in effect, advised the jury that there was a rule of law that they must not be influenced by the argument of counsel to disregard or disbelieve the testimony of any witness, unless such witness had been impeached. The jury are to decide questions of fact, and the purpose of argument by counsel is to induce them to decide such questions in accordance with the claims and theories of counsel. Where witnesses contradict each other, the object of argument is to influence the jury to believe the testimony of one and to disregard or disbelieve the testimony of the other. To that end counsel have a right to present to the jury, in argument, the inconsistencies and contradictions of witnesses, to comment on their manner of testifying, their appearance upon the stand, the improbability of their statements, and anything else which will show that they are mistaken or unworthy of belief, and to denounce a witness as unreliable or untruthful when subjected to

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any of the tests for determining his credibility. It is the right of counsel to draw any and all proper inferences arising from the evidence in the case tending to show that the testimony of witnesses is untrue. *East St. Louis Connecting Railway Co. v. O'Hara*, 150 Ill. 580, 37 N. E. 917. The instruction was erroneous in telling the jury that the credibility of a witness cannot be affected by the argument of counsel, unless the witness is impeached, and in practically destroying the effect of argument on the credibility of witnesses or the weight to be given to their testimony.

But counsel for the appellee say that the record does not show that there had been any argument, and for that reason the instruction was not harmful. The case of *North Chicago Street Railroad Co. v. Wellner*, 206 Ill. 272, 69 N. E. 6, is cited to support that claim. In that case the instruction related to statements of counsel, not based upon the evidence, made either in putting in evidence in the case or in argument, and it would have had some relation to the case, although there had been no argument. But in this case the first part of the instruction related to nothing else, and had neither place nor purpose in the case unless there had been argument to the jury. Counsel on each side asked, and the court gave, instructions relating to argument of counsel and which could apply to nothing else. But, if we ought to or can presume that counsel on each side asked the court to give, and the court gave, purposeless and useless instructions concerning something which never happened, and that the only effect, so far as argument is concerned, was to misinform the jury as to the law applicable to a case where there is argument, the objections to the instruction are not thereby removed. The part of the instruction which states that witnesses, like all other citizens, are presumed by the law to be law-abiding citizens and the law supplies a proper method of impeaching their evidence in cases where it can be impeached, is equally vicious with the other part. The question of the credibility of witnesses is exclusively within the province of the jury, and it is not the right of the court to take that question from them. Whether a witness has been impeached is a question of fact, and not of law, and, when not impeached, it is for the jury to determine whether he shall be believed and to what extent. The court may give to the jury general rules for their guidance, but where witnesses contradict each other as to matters of fact, and there is no impeachment of any witness, as was the case here, the law indulges no presumption that they are all telling the truth. When a witness testifies in a case, the inherent improbability of his statements may induce the jury to disbelieve him, although he is not contradicted. How much weight is to be given to his testimony depends largely upon his appearance, his manner of testifying, and all the other evidence and circumstances from which the jury may credit or discredit him. Where witnesses contradict each other, and the result of the case depends upon their credibility, it is for the jury to determine which one they will believe. *Stampofski v. Steffens*,

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79 Ill. 303. The law has no rule which the court may lay down in instructions to the jury that there is a presumption that an unimpeached witness has testified truly, and such instructions infringe upon the province of the jury to determine the credibility of the witnesses and the weight and value of their testimony. *Hauser v. People*, 210 Ill. 253, 71 N. E. 416; 30 Am. & Eng. Ency. of Law (2d Ed.) 1068; 11 Ency. of Pl. & Pr. 312.

The seventh instruction was based on the hypothesis that the plaintiff was a passenger, and it began with this statement: "The court instructs the jury that the fact that the law does not make a common carrier an insurer of the safety of its passengers does not, even to the slightest extent, relieve such common carrier of its legal duty to exercise the highest degree of care for the safety of its passengers, consistent with the practical operation of its vehicle." The purpose of instructions is to state and explain the law applicable to the case, and the practice of injecting an argument in an instruction is not approved. *Ludwig v. Sager*, 84 Ill. 99. There was no question in the case to which this prefatory statement was in any way related, and while the statement of law was not incorrect it should have been omitted. The remainder of the instruction and the ninth instruction were on the same question of the duties of a common carrier of passengers for hire, and they are objected to on the grounds that the evidence did not tend to prove that the plaintiff was a passenger, and that the declaration did not so aver. We are of the opinion that the instruction is not subject to either objection. Facts were stated in the declaration which, if proved, showed that he was a passenger. It alleged that he was rightfully, and with due care and diligence, in the act of getting upon and alighting upon said car, which was then and there receiving and discharging passengers of the defendant, for the purpose of being carried as a passenger thereon for reward. The evidence was that the car was in motion, and not at a stopping place for passengers; but there was evidence tending to show that the car was slowed down for the purpose of permitting plaintiff and his companions to take passage thereon. That evidence was contradicted, but the decision of the question was for the jury. The relation of passenger and carrier is contractual, and does not arise out of the fact that a person runs toward a moving car to get on board, but the relation may be proved by circumstances, and we do not regard it as error to give the instructions to the jury in this case.

For the error in giving the sixth instruction, the judgments of the Appellate Court and circuit court are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

OMAHA ST. RY. CO. *v.* BOESEN.

(Supreme Court of Nebraska, Oct. 19, 1905.)

[105 N. W. Rep. 303.]

Carriers—Injury to Passenger—Burden of Proof.*—In an action against a street railway company for damages for injuries sustained by one of its passengers, the burden of proof on the question of negligence does not shift to the defendant upon proof that the injuries resulted from a derailment of the car.

Same—Negligence—Presumptions—Evidence.*—In such case a presumption of negligence arises from the fact of derailment; but, when that presumption is met by evidence which makes it equally probable that the accident was not due to negligence on the part of the defendant, in the absence of other evidence tending to establish the affirmative of the issue, the defendant is entitled to a verdict.

Same—Duty as to Passengers.†—A street railway company is not an insurer of its passengers. It is not bound to do everything that can be done to insure their safety. It fulfills its obligations in that regard when it exercises the utmost skill, diligence, and foresight consistent with the practical conduct of the business in which it is engaged.

Witness—Impeachment.—On a subsequent trial the evidence of a deceased witness, taken at a second trial, cannot be impeached by showing that some of his statements on the witness stand at the first trial are inconsistent therewith, where, upon the second trial, his attention was not directed to such statements, and he was given no opportunity to explain the alleged discrepancies.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 2. Error to District Court, Douglas County; Estelle, Judge.

*For the authorities in this series on the question whether a presumption of negligence arises from the fact that a passenger is injured, see foot-notes appended to *State v. United Rys. & Elec. Co.* (Md.), 17 R. R. R. 624, 40 Am. & Eng. R. Cas., N. S., 624; *Blake v. Camden Interstate Ry. Co.* (W. Va.), 17 R. R. R. 617, 40 Am. & Eng. R. Cas., N. S., 619; *Patterson v. San Francisco & S. M. Elec. Ry. Co.* (Cal.), 17 R. R. R. 552, 40 Am. & Eng. R. Cas., N. S., 552; *Lincoln Traction Co. v. Heller* (Neb.), 17 R. R. R. 368, 40 Am. & Eng. R. Cas., N. S., 368; *Western Maryland R. Co. v. Shivers* (Md.), 17 R. R. R. 34, 40 Am. & Eng. R. Cas., N. S., 34; *Georgia Ry. & Elec. Co. v. Reeves* (Ga.), 17 R. R. R. 26, 40 Am. & Eng. R. Cas., N. S., 26; foot-note appended to *Minahan v. Grand Trunk W. Ry. Co.* (C. C. A.), 16 R. R. R. 562, 39 Am. & Eng. R. Cas., N. S., 562; foot-note appended to *Fagan v. Rhode Island Co.* (R. I.), 16 R. R. R. 22, 39 Am. & Eng. R. Cas., N. S., 22.

†For the authorities in this series on the subject of the degree of care required of a carrier of passengers, see foot-notes appended to *Denham v. Washington Water Power Co.* (Wash.), 17 R. R. R. 689, 40 Am. & Eng. R. Cas., N. S., 689; *Atchison, etc., Ry. Co. v. Holloway* (Kan.), 17 R. R. R. 648, 40 Am. & Eng. R. Cas., N. S., 648; *Blake v. Camden Interstate Ry. Co.* (W. Va.), 17 R. R. R. 619, 40 Am. & Eng. R. Cas., N. S., 619; *Little Rock Traction & Elec. Co. v. Kimbro* (Ark.), 17 R. R. R. 501, 40 Am. & Eng. R. Cas., N. S., 501; *Western Maryland R. Co. v. Shivers* (Md.), 17 R. R. R. 34, 40 Am. & Eng. R. Cas., N. S., 34; *Abbott v. Oregon R. Co.* (Ore.), 16 R. R. R. 52, 39 Am. & Eng. R. Cas., N. S., 52; foot-notes appended to *South Covington & C. St. Ry. Co. v. Smith* (Ky.), 16 R. R. R. 26, 39 Am. & Eng. R. Cas., N. S., 26.

Omaha St. Ry. Co. v. Boesen

Action by John Boesen against the Omaha Street Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

See 94 N. W. 619.

John L. Webster and *W. J. Connell*, for plaintiff in error.

T. W. Blackburn and *R. S. Horton*, for defendant in error.

ALBERT, C. This is an action wherein the plaintiff seeks to recover for personal injuries alleged to have been sustained by reason of the negligence of the defendant. It is alleged in the petition that, while the plaintiff was a passenger on one of the cars operated by the defendant on its street railway, such car, by reason of certain negligent acts and omissions of the defendant, was derailed, and in consequence the plaintiff was thrown violently therefrom, and thereby sustained serious and permanent bodily injuries. These allegations are put in issue by the answer, which also charges the plaintiff with contributory negligence. The reply consists of a general denial. A trial of the issues resulted in a verdict and judgment for plaintiff. The defendant brings error.

The court instructed the jury that if they found that the car was derailed, and that in consequence the plaintiff was thrown from the car and injured, it devolved upon the defendant to show by a preponderance of the evidence that the injuries were not due in any degree to a failure on the part of the defendant to exercise the utmost care, diligence, and foresight for the safety of its passengers. It would seem that the theory of the court that the burden of proof on the question of negligence shifted to the defendant upon a showing that the plaintiff was injured in consequence of a derailment of the car is erroneous. Section 3, art. 1, c. 72, Comp. St. 1903, which charges railroad companies with liability for all damages inflicted upon the persons of their passengers while being transported over their roads, except when the injury arises from the criminal negligence of the person injured, has no application to street railways. *Lincoln St. Ry. Co. v. McClellan*, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 736. The latter class of carriers are liable only when such injuries are traceable to some negligent act or omission on their part. Negligence is the gist of the action, and the plaintiff holds the affirmative, which he must establish by a preponderance of the evidence. Proof of the accident is not direct proof of negligence. The accident is a mere collateral fact, but one so commonly associated with the lack of due care that, when proved, it raises a strong probability, amounting to presumption, of negligence. But when the proof of such accident is met by proof of other facts and circumstances, making it equally probable that it was the result of causes wholly beyond the control of the defendant, and which no human skill and foresight could have guarded against or prevented, one probability offsets the other, and the affirmative of the issue, in the absence of other evidence tending to establish it, stands, just as it stood at the beginning of the controversy, not

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proved. As was said by Commissioner Ames, in *Rupp v. Sarpy County* (Neb.) 98 N. W. 1042: "The burden of sustaining the affirmative of an issue does not shift during the progress of a trial, but is upon the party alleging the facts constituting the issue, and remains there until the end."

The charge of the court is also open to the further criticism that it imposed upon the defendant too high a degree of care. A street railway company is not bound "to exercise the utmost care, diligence, and foresight for the safety of its passengers." In no case should such carriers be held to a higher degree of care than is consistent with the practical conduct of its business. While the precise point was not under consideration at the time, this court recognized the justice of the qualification just suggested in *Lincoln St. Ry. Co. v. McClellan*, supra. In *Johnson v. Seattle Electric Co.*, 35 Wash. 382, 77 Pac. 677, the court said: "While the jury are told that a common carrier is not an insurer of the lives and limbs of its passengers, yet they are told that it is liable if it has not done everything that could have been done to insure their safety. The rule is not so onerous as this. There are many things that a carrier could do, which would conduce to the safety of its passengers, but which it is not required to do, simply because the practical prosecution of the business will not permit of it. The carrier could, for example, by simply increasing its force of attendants, reduce to a minimum the happening of accidents like the one complained of here; but this, simple as the remedy may seem, might so increase the cost of operation as to compel the abandonment of the business. Hence the carrier cannot be held bound to do everything that can be done to insure the safety of its passengers, but only to the highest degree of care consistent with the practical conduct of its business. The measure of duty as laid down by the trial court was more than the law requires of the carrier, and for that reason erroneous." To the same effect are the following: *West Chicago St. Ry. Co. v. Winters*, 107 Ill. App. 221; *Chicago Union Traction Co. v. Mommsen*, 107 Ill. App. 353; *Palmer v. Warren St. Ry. Co.*, 206 Pa. 574, 56 Atl. 49, 63 L. R. A. 507; *Fitch v. Traction Co.*, 124 Iowa, 665, 100 N. W. 618; Ind., etc., *Ry. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898.

The defendant asked the court to instruct the jury to the effect that, although they found that the car was derailed, yet if they found that, at the time and place of the accident, the car and track were in good order and condition, and without defect or imperfection, the presumption arising from the derailment of the car would be thereby overcome. It was not error to refuse this instruction because it ignores the inference of negligence in the operation of the car, which the jury might legitimately draw from the fact of derailment.

This case has been tried in the district court six times. A witness, who had testified at the first and second trial, died before the last trial. The testimony of the witness taken at the second trial was received on behalf of the plaintiff at the last trial of the

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case. For the purpose of impeachment, the defendant offered certain portions of the evidence of the same witness, given at the first trial. The offer was rejected, and its rejection is now assigned as error. It does not appear that any attempt was made at the second trial to lay a foundation for the impeachment of the witness by calling his attention to the alleged inconsistent statements or otherwise. The evidence offered was not, under the circumstances, admissible for the purpose of impeachment. Jones on Evidence, vol. 3, § 851; *Ayers v. Watson*, 132 U. S. 394, 10 Sup. Ct. 116, 33 L. Ed. 378.

There is some question whether the defendant is in a position to complain of that portion of the charge in regard to the degree of care required of a carrier of passengers; but, as the judgment must be reversed for the error in the charge with respect to the degree of proof necessary to rebut the presumption of negligence arising from the derailment of the car and consequent injury to the plaintiff, we have not gone into that question.

It is recommended that the judgment of the district court be reversed, and the cause remanded.

DUFFIE and JACKSON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings according to law.

HOLCOMB, C. J., not sitting.

SEABOARD AIR LINE RY. v. O'QUIN.

(Supreme Court of Georgia, Nov. 20, 1905.)

[52 S. E. Rep. 427.]

Carriers—Forcible Expulsion of Passenger—Punitive Damages.*—

Punitive damages are recoverable in an action against a railroad company by a passenger, where the evidence shows that he was, without justification or excuse, forcibly expelled from its train by the conductor or other employees in charge thereof.

Same—Torts of Servants.—When a common carrier undertakes, through its servants, to exercise its rights to eject from its cars passengers who have been guilty of disorderly conduct, it acts at its peril in determining their identity; and if by mistake one who has in no way forfeited his rights as a passenger be ejected, the carrier will be liable to respond in damages for the tort thus committed by its serv-

*For the authorities in this series on the subject of the right to recover exemplary or punitive damages for wrongs to passengers, see foot-notes appended to *Peterson v. Middlesex & S. T. Co.* (N. J.), 15 R. R. R. 672, 38 Am. & Eng. R. Cas., N. S., 672; foot-notes appended to *Dagnall v. Southern Ry. Co.* (S. Car.), 15 R. R. R. 59, 38 Am. & Eng. R. Cas., N. S., 59; *Southern Ry. Co. v. Lanning* (Miss.), 15 R. R. R. 1, 38 Am. & Eng. R. Cas., N. S., 1; foot-notes appended to *Pickett v. Southern Ry. Co.* (S. Car.), 14 R. R. R. 269, 37 Am. & Eng. R. Cas., N. S., 269; foot-notes appended to *Yazoo & M. V. R. Co. v. Mattingly* (Miss.), 14 R. R. R. 48, 37 Am. & Eng. R. Cas., N. S., 48.

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ants, their good faith being only available in defeating a recovery of punitive damages.

Judgment—Conclusiveness—Criminal Prosecution.—In such an action it is not permissible for the carrier to plead or prove the conviction of the plaintiff, in a criminal prosecution brought against him on the charge of using profane and vulgar language in the presence of females, while upon its cars on the occasion when he was forcibly expelled from the train.

(Syllabus by the Court.)

Error from Superior Court, Tattnall County; B. T. Rawlings, Judge.

Action by Preston O'Quin against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

This was an action to recover damages from the defendant for unlawfully and wrongfully expelling the plaintiff from its cars on which he was riding as a passenger, and for ejecting him with unnecessary force and causing him to be arrested for an offense alleged to have been committed on the cars. The jury on the trial found a verdict for \$500 damages. The defendant made a motion for a new trial, which was refused by the court, and it excepts to the judgment overruling this motion. The evidence for the plaintiff tended to prove that he was a passenger on the cars of the Seaboard Air Line Railway, and was traveling from Savannah to his destination at Fitzgerald; that when the train reached the station of Collins, in Tattnall county, certain detectives, employees of the railway company, forcibly ejected him from the train, without allowing him to get his baggage, and turned him over to the marshal of Collins; that on the next day a warrant was sued out in Bryan county at the instance of one of the detectives who ejected him from the train, and he was arrested on this warrant and had to give bond for his appearance before the committing court; that the warrant was subsequently dismissed for want of prosecution; that at the time of his ejection he was conducting himself in a proper and orderly manner; and that his previous conduct had given no pretense to the servants of the railway company for expelling him from the train, causing his arrest, and suing out a warrant against him. The defendant offered evidence to show that at the time the plaintiff boarded its cars at Savannah he was partially intoxicated; that while on its cars he used profane and obscene language in the presence of the passengers, among whom were several females; that because of such improper conduct he was expelled from the train by its employees; and that in ejecting him no more force was used than was necessary.

Brown & Randolph, Tom Eason, and J. V. Kelley, for plaintiff in error.

W. T. Burkhalter and Jos. K. Hines, for defendant in error.

EVANS, J. (after stating the facts). 1. The first ground of the amended motion for a new trial complains that the court erred in

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charging the jury: "In every tort there may be aggravating circumstances, either in the act or in the intention; and in that event, the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as a compensation for the wounded feelings of the plaintiff." The error assigned on this charge is that it was not applicable to the facts of the case. The charge was almost a literal excerpt from Civ. Code 1895, § 3906, which is applicable in all cases where there has been a trespass upon or unlawful invasion of the personal rights of the aggrieved party. *W. & A. R. v. Turner*, 72 Ga. 292, 53 Am. Rep. 842; *City & Suburban Ry. v. Brauss*, 70 Ga. 368; *Georgia R. v. Homer*, 73 Ga. 257; *Georgia R. Co. v. Dougherty*, 86 Ga. 744, 12 S. E. 747, 22 Am. St. Rep. 499. The case made by the plaintiff is that, while traveling as a passenger and behaving in a decorous manner, he was ruthlessly ejected from the defendant's train by its servants, without any excuse and without informing him why he was so treated; that he was forcibly expelled; and that in ejecting him the company's employees, in the presence of other passengers, roughly took hold of his person and jerked him from the train. If this was the truth of the case (and the verdict of the jury solves this question in favor of the plaintiff), the conduct of the railway company's employees evinced a reckless disregard of the plaintiff's rights, their wrongful act amounted to a trespass upon his person, and the charge of the court was applicable to the case as made out by the evidence introduced in his behalf. *Georgia R. v. Homer*, supra; *Head v. Railway Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434; *Atlanta St. Ry. Co. v. Hardage*, 93 Ga. 457, 21 S. E. 100; *Southern Ry. Co. v. Harden*, 101 Ga. 263, 28 S. E. 847.

2. The following charge was also excepted to: "I charge you further, in determining this question and in dealing with the passenger while on the train, the railroad was bound to exercise extraordinary diligence in looking into the facts and circumstances and determining the question as to whether or not this particular passenger, or whether somebody else, had been using profane and vulgar language. In other words, in determining the question as to whether or not the passenger was subject to the section of the Code which I have read to you—being ejected for using obscene language—they should use extraordinary diligence in determining that question." This charge is alleged to be erroneous, because the rule as to extraordinary diligence did not apply to the facts of the case, and because the court should have qualified the charge by instructing the jury that if the employees of the company acted in good faith and used ordinary diligence in undertaking to ascertain whether the plaintiff was the person who had been guilty of disorderly conduct on the train, the company could not be held liable for his expulsion. We agree with counsel for the plaintiff in error that the question of extraordinary diligence was not involved under the facts of this case. A common carrier owes to a passenger the duty of exercising extraordinary diligence to guard him against injury

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and to provide for his safety while he is traveling on its cars; but where the carrier, through its employees, acting within the scope of their authority, wrongfully ejects a passenger, the carrier is liable for the tort thus committed, irrespective of the good faith of its employees and the exercise on their part of ordinary prudence in determining whether or not the passenger has been guilty of misconduct. A mistake of fact on their part will not relieve the carrier from liability, even though they may have acted in entire good faith. *Georgia R. Co. v. Eskew*, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490; *Atlanta Ry. Co. v. Keeny*, 99 Ga. 266, 25 S. E. 629, 33 L. R. A. 824. Their intention can only be looked to in determining whether the case is one calling for punitive damages. *Georgia R. Co. v. Eskew*, just cited. In expelling a passenger from its train, the carrier acts at its peril; and, if he be wrongfully ejected, the fact that its servants acted under a misapprehension in supposing that he had been guilty of misconduct can afford no excuse to the carrier for his unlawful expulsion. A conductor on a passenger train is "invested with all the powers, duties, and responsibilities of police officers while on duty," and may lawfully eject a passenger who is guilty of disorderly conduct, and cause him to be arrested and detained for a violation of any of the penal laws of this state; but the statute which clothes a conductor with this authority expressly provides that nothing therein contained "shall affect the liability of any railroad company for the acts of its employees." Pen. Code 1895, § 902. While the law as to extraordinary diligence does not apply to a case where a passenger is wrongfully ejected from a train by the servants of a railway company, yet the charge excepted to affords no cause of complaint to the defendant company, as the charge was more favorable to it than would have been a correct presentation to the jury of the law bearing upon its liability as a common carrier. *Atlanta St. Ry. Co. v. Keeny*, 99 Ga. 266, 25 S. E. 629, 33 L. R. A. 824.

3. On the trial the defendant offered an amendment to its plea, alleging that since the filing of the suit, the plaintiff had been indicted and convicted in the superior court of Chatham county for using profane, obscene, and vulgar language, in the presence of females, on a passenger car, on the same day as that on which he claims he was unlawfully ejected from the defendant's train. The court declined to allow this amendment. The record of the criminal proceeding therein referred to was offered in evidence in behalf of the company, but was excluded by the court. Error is assigned upon both of these rulings. The judgment of conviction in a criminal prosecution constitutes no bar to a civil action based upon the same act or transaction. 24 Am. & Eng. Enc. Law (2d Ed.) 831; *Cottingham v. Weeks*, 54 Ga. 275. This rule rests upon the reasoning that the two proceedings are not, ordinarily, between the same parties; different rules as to the competency of witnesses and as to the weight of evidence exist, and the issue in the criminal proceeding is not necessarily the same, either as to scope or as to its attendant results, as that

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involved in the civil action. In this state the defendant is not, in a criminal case, permitted to testify, and his version of the transaction may be believed or rejected in the discretion of the jury: while, on the other hand, the party against whom the civil action is brought should not be held bound by the result of the criminal proceeding, not being a party thereto, and not having the right to examine or cross-examine witnesses, or to control the conduct of the case. It follows that the court did not err in refusing to allow the amendment, or in rejecting the proffered evidence.

Judgment affirmed. All the Justices concurring.

FIREBAUGH v. SEATTLE ELECTRIC CO.

(Supreme Court of Washington, Dec. 11, 1905.)

[82 Pac. Rep. 995.]

Carriers—Injury to Passengers—Evidence—Negligence—Presumptions.*—An accident resulting in injury to a passenger on a street car was caused by the blowing out of the controller on the car. The company had control over the equipment and operation of the car, and the passenger was not charged with contributory negligence. Held, the company was presumptively guilty of actionable negligence; it being presumed that the accident was caused by a defect in the controller.

Same.*—A passenger on a street car, who, on being placed in danger in consequence of the blowing out of the controller on the car, jumped from the car with a view of saving himself and was injured, was not deprived of the right to insist that proof of the accident presumptively showed actionable negligence on the company's part.

Same—Evidence—Question for Jury.—In an action against a street railway company for injuries to a passenger by reason of the blowing out of the controller on the car, witnesses for the company testified that they did not know what the cause of the accident was, and that sometimes a blowing out would occur, and the cause could not be

*For the authorities in this series on the question whether a presumption of negligence arises from the fact that a passenger is injured, see foot-notes appended to *State v. United Rys. & Elec. Co.* (Md.), 17 R. R. R. 624, 40 Am. & Eng. R. Cas., N. S., 624; foot-notes appended to *Blake v. Camden Interstate Ry. Co.* (W. Va.), 17 R. R. R. 619, 40 Am. & Eng. R. Cas., N. S., 619; foot-note appended to *Patterson v. San Francisco & S. M. Elec. Ry. Co.* (Cal.), 17 R. R. R. 532, 40 Am. & Eng. R. Cas., N. S., 552; foot-notes appended to *Lincoln Traction Co. v. Heller* (Neb.), 17 R. R. R. 368, 40 Am. & Eng. R. Cas., N. S., 368; foot-notes appended to *Western Md. R. Co. v. Shivers* (Md.), 17 R. R. R. 34, 40 Am. & Eng. R. Cas., N. S., 34; *Georgia Ry. & Elec. Co. v. Reeves* (Ga.), 17 R. R. R. 26, 40 Am. & Eng. R. Cas., N. S., 26; foot-notes appended to *Minahan v. Grand Trunk W. Ry. Co.* (C. C. A.), 16 R. R. R. 562, 39 Am. & Eng. R. Cas., N. S., 562.

For the authorities in this series on the question whether failure to exercise good judgment, caused by freight, is contributory negligence, see *Staines v. Central R. Co.* (N. J.), 17 R. R. R. 612, 40 Am. & Eng. R. Cas., N. S., 612; foot-notes appended to *Morey v. Lake Superior Term. & Trans. Ry. Co.* (Wis.), 16 R. R. R. 113, 39 Am. & Eng. R. Cas., N. S., 113.

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ascertained. Plaintiff showed different causes for the explosion which might have been controlled and remedied by the company. Held, that the question whether the company rebutted the presumption of negligence arising from the occurrence of the accident was for the jury.

Appeal from Superior Court, King County; Geo. E. Morris, Judge.

Action by Franklin Firebaugh, an infant, by W. R. Kelly, his guardian ad litem, against the Seattle Electric Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hughes, McMicken, Dovell & Ramsey, for appellant.

Brady & Gay, for respondent.

DUNBAR, J. The action was brought by the respondent, to recover damages for personal injuries sustained by jumping from a front platform of a street car operated by the appellant company, and on which he was a passenger. The complaint alleges, among other things, that the defendant carelessly and negligently used the said car when it was out of repair in its motor power and in its appliances appertaining thereto; that while the plaintiff was such passenger on said car, by reason of defendant's negligence, the controller, machinery, and appliances of said car exploded, and filled the vestibule thereof with smoke and flames to such an extent that all the front portions of said car became greatly heated; that by reason thereof the plaintiff was placed in a situation of apparent and imminent peril, and was dominated by the peril of impending danger, and believed that the only way he could save himself was to jump from said car, and without time to deliberate, and acting on the instinct of self-preservation, did jump and was thrown against hard substances beside the track, and thereby injured. The defendant, in its answer, admitted that the plaintiff was a passenger, and that he did jump from the car at the time and place alleged, but denied every allegation of negligence on its part, and pleaded affirmatively contributory negligence on the part of the plaintiff in carelessly and negligently jumping, or climbing over the gate on the platform of its car while the same was closed. The reply denied contributory negligence. The case was tried to a jury, which resulted in a verdict for the plaintiff. Judgment followed, and this appeal is taken therefrom.

There are but two assignments of error, the first that the court erred in giving instruction No. 5, which was as follows: "When a controller upon a car of a street railway company blows out or burns out, the law presumes that such blowing or burning resulted from some defect of the controller or other appliances of the car, or means used by the company in the operation of the car, and in such a case it devolves upon the company to show that such burning or blowing out did not result from any cause which the highest degree of care on its part could have prevented." Assignment 2 is that the court erred in denying defendant's challenge to the legal sufficiency of the evidence, and in

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refusing to instruct the jury to return a verdict for the defendant. The allegation of contributory negligence raised in the answer is not urged here.

It is contended by the learned counsel for appellant that the doctrine of "*res ipsa loquitur*" does not apply in a case of this kind, and that it was improper in this case to tell the jury that they were entitled to find the appellant negligent upon proof of the accident alone; and the case of *Allen v. Northern Pacific Ry. Co.*, 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804, is cited in support of the contention that the doctrine of "*res ipsa loquitur*" has been somewhat modified by this court. It is insisted by the appellant that it is manifest that this court has not intended to announce the rule that there is a presumption of negligence unless it is apparent that the accident could not have happened without negligence on the part of the carrier. This is no doubt true, for the rule of "*res ipsa loquitur*" is based upon the apparent fact that the accident could not have happened without negligence on the part of the carrier, or upon the literal meaning of the expression that the thing itself speaks, and shows *prima facie* that the carrier was negligent. The cases which we will hereafter cite do not in any way contradict the further contention of the appellant that a careful analysis of the better considered decisions shows that negligence will not be presumed from the mere fact of accident which is as consistent with the presumption that it was unavoidable as it is with negligence; and therefore, if it be left in doubt what the cause of the accident was, or if it may as well be attributable to the act of God or unknown causes as to negligence, there is no such presumption. As we have said, this does not affect the principle of law that, when, by reason of the machinery and appliances used by the common carrier wholly under its control, a passenger is injured, this fact shows *prima facie* negligence on the part of the carrier.

Looking to eminent authority for expression on this subject, we find the following announcement in *Nellis on Street Railroad Accident Law*, pp. 590, 591: "Where the plaintiff is a passenger on a street car, a *prima facie* case of negligence is made out by showing the happening of the accident during the course of transportation; and, if the injury was caused by apparatus wholly under its control, furnished and applied by it, a presumption of negligence on the part of the company is raised, and the burden is on the latter to prove itself not guilty of negligence." The same rule is substantially laid down by *Shearman & Redfield on the Law of Negligence*, and by all other authority. In *Gleeson v. Virginia Midland R. R. Co.*, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458, which was an action for damages caused by a landslide in a railway cut, the doctrine of "*res ipsa loquitur*" was applied, and the court announced the rule as follows: "Since the decisions in *Stokes v. Salstonsrall*, 13 Pet. 181, 10 L. Ed. 115, and *New Jersey R. & Trans. Co. v. Pollard*, 22 Wall. 341, 22 L. Ed. 877, it has been settled law in this court that the happening of an injurious accident is, in passenger cases, *prima*

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facie evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance, and was followed at the present term in *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270." In answer to the contention of the carrier in that case, to the effect that the operation of the rule was confined to cases where the accident resulted from defective arrangement, management, or misconstruction of things over which the defendant had immediate control, etc., the court said: "Neither of these attempted distinctions is sound, since, as has been shown, the defect was in the construction of that over which the defendant did have control and for which it was responsible, and since the slide was not caused by the act of God, in any admissible sense of that phrase. Moreover, if these distinctions were sound, still, as a matter of correct practice, the modification should have been made. The law is that the plaintiff must show negligence in the defendant. This is done *prima facie* by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, it is still none the less true that the plaintiff has made out his *prima facie* case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of the exculpation, whether disclosed by one party or the other. They are its matter of defense." So that it will be seen that the court in that case went further than it is necessary to go here, because the fact is undisputed in this case that the accident was caused by appliances over which the appellant had absolute control.

This road announcement, however, has been somewhat modified by this court in *Hawkins v. Front Street Cable Ry. Co.*, 3 Wash. St. 592, 28 Pac. 1021, 16 L. R. A. 808, 28 Am. St. Rep. 72, where it was held that the statement that, where a passenger was being carried on a train and was injured without fault of his own, there was legal presumption of negligence, casting upon the carrier the burden of disproving it, was too broad. But that was upon the express ground that the nature of the accident was not such as to warrant saying anything about the machinery; the case being an accident caused to the passenger while occupying a seat upon the dummy car of a cable railway, by reason of a collision between the dummy and a wagon which was on the track. But the rule announced in *Federal Street, etc., Ry. Co. v. Gibson*, 96 Pa. 83, was indorsed in that case, as being the proper rule, and there it was said: "It is true, in many cases, the mere fact of injury to a passenger raises the presumption of want of care on the part of the railroad company. Such is the case when the injury results from defective track, cars, machinery, or motive power." The whole case conclusively shows that there was no attempt to disturb the well-settled rule that, where the

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accident was caused by machinery or equipment over which the carrier had absolute control, the presumption of negligence on the part of the carrier would attach. And no further modification was intended by this court in *Allen v. Northern Pacific Ry. Co.*, supra. The court there quoted approvingly from *Elliott on Railroads*, § 1644, which is as follows: "It is therefore too broad a statement of the rule to say that in all cases a presumption of negligence on the part of the carrier arises from the mere happening of the accident or an injury to a passenger, regardless of the circumstances and nature of the accident. The true rule would seem to be that, when the injury and circumstances attending it are so unusual and of such a nature that it could not well have happened without the company being negligent, or when it is caused by something connected with the equipment or operation of the road over which the company has entire control, without contributory negligence on the part of the passenger, a presumption of negligence on the part of the company usually arises from proof of such facts, in the absence of anything to the contrary, and the burden is then cast upon the company to show that its negligence did not cause the injury." It would seem that this case falls squarely within the announcement there made. The accident was unquestionably caused by something in connection with the equipment or operation of the road over which the company had entire control, and it is not contended that there was contributory negligence on the part of the passenger. It follows, then, from the announcement of Mr. Elliott quoted, and which is also cited by the appellant in this case, that the presumption of negligence on the part of the company arises from such facts, and this is all that is stated by the instruction complained of. The modification in all the cases mentioned is simply to the extent that it is not sufficient to make the bare allegation that the plaintiff was a passenger on the defendant's cars and that an accident occurred by reason of which he was injured, or to rely upon such proof, or to give such an instruction, because manifestly many accidents might occur to a passenger on a train the cause of which could not to any extent be attributed to the negligence of the carrier.

This question has again lately been before this court, and the authorities generally reviewed, in the case of *Williams v. Spokane Falls & Northern Ry. Co.*, 80 Pac. 1101, where it was held that evidence that the injury of a passenger was connected with the operation of a railroad makes it a prima facie case of negligence, devolving on the carrier the duty of overcoming the presumption. And the distinction was shown there between instructions which were absolutely unlimited in their scope, and which might lead the jury to believe that even the proof of an accident caused by some agency which was not connected with the operation of the road would make a prima facie case of negligence on the part of the carrier, and an instruction which applied to accidents occurring by reason of something connected entirely with the operation of the road, citing *Thompson's Com-*

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mentaries on the Law of Negligence, vol. 3, § 2754, where these distinctions are plainly set forth. It is true that this case is now pending in this court on a petition for rehearing, but the petition does not raise any of the questions involved in the case at bar. We think that, if the doctrine of *res ipsa loquitur* could be applied in any case of accident between a passenger and a common carrier, it would naturally apply in this case.

The appellant, however, insists that, even if under the general rule it should apply, it cannot apply under the circumstances of this case, because the respondent was not relying upon the operation of the car by the appellant, and was therefore not a passive recipient; and the presumption of negligence could not obtain because he acted himself and to a certain extent took the matter into his own hands by jumping from the car; and some cases are cited in support of this contention. We think, upon an examination of the cases, that they do not in any manner sustain appellant's contention, and that, when it is conceded, as it must be from an examination of the testimony in this case, that the plaintiff was warranted in retreating from the peril which threatened him, and when in fact he would have been guilty of contributory negligence if he had not attempted to save himself by retreating, there is no equitable rule which could deprive him, by reason of such cautionary action on his part, from pleading negligence on the part of the carrier.

It is further earnestly contended by the appellant that, in any event, it was shown by the appellant that there was no negligence on the part of the carrier, and that the court should have sustained the challenge as to the legal sufficiency of the evidence. An examination of this testimony satisfies us that it was not proven that the cause of the blow-out of the controller was beyond appellant's control. It was simply shown by the witnesses who testified that they did not know what the cause was, and that sometimes a blow-out would occur and the cause could not be ascertained. But, outside of this, there was testimony offered by the respondent showing different causes for the explosion which might have been controlled and remedied by the appellant, and under the testimony it was a question for the jury to determine whether the appellant rebutted the presumption of negligence which, under the law, attached to it by reason of the accident occurring.

This question having been submitted to the jury under proper instructions, we are unable to find any error in the record, and the judgment is affirmed.

MOUNT, C. J., and RUDKIN, FULLERTON, HADLEY, CROW, and ROOT, JJ., concur.

CHICAGO, B. & Q. RY. CO. v. TODD.

(Supreme Court of Nebraska, Oct. 19, 1905.)

[105 N. W. Rep. 83.]

Evidence—Market Reports.—Market reports in journals, such as the commercial world rely upon, are competent evidence of the state of the market.

Railroads—Refusal to Transport Freight—Damages.*—Where a railroad company negligently refuses to receive and transport freight intended for immediate sale upon the market, such as live stock, it is liable for the expense of keeping the stock, caused by such delay, and for the difference between the price of the stock when it should have arrived at the market and the price when it did actually arrive.

Same—Evidence.—The class and condition of live stock are material matters in determining their market price, and, in the absence of evidence as to these matters and of what the market price of live stock of the class in question was, damages cannot be awarded from a claimed decline in the market price of stock of the general description of that which the carrier negligently refused to accept and transport.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 2. Error to District Court, Dawson County; Hostetler, Judge.

Action by Alva Todd against the Chicago, Burlington & Quincy Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

H. M. Sinclair, J. W. Deweese, and F. E. Bishop, for plaintiff in error.

Warrington & Stewart, for defendant.

DUFFIE, C. February 25, 1903, Alva Todd, the defendant in error (hereafter called the plaintiff) applied to the agent of the railway company for two cars in which to transport sheep and hogs from Farnam, Neb., to South Omaha, the cars to be furnished and stock to be shipped on February 28, 1903. The railway company placed the cars on the side track at Farnam on February 27th, but on account of a storm the plaintiff did not drive his stock to the station until Saturday afternoon, the 28th, and too late to be shipped that day; there being but one freight train, which usually left the station for the East about 7:15 a. m. At the time of ordering the cars, the agent informed the plaintiff that his sheep could not be shipped until they were inspected by a government inspector, on account of an order in force prohibiting the railway company from transporting sheep without a certificate from the inspector that they were free from disease. The agent, at Todd's request, wired to Grand Island

*See foot-notes appended to *Crutcher v. Choctaw, O. & G. R. Co.* (Ark.), 16 R. R. R. 661, 39 Am. & Eng. R. Cas., N. S., 661; foot-note appended to *American Express Co. v. Jennings* (Miss.), 16 R. R. R. 546, 39 Am. & Eng. R. Cas., N. S., 546; foot-notes appended to *Choctaw, O. & G. Ry. Co. v. Rolfe* (Ark.), 16 R. R. R. 525, 39 Am. & Eng. R. Cas., N. S., 525.

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for an inspector, but failed to secure one. The order requiring inspection was issued February 9, 1903, but on the 26th of February, 1903, the following modification of the order was made, of which the agent had no notice: "On account of requests of representatives of the South Omaha Packing industry, and with the consent of Gov. Mickey, I wish to modify the quarantine notice on sheep, viz., permitting all fat sheep to be marketed up to July 1, 1903, without certificates of inspection. After July 1st, you will please comply with the notice issued to you from this office February 9, 1903. Respectfully, W. A. Thomas."

It does not clearly appear from the record whether the plaintiff requested the agent to ship his sheep on Sunday. Monday there was no train, and on Monday evening plaintiff noticed in a newspaper that the quarantine order had been modified, and called this to the attention of the agent of the railway company. Thereupon the agent telegraphed to the general freight agent of the company, and about 11 o'clock Tuesday morning received a dispatch directing him to receive the sheep without inspection. The sheep were loaded Wednesday morning about 9 o'clock, the train being late, and arrived in South Omaha at 9:30 o'clock Thursday morning, March 5th, and were delivered by the railway company to the Union Stockyards Company at 10:45 that same morning, and by that company were sent to the chutes for unloading at 11:10 a. m. The time of the arrival of the stock at South Omaha appears from a stipulation of the parties filed in the case. It further appears from the evidence of W. A. Thomas, State Veterinarian, that the quarantine order issued by the state authorities on February 9th was modified, as appears from the order above quoted, on the afternoon of February 26th; that notice of such modification was mailed to the railway authorities of the state on the evening of that day, but too late to be carried in the mails before the morning of February 27th. The plaintiff in his petition alleges that the company refused to receive his stock until March 4th, to his damage in care and expense for feeding same, and loss from decline in the market price, and also that there was delay in moving the train, and that his stock was confined in defendant's care without feed and water for an unusual length of time, and as a consequence thereof the said sheep shrank in weight and became rough and gaunt, and their market value on that account was depreciated in the sum of \$58.20.

The court properly instructed the jury that the railway company was bound to observe and enforce a rule or regulation issued by the proper state authorities, requiring an inspection of sheep before receiving the same for shipment, until such time as it had received proper notice and authority from the government officials, acting under such inspection law, of its suspension, and until it had reasonable time to notify its agents, that such rule or regulation was no longer in force, and, further, that the jury must be satisfied from the evidence that the defendant did not transport the stock in question within a reasonable time, and, because

of such fact, the plaintiff had sustained damages. There is an entire absence in the instructions of advice to the jury of what they should consider in determining whether the company failed to receive and ship the stock within a reasonable time after the order of February 26th was issued; but, as there was no request for a charge by the company on this question, it amounts to a failure to instruct upon that particular question, and not a misdirection, and consequently not reversible error. The verdict was for \$140 in favor of the plaintiff, and as the expense claimed by the plaintiff for keeping his stock at Farnam from February 28th until March 4th was but \$22.60, it is evident that this verdict includes an amount, either for the alleged damage to the stock on account of being confined in the cars for an unusual length of time, or on account of a decline in the market price of such stock between March 2d and March 6th, when they were sold. This requires us to determine whether, under the evidence, the railway company was negligent in not receiving and shipping the stock at an earlier date than it did. The order of the state authorities allowing railway companies to receive and ship fat sheep without an inspection was mailed at Lincoln, Neb., on the evening of February 26th, and the presumption obtains that it would reach the general offices of the company at Omaha by due course of mail, which would be on the 27th. There is no evidence showing that the railway company is the owner of any telegraph line, and all that could be expected of it in the use of reasonable diligence would be to notify their agents of this order by due course of mail; and this, we think, in the absence of evidence to the contrary, could have been done as early as March 1st or 2d, which would have allowed shipment to be made no later than March 3d. There was an unexplained delay in the shipment of from one to two days, and the expense of keeping the stock at Farnam for that time was a proper element of damages.

The plaintiff introduced in evidence copies of the *Daily Drivers*, *Journal-Stockman* of March 2, 5, and 6, 1903, showing the state of the market and the sales of sheep at the stockyards in South Omaha on these dates. Objection was made to this evidence upon the ground that it was incompetent, irrelevant, and immaterial. We do not think the objection well taken. In *Sisson v. Cleveland & Toledo Ry. Co.*, 14 Mich. 489, 90 Am. Dec. 252, it is said: "Market reports in newspapers, such as the commercial world rely upon, are competent as evidence of state of markets. Such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries and individual sales or inquiries."

So, too, do we think that the plaintiff is entitled to recover on account of the depreciation in the market price of his stock between the date when it should have been delivered and the date of its delivery. In *Peet v. C. & N. W. Ry. Co.*, 20 Wis. 594, 91 Am. Dec. 446, it is said: "The rule of damages as given to the

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jury by the circuit court was that the plaintiff was entitled to recover the difference between the price of the flour when it should have arrived in New York and the price when it did actually arrive, if it was sold by the latter at the depreciated price. * * * We think on principle, as well as authority, the rule of the circuit court as to the matter of damages was right." While this is the proper rule of damages, we are yet of the opinion that there is no proper evidence in the record before us to show that the defendant sustained any damage on account of a depreciation in the market price of his sheep. It is true that the *Daily Drivers' Journal-Stockman*, introduced in evidence, shows that sheep were sold on March 5th at a higher price than that received by the plaintiff, but whether they were the same character of sheep as those reported sold nowhere appears; and it is evident that the character and class of the sheep offered on the market is a material factor in determining the price at which they will sell. Neither do we think that the plaintiff was entitled to any damage on account of his sheep being confined in the company's cars for an unusual length of time. All the evidence is to the effect that the schedule time of the train upon which the sheep were transported is about 24 hours, and the train carrying the sheep left Farnam at 10:45 a. m., and arrived in South Omaha at 9:30 the next morning, making the run in less than schedule time. There was some delay in the train arriving at Farnam, on account of what the agent calls having to "double in"—that is, the engine had to haul in part of the train and then go back for the remainder; but the plaintiff's stock was confined in the car for less time than if the train had arrived promptly and ran through on schedule time.

For the reason that the record is barren of evidence to support the amount of damages allowed, we recommend a reversal of the judgment, and that the case be remanded.

ALBERT and JACKSON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is reversed, and the case remanded.

SOUTHERN RY. CO. IN KENTUCKY v. GODDARD.

(Court of Appeals of Kentucky, Nov. 29, 1905.)

[89 S. W. Rep. 675.]

Railroads—Injuries to Persons About Cars—Rights of Shipper.—Where a contract for the shipment of horses made it the duty of the shipper to load the horses on the car, and a chute was erected for that purpose, the act of the shipper in going upon the railroad's track and around the car at other places than where the chute was erected, in seeing to the loading of the horses and their harness, did not render him a trespasser, nor constitute negligence per se.

Same—Contributory Negligence.—A shipper, engaged in loading horses on a car, is bound, in going about the premises of the railroad,

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to use ordinary care for his own safety, but need not anticipate danger.

Same—Negligence of Railroad.*—Where a railroad maintains a ditch on its premises, about or near which a shipper, who has no knowledge of its presence, might have occasion to go in loading his stock at night, and negligently fails to guard the ditch with a barrier or provide signal lights to prevent persons from falling therein, it is liable for damages to a shipper who is injured thereby.

Same.*—A railroad, which maintains a ditch on its premises at a place where a shipper is entitled to go, which ditch is dangerous when concealed by the darkness, because not guarded with a railing, should notify the shipper of the danger.

Trial—Direction of Verdict—When Proper.—A peremptory instruction for defendant is only proper when, after admitting every fact proven by plaintiff's evidence to be true, as well as all reasonable inferences that can be drawn therefrom, plaintiff has failed to establish his case.

Railroads—Loading of Live Stock—Injury to Shipper—Contributory Negligence.—Whether a shipper, who was injured by falling in an unguarded ditch on the railroad's premises while going about the premises in loading horses on a car in the nighttime, was guilty of contributory negligence, held, under the evidence, a question for the jury.

Same—Negligence of Railroad.—Whether the ditch made the railroad's premises dangerous, and whether the railroad was guilty of negligence in failing to guard it with a railing or other contrivance, held, under the evidence, a question for the jury.

Witnesses—Contradiction—Party's Own Witness.—Under Civ. Code Prac. § 596, providing that the party producing a witness may contradict him by other evidence, plaintiff may contradict testimony of his own witness, brought out by defendant's counsel on cross-examination and to plaintiff's surprise.

Damages—Exemplary Damages—Question for Court.—Whether there is any evidence in a given case to justify the assessment by the jury of exemplary damages is a question for the determination of the court.

Same—Right to Exemplary Damages.—A shipper, who was injured while engaged in loading horses upon a car by falling into an unguarded ditch on the railroad's premises, was entitled to recover only actual damages, and could not recover exemplary damages.

Same—Personal Injuries—Measure of Damages.—Compensatory damages for personal injuries is such sum as will reasonably and fairly compensate the injured person for his mental and physical suffering, the necessary and reasonable expense of medical bills incurred by him, and the permanent impairment of his ability to earn money, so far as they are directly caused by the negligent acts complained of.

Appeal from Circuit Court, Mercer County.

"To be officially reported."

Action by R. E. Goddard against the Southern Railway Com-

*For the authorities in this series relating to the care due persons, other than passengers, at stations on business, see foot-note appended to *Texas Cent. R. Co. v. Harbison* (Tex.), 16 R. R. R. 770, 39 Am. & Eng. R. Cas., N. S., 770; foot-notes appended to *Bachant v. Boston & M. R. R.* (Mass.), 16 R. R. R. 677, 39 Am. & Eng. R. Cas., N. S., 677; *Quantz v. Southern Ry. Co.* (N. Car.), 15 R. R. R. 259, 38 Am. & Eng. R. Cas., N. S., 259; *Fremont, etc., R. Co. v. Hagblad* (Neb.), 15 R. R. R. 226, 38 Am. & Eng. R. Cas., N. S., 226; *Anderson v. Seattle-Tacoma Interurban Ry. Co.* (Wash.), 14 R. R. R. 380, 37 Am. & Eng. R. Cas., N. S., 380.

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pany in Kentucky. From a judgment for plaintiff, defendant appeals. Reversed.

Humphrey, Hines & Humphrey and E. H. Gaither, for appellant.

J. F. Vanarsdall and J. T. Wilson, for appellee.

SETTLE, J. Appellee, R. E. Goddard, a trader in saddle and harness horses, together with two other stockmen, James and McGarvey, desiring to ship by rail, for exhibition at the State Fair in the city of Owensboro, a number of high-grade horses, procured of appellant, Southern Railway Company in Kentucky, a palace stock car for that purpose. The car was left by appellant on a side track in its depot yard at Harrodsburg and at its stock pen and chute provided for loading stock on its cars. Under the stock chute and on appellant's right of way is a ditch, about 8 feet in width and 5 in depth, which extends east of the chute 100 feet. On the south side of the ditch, and about 3½ feet from the track on which the stock car was standing, is a perpendicular stone wall, from 5 to 6 feet in height, erected by appellant to protect the roadbed bordering on the ditch from landslides; the top of this stone wall being on a level with the roadbed. In addition to the horses to be shipped by appellee, James, and McGarvey to Owensboro, they had harness, sulkies, and other "paraphernalia" to be carried on the same car. After loading the horses appellee discovered that there was not room in the car for one of his sulkies. For the purpose of ascertaining whether there was room for it on the platform at the end of the car, he went from the stock chute to inspect the platform of the car. This he did by climbing over the railing of the chute and going down a short flight of steps, attached to the side of the chute and connecting with the roadbed below, on the south side of the ditch, by the side of the car containing the horses. Upon reaching the ground appellee walked to the platform of the car, and, finding no room there for the sulky, went on around the car to see if its south door was securely fastened, and in attempting to return by the same route to the steps at the stock chute fell into the ditch, thereby receiving a deep cut in the head and fracture of the bones of one shoulder; the fracture causing the use of the shoulder and arm to become permanently impaired. Appellee's injuries were received September 17, 1903, at night; it being quite dark and raining at the time. For the injuries thus sustained he sued appellant in the lower court, and recovered a verdict and judgment for \$5,200 in damages. It appears from the allegations of the petition that appellee's claim to damages rests upon the theory that he had not before the accident been upon appellee's premises; that the existence of the ditch and the danger from walking near it in the dark were unknown to him, and could not by reasonable diligence have been discovered by him before he fell into same; and that his injuries were caused by the negligence of appellant in failing to provide the south wall of the ditch with a railing or other contrivance to prevent ship-

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pers of stock and others having business on its premises from falling therein. The answer of appellant contained a traverse, and averred contributory negligence on the part of appellee, and the latter plea was controverted by reply.

The appellant did not introduce any evidence, and its counsel insists that that of appellee entitled it to the peremptory instruction asked of the trial court; that is, it is argued that the evidence failed to show any negligence on the part of appellant, but did show that appellee's injuries resulted from his own negligence. This contention is based upon the idea that the ditch had existed for more than 20 years in the condition it presented when appellee was injured, that no other person had fallen in or been injured by it, that there was no necessity for appellee's leaving the stock chute and going near the ditch at the time he was injured, and that he was negligent in doing so and especially in attempting to walk around the car and return to the stock chute without a light. It is also argued for appellant that appellee, in going upon appellant's premises where the car was standing, became a trespasser; but we cannot accept this conclusion. Under the contractual relations existing between appellant and appellee the latter had the right to go upon the former's premises to load his horses in the car furnished him for that purpose. Indeed, it may be said he was invited to do so as a customer of appellant. It cannot, however, be assumed that, because the chute had been erected for the purpose of loading stock on the cars, it was negligence per se for appellee to approach the car for any other purpose than the loading of the horses by leading them through the chute into it.

It is conceded that it was the duty of appellee and his fellow shippers to load their own stock on the car, and that they did so without assistance from any of appellant's servants. But the loading was not complete until the vehicles and trappings of the shippers were also placed in or about the car, the horses haltered in their proper places, the doors of the car securely fastened, and its other openings closed to protect the horses from drafts, or so adjusted as to give them necessary ventilation. All these duties had to be attended to by the shipper before the car started for its destination, and, if any of them could not be performed by appellee without approaching the car on the ground from the outside, he had the right to perform them in that way; and, in the absence of knowledge on his part of the condition of the premises, he also had the right to assume that they were reasonably safe for such use. But in such performance of his duties it was incumbent on him to use ordinary care for his own safety. He was not required to anticipate danger, but only to exercise the care that a person of ordinarily prudent habits would have exercised under the same circumstances. Upon the other hand, a common carrier like the appellant is required to furnish shippers of stock over its road reasonably safe premises for loading same on the cars; and as stock is loaded for shipment at night as well as by day, if a ditch is maintained on the premises by the carrier,

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about or near which a shipper, without knowledge of its presence, would have occasion to go in loading his stock on the cars at night, and by reason of the darkness he falls therein and is injured, the carrier should, we think, be held liable to him in damages, if guilty of negligence in failing to guard the ditch with a barrier or provide signal lights to prevent persons from falling therein.

As before stated, appellee was not upon appellant's premises as a trespasser or licensee, but by invitation as a customer of appellant. The relation between him and appellant was, therefore, one of mutual advantage and common interest. The distinction between invitation and license is stated in Wharton on Negligence (book 1, § 349) as follows: "The principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while license is inferred where the object is the mere pleasure or benefit of the person using it." As to the degree of care required of one who invites another to come upon his premises, Judge Cooley, in his work on Torts (604-607), says: "When one expressly or by invitation invites others to come upon his premises, whether for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." In *Bennett v. L. & N. R. Co.*, 102 U. S. 577, 26 L. Ed. 235, Mr. Justice Harlan reviewed the leading English and American authorities on the question here involved, with the conclusion that they are in thorough accord. From the authorities referred to this rule is announced: "The owner or occupant of land, who by invitation, express or implied, induces others to come upon his premises for any lawful purpose, is liable in damages to such persons, they using due care, for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him, and not to them, and was negligently suffered to exist without timely notice to the public, or to those who were likely to act upon such invitation." This court, in the case of *Shelby's Adm'r v. C., N. O. & T. P. R. R. Co.*, 85 Ky. 224, 3 S. W. 157, seems to have fully concurred in the doctrine announced by the authorities supra.

In the case at bar appellee had no assistance from appellant's servants, none of them were about for him to command, and he and his fellow shippers had everything to do in loading the stock and preparing the car for its journey. Obviously, appellant should have furnished appellee with reasonably safe premises for this purpose; and if the ditch thereon was dangerous, because concealed by the darkness and not guarded with a railing for the protection of persons entitled, as was appellee, to go upon the premises in the nighttime, it should have notified him of the danger, that he might have avoided it. It was averred in the petition, and proved by appellee without contradiction, that he had never been at appellant's stock pen or on the adjacent premises before, and that he had never seen and did not know of the

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existence of the ditch. It also conclusively appears from the evidence that appellee received no notice or warning from appellant of the existence of the ditch, though two of its servants set the car at the chute that night for the use of appellee and his fellow shippers, and left, knowing that the stock, vehicles, etc., would immediately be loaded.

It is contended by counsel for appellant that appellee's negligence was established by the fact that he went upon the ground and around the car without a light, though he had a lantern in the car, which he might have carried with him, and, furthermore, that in leaving the chute to go to the car he was warned by a fellow shipper, McGarvey, of the danger of doing so. We have already said that in going upon the ground and about the car it was the duty of appellee to use ordinary care for his own safety, and if he failed to do so, and by reason thereof received the injuries complained of, he cannot recover, although appellant may have been negligent in failing to provide the ditch with a railing or in failing to warn him of its presence. It is true that there was some testimony that tended to prove appellee guilty of contributory negligence, such as his failing to provide himself with a light and the statement of McGarvey that he warned him of the danger. McGarvey called to appellee from the car. His statement was: "I hallooed to him to be careful; that there was a dangerous place down there." He did not, however, claim to have told appellee of the ditch, or what the danger was. Appellee testified that the lantern could not be taken from the car, because it was needed to enable James, McGarvey, and appellee's servant, Jenkins, to secure the horses in their places, and store the vehicles and trappings that had to be shipped in the car, and he flatly denied that he received any warning of danger from McGarvey. James, who stood between McGarvey and the appellee at the time the former said he gave the warning, testified that he (James) did not hear the warning. The facts relied on by appellant as showing negligence on the part of appellee were not so conclusive as to justify a peremptory instruction. "A peremptory instruction is only proper when, after admitting every fact proven by plaintiff's evidence to be true, as well as all reasonable inferences that can be drawn therefrom, the plaintiff has failed to establish his case." *Miller v. Metropolitan Life Ins. Co.*, 89 S. W. 183, 28 Ky. Law Rep. 223.

As to his conduct on the occasion in controversy appellee further testified, in substance, that in going from the chute to the roadbed and along the way between the track and the ditch, as well as in returning, he exercised the greatest care possible, both because of his ignorance of the premises and the darkness of the night. When he thought he had gotten back to the steps, he felt for them with his foot. Failing to find them, he took another step, and fell in the ditch. We think the question of whether he was guilty of negligence and whether it contributed to his injuries to such an extent that, but for such negligence, they would not have been received, was properly left to the de-

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cision of the jury by the court, as also were the questions of whether the existence of the ditch made the appellant's premises dangerous at night, and whether appellant was guilty of negligence in failing to guard it with a railing or other contrivance, to prevent injury to appellee and others entitled to go upon the premises.

We do not think it was error for the court to permit the testimony given in rebuttal by appellee and James. They were re-introduced to contradict McGarvey, a witness for appellee, who on cross-examination, and apparently to appellee's surprise, had testified that he gave appellee warning of the danger of going to the car at the time of the accident. As his statement in respect of the warning was brought out by appellant's counsel, McGarvey as to that matter was its witness. A party, by introducing a witness who gives evidence against him, is not concluded by such evidence. He may call other witnesses to prove that the facts are otherwise than as stated. Civ. Code Proc. § 596.

We are, however, of opinion that the lower court erred in instructing the jury that they might allow appellee punitive damages. The evidence found in the record fails to show on the part of appellant, or in the conduct of its servants, any of the elements of wrongdoing that would justify the infliction of punishment in the shape of exemplary damages. It is well settled that the question of whether there is any evidence in a given case to justify the assessment by the jury of exemplary damages is for the determination of the court. *Lexington Ry. Co. v. Fain*, 80 S. W. 463, 25 Ky. Law Rep. 2243; *McHenry Coal Co v. Snedden*, 98 Ky. 686, 34 S. W. 228; *Sedgwick on Damages*, § 387. Under the facts of this case, the recovery, if any, should have been confined by the court to compensatory damages; that is, such a sum in damages as, according to the evidence, will fairly and reasonably compensate appellee for the mental and physical suffering, if any of either, the necessary and reasonable expense in the way of medical bills he incurred, if any, and for the permanent impairment, if any, of his liability to earn money, that may have been caused by and directly resulted from the negligence of appellant complained of, the damages altogether not to exceed the amount claimed in the petition. Instruction No. 1, except in the matter of its allowing the finding of punitive damages, is, we think, substantially correct. It should, however, confine the jury to compensatory damages, defined as above indicated. Instruction No. 2, as to contributory negligence, is unobjectionable. The court should also give an instruction defining negligence and ordinary care.

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial and for further proceedings consistent with the opinion.

ROBERTSON *v.* BOSTON & N. ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Middlesex, Jan. 3, 1906.)

[76 N. E. Rep. 513.]

Trial—Requests to Charge—Time—Rules.—Superior court rule 48, requiring requests to charge to be submitted before argument, does not prevent the presiding justice from receiving and passing on requests subsequently presented, if he so elects, and allowing an exception to the party aggrieved by the giving or refusal thereof.

Same—Leave to Present.—Where the trial judge received and refused certain requests to charge, presented after argument, his act in so doing was in effect the giving of special leave to present such instructions at the time they were presented.

Same—Construction of Rule.—Superior court rule 48, requiring instructions requested to be presented before argument, does not mean that leave must be obtained to present requests later, but that requests presented later cannot be entertained without leave of court.

Carriers—Injuries to Passengers—Beginning of Relation.*—Where plaintiff boarded a street car, and on the conductor's announcing that the car only went to the stables plaintiff attempted to leave the same, and was injured by the sudden starting of the car as he attempted to do so, plaintiff not having been accepted as a passenger at the time of the accident, the carrier was only bound to exercise ordinary care.

Exceptions from Superior Court, Middlesex County; Chas. A. Bell, Judge.

Action by one Robertson against the Boston & Northern Street Railway Company. From a judgment in favor of defendant, plaintiff brings exceptions. Overruled.

Julian C. Woodman and Chas. Toye, for plaintiff.

Endicott P. Saltonstall and Sanford H. E. Freund, for defendant.

MORTON, J. The plaintiff, with some companions, boarded in Revere, at half past 11 in the evening of April 20, 1902, a car belonging to the defendant, thinking that it was the proper car to take him to his home. The car had stopped at a stopping place upon a signal from another person, meaning, as we construe the exceptions, some other person who wished to alight. After the plaintiff had boarded the car and taken a seat the conductor called out, "this car goes to the stables only," in consequence of which, after several of plaintiff's companions had left the car, he attempted to get out, and as he was doing so the car suddenly started and threw him, causing the injuries complained of. The stables, if that is material, were in the direction in which the plaintiff was going. The plaintiff alleged in his declaration

*See foot-notes appended to *Atchison, etc., Ry. Co. v. Holloway* (Kan.), 17 R. R. R. 648, 40 Am. & Eng. R. Cas., N. S., 648; *Sprigg's Adm'r v. Rutland R. Co.* (Vt.), 17 R. R. R. 628, 40 Am. & Eng. R. Cas., N. S., 628; *McCarter v. Greenville Traction Co.* (S. Car.), 17 R. R. R. 5, 40 Am. & Eng. R. Cas., N. S., 5; *Kroeger v. Seattle Elec. Co.* (Wash.), 16 R. R. R. 689, 39 Am. & Eng. R. Cas., N. S., 689; *St. Louis, etc., Ry. Co. v. Reed* (Ark.), 16 R. R. R. 541, 39 Am. & Eng. R. Cas., N. S., 541.

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that he "boarded one of said company's cars in said town with the intent of becoming a passenger; that while he was in the act of alighting, * * * and in the exercise of due care, he was thrown to the street in consequence of the sudden starting of the car," etc. The court instructed the jury "that the defendant owed to the plaintiff the duty of ordinary care only, and that he had not the rights of a passenger, as he had not claimed in his declaration that he was a passenger." At the conclusion of the charge the counsel for the plaintiff handed to the court for the first time a written request that the jury be instructed that if they found that the plaintiff boarded the car, intending to become a passenger, then the defendant was bound to exercise the same degree of care towards him as towards a passenger. The court declined to instruct the jury as thus requested, and saved the plaintiff's exception thereto, understanding that the whole question as to the degree of care was raised by and saved to the plaintiff. Thereupon the defendant excepted to the giving by the presiding judge of an exception to the plaintiff after the arguments and charge had been completed. There was a verdict for the defendant, and the case is here on the plaintiff's exceptions to the refusal of the court to instruct the jury as above requested.

The defendant objects that, under common-law rule 48 of the superior court, the exceptions are not properly here, because the request was not made before the closing arguments. But there is nothing in that rule to prevent the presiding justice from receiving and passing, if he so elects, upon requests for instructions presented for the first time after the closing arguments, and allowing an exception to the party aggrieved by the giving or refusing of them. Receiving and giving or refusing them, and allowing the aggrieved party an exception, is in effect giving the special leave to present them that is provided for in the rule. The rule does not mean that leave must be obtained to present requests later, but that requests presented later cannot be entertained without the leave of the court.

Upon the undisputed facts the plaintiff had not been accepted by the defendant as a passenger at the time of the accident, and had himself abandoned the intention of becoming one upon hearing the announcement by the conductor. The court, therefore, properly instructed the jury that the defendant was bound to exercise ordinary care only. See *Webster v. Fitchburg R. R.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; *Jones v. B. & M. R. R.*, 163 Mass. 245, 39 N. E. 1019.

Exceptions overruled.

GULF, C. & S. F. RY. CO. *v.* JACKSON & EDWARDS.

(Supreme Court of Texas, Nov. 24, 1905.)

[89 S. W. Rep. 968.]

Carriers—Carriage of Live Stock—Shipping Contracts—Authority of Agent.—An authorized agent of a railroad, who receives cattle for shipment without objection under a parol agreement made by an unauthorized agent, binds the company by his authority, notwithstanding the want of authority of the agent who made the contract.

Same—Scope of Agent's Authority.—A railroad, which places an agent in charge of its business at a station and empowers him to contract for the shipment of freight, holds him out to the public as having authority to contract with reference to all the necessary and ordinary details of the business, and within the range of such business he is a general agent.

Same—Connecting Carriers—Duty of Initial Carrier.*—In the absence of an agreement or course of business to the contrary, an initial carrier is bound only to safely carry and deliver to the next carrier.

Same—Authority of Agent.†—A local freight agent of a railroad ordinarily has no authority to bind the railroad to carry freight beyond its line, unless it is shown that the railroad has engaged in the business of carrying freight beyond its line.

Same.—A local freight agent of a railroad has no authority to bind the railroad by an agreement that cattle shall be shipped in a solid train without mixing any other freight with them, or that the train shall be drawn by a single engine.

Same—Damages—Evidence.—In an action against a carrier for

*See foot-notes appended to *Meredith v. Seaboard Air Line Ry.* (N. Car.), 17 R. R. R. 641, 40 Am. & Eng. R. Cas., N. S., 641; *Chicago, etc., Ry. Co. v. Woodward* (Ind.), 17 R. R. R. 7, 40 Am. & Eng. R. Cas., N. S., 7; *Southern Ry. Co. v. Levy* (Ala.), 17 R. R. R. 50, 40 Am. & Eng. R. Cas., N. S., 50; *St. Louis, etc., Ry. Co. v. Coolidge* (Ark.), 15 R. R. R. 713, 38 Am. & Eng. R. Cas., N. S., 713.

†For the authorities in this series on the subject of the implied authority of a carrier's freight or ticket agents, see *Bachant v. Boston & M. R. R.* (Mass.), 16 R. R. R. 677, 39 Am. & Eng. R. Cas., N. S., 677 (carrier bound by acts of its station agent in giving instructions to consignees as to place for unloading freight); *Adger v. Blue Ridge Ry.* (S. Car.), 16 R. R. R. 83, 39 Am. & Eng. R. Cas., N. S., 83 (carrier was liable for loss of baggage, where its agent declined to sell through ticket, but sold ticket over his line and connecting line and checked baggage to destination); *Georgia S. & F. Ry. Co. v. Marchman* (Ga.), 14 R. R. R. 263, 37 Am. & Eng. R. Cas., N. S., 263 (authority of agent to contract to receive freight deposited along the railway line at points other than stations to await the arrival of cars); *Baker & Penniston v. Chicago, etc., Ry. Co.* (Minn.), 11 R. R. R. 607, 34 Am. & Eng. R. Cas., N. S., 607 (authority of traveling freight agent to bind carrier of live stock); *Outland v. Seaboard A. L. Ry. Co.* (N. Car.), 10 R. R. R. 476, 33 Am. & Eng. R. Cas., N. S., 476 (authority of general freight agent to contract to furnish cars for freight); *Myar v. St. Louis S. W. Ry. Co.* (Ark.), 9 R. R. R. 814, 32 Am. & Eng. R. Cas., N. S., 814 (railroad station agent has no authority to contract with a shipper for transportation at a lower rate than that allowed to others); *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.* (C. C. A.), 7 R. R. R. 852, 30 Am. & Eng. R. Cas., N. S., 852 (authority of general freight agent to bind receivers by contracting to transport over connecting lines); *Fremont, etc., R. Co. v. New York, etc., R. Co.* (Neb.), 5 R. R. R. 470, 28 Am. & Eng. R. Cas., N. S., 470 (implied authority of agent to solicit traffic for foreign railroad company to bind his principal for safe delivery of goods beyond its

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breach of a contract for the shipment of cattle, where plaintiff testified that he formed his opinion of the market value of the cattle at destination from the estimate of value which commission men place upon cattle for the purpose of determining the amount to be loaned on them, defendant should have been permitted on cross-examination to ask him what he paid for the cattle when he purchased them and the cost of shipping them to destination.

Evidence—Hearsay.—Evidence as to the value of cattle in a certain vicinity, as ascertained by the witness from inquiry of cattle raisers in that vicinity, is hearsay.

Error from Court of Civil Appeals of Third Supreme Judicial District.

Action by Jackson & Edwards against the Gulf, Colorado & Santa Fe Railroad Company. There was a judgment of the Court of Civil Appeals, affirming a judgment for plaintiff (86 S. W. 47), and defendant brings error. Reversed.

J. W. Terry, Chas. K. Lee, and Matthews & Browning, for plaintiff in error.

Walter Acker, for defendants in error.

BROWN, J. Jackson & Edwards sued the railroad company to recover damages for breach of a contract in the shipment of cattle from Lampasas to Halls and Sepulpa, Ind. T. Upon trial the jury returned a verdict for \$4,000 damages. From the statement made by the Court of Civil Appeals we condense the following as the facts found by that court:

own line); *McLagan v. Chicago & N. W. Ry. Co. (Iowa)*, 1 R. R. R. 566, 24 Am. & Eng. R. Cas., N. S., 566 (initial carrier not bound by statements of its agent as to rates of connecting carrier); note, 20 Am. & Eng. R. Cas., N. S., 468 (authority of agents to receive merchandise as baggage); note, 20 Am. & Eng. R. Cas., N. S., 469 (authority of baggage master to waive rule requiring release of liability where sample trunks are checked as baggage); note, 20 Am. & Eng. R. Cas., N. S., 729 (authority of agent, employed to solicit passengers, to receive freight from connecting line); note, 20 Am. & Eng. R. Cas., N. S., 728 (authority of local agent to make contract to carry goods beyond carrier's line); note, 20 Am. & Eng. R. Cas., N. S., 728 (authority of station foreman of freight department to make contract to carry goods beyond carrier's line); note, 2 Am. & Eng. R. Cas., N. S., 585 (authority of station agent to contract to furnish cars); *Coffee v. Louisville & N. R. Co. (Miss.)*, 14 Am. & Eng. R. Cas., N. S., 423 (authority of baggage agent); *St. Louis S. W. R. Co. v. Berry (Ark.)*, 2 Am. & Eng. R. Cas., N. S., 457 (scope of authority of baggage master accepting as baggage money in excess of that prescribed by carrier's rule); *Coats v. Chicago, M. & St. P. R. Co. (S. Dak.)*, 3 Am. & Eng. R. Cas., N. S., 426 (authority of agents); *Sutton v. Chicago & N. W. Ry. Co. (S. Dak.)*, 20 Am. & Eng. R. Cas., N. S., 726 (authority of local agents to make contract for transportation beyond carrier's line); *Gulf, Colo., etc., R. Co. v. Hodges (Tex.)*, 2 Am. & Eng. R. Cas., N. S., 574 (authority of station agent to bind company by contract to furnish cars); *Page v. Chicago, St. Paul, etc., Ry. Co. (S. Dak.)*, 2 Am. & Eng. R. Cas., N. S., 622 (authority of station agent to bind initial carrier by through contract); *Hanlon v. Illinois Cent. R. Co. (Iowa)*, 16 Am. & Eng. R. Cas., N. S., 101 (authority of ticket agent); *Coyle v. Southern Ry. Co. (Ga.)*, 20 Am. & Eng. R. Cas., N. S., 529 (authority of ticket agent to waive limitations on ticket).

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On the 1st day of March, 1902, J. I. Conway was the live stock agent of the Gulf, Colorado & Santa Fe Railroad Company, and as such on that day entered into a parol agreement with Jackson & Edwards whereby it was agreed that the Gulf, Colorado & Santa Fe Railway Company should furnish, at Lampasas, Tex., at the request of the shippers, sufficient cars to ship about 3,000 head of cattle from Lampasas to Halls and Sepulpa, Ind. T. It was agreed that the cattle should be shipped in special solid stock trains, unmixed with other cars or freight, and that each train should be drawn by a single engine—not to be run as a double-header train—and should make the trip in 27 hours. Plaintiffs were the owners of about 2,053 head of the cattle; the remainder being the property of other persons. About the 11th day of April of that year the shippers directed that the railroad company should furnish them cars sufficient to ship about 2,300 head of cattle, and on the 15th day of April the railroad company sent to Lampasas two trains, of 35 cars each; each train being drawn by two engines. The cars were not bedded nor prepared for loading, which caused some delay at Lampasas. The shippers protested against the use of the double-header trains, insisting on the use of one engine for each train; but the railroad company persisted in using the double-header trains. The local agent at Lampasas knew the terms of the parol contract between Conway and the shippers, received the cattle, and loaded them on the cars, knowing that they were being shipped under that agreement. After the cattle were loaded the agent presented to the shippers 30 contracts for their signatures, each of which contained the stipulation that each carrier mentioned in the contract limited its liability to its own line; the contract being otherwise in the usual form of such contracts of shipment. Jackson & Edwards objected to signing the contracts, and insisted that they were shipping under the contract made with Conway; but the agent informed them that unless they signed the contracts the cattle would not be shipped, after which they signed the contracts and accepted them as part of the parol contract and for the purpose of securing the carriage on the freight trains of themselves and their men in charge of the cattle. On the way the railroad company attached other cars to each train, thereby causing delay and rough handling of the cattle. The second train was 42 hours in making the trip, and the cattle arrived at Halls in the night, and were turned loose in the open country, because there were no pens in which to place them, whereby they were injured to the amount of the verdict. Conway, as live stock agent of the railroad company, had authority to make contracts for the shipment of cattle over any part of its line, and had such authority as was usually vested in the local agent of the railroad company at a station.

The principal question of law that is involved in this case is whether, under the facts found by the Court of Civil Appeals, Conway, the soliciting agent of the plaintiff in error, or Curtis, the station agent at Lampasas, had authority to make the parol

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contract claimed by the defendants in error. If Conway made the parol contract by authority, it matters not whether Curtis had authority or not; and if Curtis had the authority to make the contract and Conway had not, the contract would be binding under the facts found, for, when Curtis, knowing of the contract and its terms, received the cattle for shipment under the parol agreement without objection, that contract became binding upon the company by reason of the authority of Curtis to make it. The Court of Civil Appeals found that Conway had all the authority that a station agent had, and, accepting that as a finding of fact, we can solve the legal question by ascertaining what authority Curtis had.

The same rule of law applies to agents of railroad companies as to agents of natural persons, which, applied to the facts of this case, is well expressed in the following extract: "Where a railroad company places an agent in charge of its business at a station, and empowers him to contract for the shipment of freight, it holds him out to the public as having the authority to contract with reference to all the necessary and ordinary details of the business, and within the range of such business he becomes a general agent." 5 Am. & Eng. Ency. Law, p. 351, § 13. Consistently with that general rule this court has held that the local agent of a railroad company, having the power to contract for the shipment of cattle, has also authority to agree with the shipper upon a time at which the cars necessary for that shipment shall be furnished. *McCarty v. Railroad Co.*, 79 Tex. 37, 15 S. W. 164; *Railway Co. v. Hume*, 87 Tex. 219, 27 S. W. 110. These cases rest upon the well-recognized rule of law that, by conferring upon an agent express power to do certain acts, the authority is implied to do whatever may be necessary to execute the express power. It is held in the cases referred to that the authority to contract for the shipment implied the power to make the agreement to furnish cars at a given time. It was necessary to enable the agent to properly perform his duties. But it has also been held that the local agent of a railroad company has no authority to contract for the furnishing of cars at a station other than his own, nor to make any contract which will bind the company with reference to freight to be received at a different station. *Railway Co. v. Dinwiddie*, 21 Tex. Civ. App. 344, 51 S. W. 353; *Railway Co. v. Belcher*, 88 Tex. 549, 32 S. W. 518. The cases last cited show that the authority of Curtis did not extend to the performance of any act for which he had not express authority, unless it was a thing necessary for him to do in the execution of the powers expressly given.

It is a general rule of law, supported by the weight of authority and by sound reasoning, that in the absence of an agreement or course of business to the contrary the initial carrier is bound only to safely carry and deliver to the next carrier. *Railway Co. v. Mfg. Co.*, 16 Wall. 324, 21 L. Ed. 297; *Railway Co. v. Pratt*, 22 Wall. 124, 22 L. Ed. 827. It logically follows that a local freight agent of a railroad company ordinarily has no au-

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thority to bind the corporation to carry freight beyond its line. 5 Am. & Eng. Ency. Law, p. 352, and cases cited in note 3. It therefore follows that the contract which is claimed to have been made to carry the freight beyond the line of the plaintiff in error was without authority, unless it shall be shown that the railroad company has engaged in carrying freight beyond its line, in which event the power might be implied from the course of business, since the local agent would be authorized to contract for the performance of those things usually done by the company. But no fact is found by the Court of Civil Appeals, nor is any evidence pointed out by counsel for defendants in error, which tends to show such a course of business. The stipulation in the contract for delivery at a certain time necessarily involved the performance of it beyond the line of the plaintiff in error, and was therefore unauthorized upon the facts which are before us, whether made by Conway or by the local agent. It is not necessary for us to determine in this case whether the local agent might not have contracted for the delivery of the freight upon the line of the plaintiff in error at a given time. The authorities are in conflict upon that question, and we do not find it necessary to express an opinion upon it.

The provision of the contract that the cattle were to be shipped in solid trains, without mixing other freight with them, and also that each train should be drawn by a single engine, must be held to be unauthorized, and not binding upon the railroad company, for the same reasons which deny to the local agent the authority to contract to furnish cars at another station. The character of the trains which were to be run in the transportation of those cattle and the number of engines to be used were matters under the charge and control of entirely different departments from that in which Conway or the local agent of the railroad company was engaged. It was not necessary, to enable either Conway or Curtis to execute the power of receiving and shipping the cattle, that those cars should be hauled in solid trains without other cars; nor was it necessary to the performance of this duty that the number of engines to be used should be restricted as was done by the contract. These subjects were as much beyond the authority of the local agent at Lampasas as it would have been to contract for the delivery of cars upon the said line of railroad at Temple, and, by the same reasoning upon which our decisions rest which limit the authority of the local agent to his own station, his authority must be limited to his department of service.

The conclusion that we have reached results in a reversal of the judgment and remanding the case for another trial. There are many assignments of error upon other questions embraced in the application of 186 printed pages, and we do not feel called upon to discuss those questions in detail; but there are some assignments of error that we think should be examined and discussed in view of another trial.

As the measure of their damages, plaintiffs claim the difference between what the cattle in their damaged condition would have

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sold for at Halls and the sum they would have brought if they had been transported with ordinary care and reasonable dispatch. Plaintiff Jackson, being on the stand in behalf of plaintiffs, testified to what the cattle would have been worth on the market at Halls, if delivered in good condition, and what they were worth in the condition in which they were delivered. He stated, in substance that he had not known of any cattle being sold at Halls or in that vicinity during the season, except some of the same herd that he sold subsequently, and that he formed his opinion of the market value of the cattle at Halls from the estimate of value which the commission men placed upon cattle for the purpose of determining the amount to be loaned on them. After he had thus testified, the defendant upon cross-examination asked in substance what he had paid for the cattle when he purchased them in Texas, and the cost of shipping them to Halls, to which the plaintiffs' counsel objected on the ground that the proposed evidence was immaterial. The court sustained the objection, and the defendant has presented assignments which challenge the correctness of that ruling. "In order to establish the market value at the place of delivery, it was necessary that the evidence should show that cattle of like quality had been bought and sold at that place during the season in sufficient quantity and often enough to show a market value." 2 *Suth. on Damages*, p. 1213; *Pacific Express Co. v. Lothrop* (Tex. Civ. App.) 49 S. W. 898. The testimony of Jackson not only failed to establish a market value for such cattle at Halls at the time they arrived there, but in fact showed that his estimate was not based upon any such value, but upon the opinions of men who were not engaged in buying, but in lending money upon, cattle. The rules of law for ascertaining damages are not inflexible, but the circumstances of each case must control. "What is required is that reliable and satisfactory evidence shall be produced from which the value of the property in controversy may be ascertained with a reasonable degree of certainty." 3 *Sedg. Dam.* p. 620. "The evidence excluded fills the requirements of that rule, and was peculiarly applicable in this case, and would have furnished a test of the correctness of Jackson's estimate of the value of the cattle. The court erred in excluding the evidence.

The defendant offered to prove by witness Gravitt that in May, 1902, something like a month after the shipment of these cattle from Lampasas, the witness was in the country near Lampasas from which the plaintiffs had purchased their cattle, and by inquiry of cattle raisers in that section of the country he learned what the value of cattle was in that vicinity in March and April, and that the price had not advanced from that time to the time when the witness was making the inquiry. The defendant then proposed to prove by the witness the value of cattle so ascertained, to which counsel for plaintiffs objected, because it was hearsay, and the court sustained the objection, in which we think there was no error.

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There are a number of assignments which we do not discuss, because, under the conclusion reached, there is little probability that the same questions will arise at a subsequent trial. For the errors specified in this opinion, the judgments of the district court and Court of Civil Appeals are reversed, and the cause is remanded.

MONTGOMERY ST. RY. CO. v. SMITH.

(Supreme Court of Alabama, Dec. 21, 1905.)

[39 So. Rep. 757.]

Pleading—Disjunctive Allegations.—In an action against a street railway for injuries received by plaintiff through falling into an excavation made by defendant in a public street, the first count of the complaint alleged that defendant excavated its track or dug a ditch in the street, etc., and that plaintiff fell into such excavation and was injured in consequence of defendant's negligence in leaving the excavation without barricades or without such other means as are usual to guard the public at night from falling into it, etc. The second count alleged the character of the injury received and the manner in which it was received, and averred that defendant's negligence consisted in leaving the excavation open without a light or other thing to give warning thereof. The third count alleged the duty of defendant as operator of a street railway to keep the part of the street occupied by its track in a reasonably safe state of repair for the safe passage of travelers over it, and alleged a negligent disregard of such duty by permitting an excavation to remain in the same unguarded, without lights or other things to give warning thereof. The fourth count alleged defendant's duty to keep that part of the street over which its track ran in safe repair for the passage of travelers and a disregard of the duty by excavating the same and negligently failing to put up signals or lights on the excavation. The fifth count set out that it was defendant's duty to keep the street occupied by its tracks in reasonable repair for the safe passage of travelers, and that a contractor, constructing or repairing said track for defendant, made an excavation and negligently left it open at night without proper lights or safeguards. The sixth count set forth a city ordinance requiring any street railway company operating its line within the city to keep in good repair all that part of the street occupied by its tracks, and averred the operation by defendant of a street railway company, etc., its duty to keep the street so occupied, etc., in reasonable repair, and that the tracks and the street were out of repair by reason of a hole negligently left open by defendant without proper guards, etc., and that plaintiff fell in and was injured. The seventh count set out an ordinance granting to defendant the right to operate and maintain an additional track on the street in which the injury occurred, and also another city ordinance requiring defendant to keep that part of the street whereon its track was laid in good repair, and alleged a breach of duty in respect thereto and negligence, etc. Held, that the several counts were not demurrable as charging disjunctively two causes of action.

Street Railroads—Defect in Streets—Negligence—City Ordinances

—Effect.—The fact that a street railway is by city ordinance required to keep that part of the street over which its track passes in good repair does not make it any the less liable for negligence in leaving an excavation made by it in such street without the usual safeguards.

Master and Servant—Independent Contractor—Action—Evidence.

—Where, in an action against a street railway for injuries received

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by plaintiff through falling into an excavation made by defendant in a street over which its track passed, defendant set up that the excavation was being made by an independent contractor for whose negligence it was not liable, and, further, that the work was done under the supervision and direction of the city engineer, plaintiff was properly permitted to prove by such city engineer that the permit to do the work was secured by one stated to be defendant's general manager.

Street Railroads—Repair—City Ordinance—Construction.—A city ordinance, requiring any street railway company operating a line within the corporate limits to keep in good repair all that part of the street occupied by its tracks, includes additional tracks to be laid, as well as those already laid and under operation.

Same—Taking Possession of Street—Duty to Public.—Irrespective of ordinance, when a street railway company takes possession of a portion of a public street for the purpose of building and operating a railway under its franchise, it necessarily assumes a duty to the public to keep that part of the street occupied by it free from pitfalls and in a safe condition.

Master and Servant—Independent Contractors—Negligence—Liability of Employer.*—A principal is liable for the acts of an independent contractor employed by him where the work to be done is intrinsically dangerous, however skillfully performed.

Same.*—Where an employer owes certain duties to third persons or the public, he cannot relieve himself from liability by committing the work to a contractor.

Street Railroads—Excavation in Street—Injuries—Action—Instructions.—In an action against a street railway for injuries sustained by plaintiff through falling into an excavation made by defendant in a street, an instruction that if plaintiff "on approaching the place where she sustained her injury, if there was anything, such as debris, lumber, timber, piles of dirt, etc., such as was reasonably calculated to give warning that the earth had been excavated at that point, it was then her duty to be on the lookout to detect and avoid any such excavation, and if she failed to do this, and thereby contributed to her injury, she cannot recover," was properly refused as confusing.

Trial—Instructions—Province of Court.—In an action against a street railway for injuries sustained by plaintiff through falling into an excavation made by defendant in the street, a charge that there was no evidence in the case that plaintiff suffered any permanent injury on account of the fall testified about was properly refused, as the court cannot be required to declare to the jury that there was no evidence of a particular fact.

Street Railroads—Obstruction in Street—Liability.—The fact that the city engineer is overlooking work done by a street railway in a public street in the course of repairing its tracks does not relieve the railway from the duty resting on it to keep such part of the street in a safe condition.

Trial—Instructions—Confused or Misleading Charge.—In an action against a street railway for injuries sustained by plaintiff through falling into an excavation made by defendant in a public street, a charge reading: "When I charge you that the plaintiff did or failed to do anything which contributed to her injury, I do not mean that what she might have done or failed to do was the sole cause of her injury. It would be sufficient if such conduct on her part merely contributed to her injury to prevent a recovery in her case"—was properly refused, as confusing and liable to the construction that the

*For the authorities in this series on the subject of the liability of railroad companies for the negligence of independent contractors, see foot-notes appended to *Arthur v. Texas & P. Ry. Co.* (C. C. A.), 17 R. R. R. 17, 40 Am. & Eng. R. Cas., N. S., 17; *Parrott v. Chicago G. W. Ry. Co.* (Iowa), 16 R. R. R. 253, 39 Am. & Eng. R. Cas., N. S., 253.

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court had charged that plaintiff had done or failed to do something which contributed to her injury.

Same—Abstract Charge.—Where, in an action against a street railway for injuries sustained by plaintiff through falling into an excavation made by defendant in a public street, the evidence was uncontradicted that plaintiff was crossing the street at a regular crossing when the accident occurred, a charge that "while a foot traveler on the sidewalks or on crosswalks provided for them, if they go off the sidewalks or crosswalks for foot travelers, it is their duty to use reasonable care to see that the way is clear," was properly refused as abstract.

Same.—In an action against a street railway for injuries sustained by plaintiff through falling at night into an unlighted excavation made in a public street by defendant, where there was no evidence tending to show that any light had been placed at the excavation or that any one had extinguished such light, a charge that if lights were placed at the excavation, and they were thereafter extinguished by some person unknown to defendant before the injury occurred, defendant was not liable, was properly refused as abstract.

Same—Misleading Charge.—In an action against a street railway for injuries sustained by plaintiff through falling into an excavation made by defendant in a street, a charge that plaintiff, while walking along the sidewalk on the street, had the right to assume that the sidewalk was safe, but when she stepped off the same and into the street it became her duty to use ordinary care to look and see that the street was clear and safe, was properly refused, as calculated to mislead the jury by giving the impression that greater care was required when off the sidewalk than when on it.

Municipal Corporations—Obstruction in Street—Duty of Traveler.—It is not the duty of a traveler in a public street to ascertain whether or not the way is clear, though it is his duty, after ascertaining that there is an obstruction, to exercise ordinary care to avoid injury.

Damages—Expenses Incurred—Husband and Wife—Credit—Presumptions.—In an action against a street railway for injuries to a married woman, where there was no evidence as to whether credit was given plaintiff or her husband for medical services, the presumption was that the credit was given to the husband.

Municipal Corporations—Obstruction in Street—Duty of Traveler.—A traveler on a public street, knowing of a dangerous excavation therein, or having reason to believe that the same exists, must, on approaching the place, look for and avoid it if possible.

Appeal from City Court of Montgomery; A. D. Sayre, Judge.
"To be officially reported."

Action by Mary J. Smith against the Montgomery Street Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

This was a suit for damages sustained by appellee on account of the alleged negligence of the appellant in leaving a hole or ditch open and unguarded on one of the public streets of Montgomery, into which appellee, while crossing the street, fell and sustained injuries complained of. The original complaint contained six counts. The first count alleges that appellant, through and by its servants and agents, excavated its track or dug a ditch or hole in the street at the intersection of Washington and Bainbridge streets in the city of Montgomery; that said streets were public highways in the city of Montgomery; and that, while walking along or across said public highway at a point

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where Washington crosses Bainbridge street, she fell into said excavation or ditch and was greatly bruised and injured; that her injuries were suffered in consequence of the negligence of defendant, or its servants or agents, in leaving said ditch or hole without barricades or without such other means as are usual and proper to guard the public at night from falling into said excavation while passing along said street. Demurrers were sustained to the second count, and it went out. The third count contained practically the same allegations as to the nature and cause of the injury as the first count. Demurrers were sustained to the fourth count, and it went out. Demurrers were sustained to the fifth count, and it went out. The sixth count made the same allegations as to the character of injury received and the manner in which it was received, and averred that the negligence of the defendant or its servant or agent consisted in leaving said ditch or excavation open without a light or other things to give warning thereof.

The complaint was afterwards amended by adding the seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth counts. The court gave the affirmative charge for the defendant as to the seventh, ninth, and twelfth counts. The eighth count alleged the duty on appellant, as the operator of the street railway over the streets of Montgomery and at the point mentioned, at the crossing of Washington and Bainbridge streets, to keep the part of the street occupied by its track in a reasonably safe state of repair for the safe passage of travelers over it, and alleged a negligent disregard of this duty by permitting an excavation or ditch to remain in the same unguarded, without lights or other things to give warning thereof. The tenth count alleges the duty of appellant to keep the part of the streets over which its said track ran in safe repair for the passage of travelers over it, and a disregard of that duty by excavating the same and leaving the excavation and negligently failing to put up signals or lights upon said excavation. Count 11 is practically the same as the tenth count. The thirteenth count alleges the duty on defendant to keep the street occupied by its tracks in reasonable repair for the safe passage of travelers over it, and that a contractor, who was constructing or repairing said track for defendant, made an excavation and negligently left it open at night, without proper lights or safeguards. The fourteenth count sets forth an ordinance of the city of Montgomery which requires any street railway company, operating any line of street railway within the corporate limits of the city of Montgomery or within the police jurisdiction thereof, to make said track conform to the grade of the streets where laid, and to keep in good repair all that part of the street occupied by said rails and tracks and for two feet on either side of said track; averring that the defendant operated a street railway and had a track extending from Bainbridge street to Washington street, in the city of Montgomery, and alleging the duty of appellant of keeping said streets so occupied by its tracks and the two feet on either side thereof in reasonable repair,

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and alleging that said tracks and the street two feet on either side thereof were out of repair by reason of a deep hole, ditch, or gully, which had been negligently left open by defendant without proper guards, lights, or covering, and that appellee fell in and was injured. Count 15 sets up an ordinance granting the right, privilege, power, and authority to appellant to operate and maintain an additional track on South Bainbridge street, in the city of Montgomery, and setting up the further fact that this right and power was subject to all the conditions, requirements, limitations, and regulations under which said street railway is now operating and subject to any ordinance of the city of Montgomery now in existence or which may hereafter be adopted regulating the operation of street railways in said city, and averring that at the time of the approval of said ordinance there was another ordinance of the city of Montgomery in full force and effect, setting out the ordinance set out in the fourteenth count and alleging the same breach of duty and negligence as alleged in count 14. There was demurrer to all of these counts, specifying many and various grounds of demurrer. The demurrers were sustained as to counts 2, 4, and 5 of the original complaint, and overruled as to the others.

It was shown that the witness Ford was city engineer. He was asked by the plaintiff "Who got the permit to do this work for the city?" He answered: "Mr. Semmes and Mr. Scott applied for a permit to fix the street. They did not state that the permit was for the Montgomery Street Railway. Mr. Semmes was its manager at that time. I do not know what position Mr. Scott occupied."

The court in its oral charge to the jury said: "Ordinarily an independent contractor, in the prosecution of the work secured by the contract between him and his employer, being guilty of negligence, the employer is not responsible for it. But there is a very important modification of that proposition, which in my judgment, as a matter of law, takes it entirely out of this case; that is to say, that, if the work to be done is one which in its nature is intrinsically or necessarily accompanied with danger, then the employer cannot put himself behind his independent contractor. In a case of that sort, the employer and the independent contractor are both equally responsible, and the person injured under these circumstances has a right to sue one or the other, just as he pleases, or to sue both of them if he pleases, and, upon establishing his case to the reasonable satisfaction of the jury, would be entitled to the verdict." Further charging the jury orally, the court said: "It was the duty of this defendant, and whether that duty arose out of some rule at common law, or whether out of some statutory enactment of the city council of Montgomery, it makes no difference, the duty was the same; and it was the duty of this defendant, if it was operating and using that railroad track there in a public highway, to keep so much of the highway as lay under and between its track in safe condition of repair." Further charging the jury, the court said: "I had

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something to say to you about this question of independent contractor, and I stated certain propositions, having in mind the idea that certain charges would be requested; but I find they have not been. I want to modify all that I have said to you in regard to that question in this way: I state to you now that if the work required to be done in the repair and rebuilding of this road was intrinsically or necessarily accompanied by danger to pedestrians, if left unguarded or unlighted or without signals at night, if you shall be satisfied from the evidence that that is the case, then this defendant cannot escape liability on the ground that its agent in the rebuilding or repairing of that railroad was an independent contractor. Now, whether or not this excavation required by this work was of that sort or not, under the conditions which I have named, is a question of fact which in the present state of this case I submit to you for your determination."

To defendant charges were refused as follows:

Charge 1: "The court charges the jury that if the plaintiff, on approaching the place where she sustained her injury, if there was anything, such as debris, lumber, timber, piles of dirt, etc., such as was reasonably calculated to give warning that the earth had been excavated at that point it was then her duty to be on the looked to detect and avoid any such excavation, and if she failed to do this, and thereby contributed to her injury she cannot recover."

Charge 2 was the general affirmative charge. Charge 3, affirmative charge as to fourteenth count. Charge 4, affirmative charge as to sixth count. Charge 5 was the affirmative charge as to the eighth count. Charge 7 was the affirmative charge as to the tenth count. Charge 8 was the affirmative charge as to the eleventh count. Charge 10, affirmative charge as to the thirteenth count. Charge 11 was the affirmative charge as to the fifteenth count. Charge 14, general affirmative charge. Charge 15, affirmative charge as to third count. Charge 17, affirmative charge as to the first count.

Charge 6: "There is no evidence in this case that plaintiff suffered any permanent injury on account of the fall testified about."

Charge 13: "The court charges the jury that, if they are reasonably satisfied from the evidence that the work of constructing the street railway track at the intersection of Bainbridge and Washington streets was done under the supervision and direction of the city engineer, then the defendant would not be liable for any injury suffered by the plaintiff on account of the injuries alleged in the complaint."

Charge 16: "When I charge you that the plaintiff did or failed to do anything which contributed to her injury, I do not mean that what she might have done or failed to do was the sole cause of her injury. It would be sufficient, if such conduct on her part merely contributed to her injury, to prevent a recovery in her case."

Charge 18: "The court charges the jury that while a foot traveler upon the sidewalks or upon crosswalks provided for

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them, if they go off the sidewalks or crosswalks for foot travelers, it is their duty to use reasonable care to see that the way is clear."

Charge 19: "The court charges the jury that if they are reasonably satisfied from the evidence that lights were placed at or near the place where the injury occurred, by Timberlake or any of his laborers, on the evening of May 17, 1903, before the injury occurred, and that they were put out thereafter by some person unknown to the defendant, and not connected with the defendant, before the injury occurred, then the defendant would not be liable."

Charge 20: "The court charges the jury that if they are reasonably satisfied from the evidence that the work of constructing the track at the intersection of Bainbridge and Washington streets was done by one Timberlake under an independent contract with the Montgomery Street Railway, and that under said contract the Montgomery Street Railway had no right or authority to direct the manner of the work, or to hire or discharge the laborer, or to do anything except to inspect and pay for the work when completed, then the jury should find the verdict for the defendant."

Charge 21: "The court charges the jury that the plaintiff, while walking along the sidewalk on Bainbridge street, had the right to assume that the sidewalk was safe; but when she stepped off the sidewalk into the street in Washington street, it became her duty to use ordinary care to look and see that the street was clear and safe."

Charge 22: "The court charges the jury that it is the duty of any person walking along the highway to use ordinary care to ascertain whether or not the way is clear."

Charge 23: "The court charges the jury that if they believe the evidence the plaintiff is not entitled to recover anything for doctor's bill or medical attendance."

Charge 24: "The court charges the jury that the work of constructing the track of defendant company at the place testified about was not in itself intrinsically dangerous."

Charge 25: "The court charges the jury that if there was sufficient light, from the street lights or otherwise, so that any dangerous or unsafe excavation in the street at the intersection of Washington and Bainbridge streets would have been revealed by said lights, and they shall believe from the evidence that Mrs. Smith knew the place in question or had reason to believe that it did exist, then it was her duty under the law to be on the lookout to watch to detect it and avoid it, and if she failed so to do and thereby contributed to her injury, she cannot recover."

There was judgment for plaintiff in the sum of \$858.

Steiner, Crum & Weil, for appellant.

Hill, Hill & Whiting, for appellee.

SIMPSON, J. This was a suit brought by the appellee against the appellant for damages claimed to have resulted from injuries

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received by her in falling into an excavation which had been made upon one of the streets of Montgomery in the work of changing the tracks of appellant. The demurrers to counts 1, 3, 6, 8, 10, 11, 13, 14, and 15 were properly overruled. Said counts do not charge disjunctively two causes of action. *Highland Avenue & Belt Ry. Co. v. Miller*, 120 Ala. 535, 24 South. 955. Nor were said counts liable to the further objection that the city ordinance could not create a civil right based on the negligence of one failing to obey it. The fact that the city required the defendant to keep the street in repair did not make it any the less liable for negligence in leaving an excavation without the usual safeguards.

The question to the witness Ford as to who got the permission to make the excavation, and the answer thereto, were properly admitted, as it was a proper circumstance to go to the jury, in order to determine whether the defendant was the party having the work done; and, while the answer may not prove the fact conclusively, it was proper evidence for the jury. Semmes being stated to be the general manager of the defendant company, and the witness stating that he did not know what position Scott occupied, the evidence as to Semmes was clearly admissible, and he could not answer the question without including Scott.

There was no error in admitting the city ordinance in evidence. *Elyton Land Co. v. Mingea*, 89 Ala. 522, 530, 7 South. 666. On the same authority we hold that there was no error in permitting the introduction of section 767 of the City Code. The ordinance was sufficiently proved. Code Ala. 1896, § 1822. It cannot be said that this ordinance related only to the tracks already laid and being operated, and not to additional tracks to be laid. Whenever the street car company took possession of that portion of the street for the purpose of laying a track, it was "occupied by it"; and, even if so strict a construction as the appellant contends for could be adopted, the evidence in this case shows that the cross-ties and tracks were laid at the point where complainant fell, and, irrespective of the ordinance, when a street railway company takes possession of a portion of the street for the purpose of building and operating a railway under a franchise, it necessarily assumes the duty to the public to keep that part of the street occupied by it free from pitfalls, in such condition as not to be dangerous to the traveling public. 27 Am. & Eng. Ency. Law (2d Ed.) p. 39; *Nellis, Street Railway Accident Law*, p. 490; *Nellis, Street Surface Railways*, p. 260; *Id.* p. 263, § 15.

The cases referred to in the latter part of the opinion in the case of *North Birmingham Railway Co. v. Calderwood*, 89 Ala. 256, 7 South. 360, 18 Am. St. Rep. 105, to the effect that a city ordinance will not be permitted to create a civil right in favor of third persons, based on the evidence of one failing to obey it, has no application to the present case. Those were cases based on a city ordinance requiring parties to remove snow from the sidewalk abutting their premises, and the reason given for nonlia-

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bility was that the defendant had no agency in placing the snow there and the requirements of the ordinance were merely to force the property owner to perform a duty which devolved on the city itself, and authorizing the city to do it at his expense if he failed. The distinction was drawn in those cases between such a case and one in which the defendant had created the nuisance himself. *Flynn v. Canton*, 17 Am. Rep. 603, 612, 613; *Heeney v. Sprague*, 23 Am. Rep. 502, 507; *Kirby v. Boylston*, 74 Am. Dec. 682. On the other hand, our own court has held that a failure to comply with the requirements of a city ordinance which is reasonable is per se negligence. *S. & N. Ala. Ry. Co. v. Donovan*, 84 Ala. 141, 147, 4 South. 142. This is not a liability on the contract made with the city, but a liability for a tort committed, under the license of the contract, which has resulted in injury to another. *Elyton Land Co. v. Mingea*, 89 Ala. 530, 7 South. 666.

That part of the oral charge marked "A," in connection with the modification of it subsequently made, was not erroneous, but for a reason a little different from that given by the court. According to the authorities there are two exceptions to the general rule as to the nonliability of the principal for the acts of an independent contractor; the first being, as stated by the court, where the work to be done is "intrinsically dangerous, however skillfully performed," and the second, where the "employer owes certain duties to third persons or the public," in which case "he cannot relieve himself from liability, to the extent of that duty, by committing the work to a contractor." *Woods' Master & Servant* (2d Ed.) p. 616, § 316; *Mayor & Aldermen of Birmingham v. McCary*, 84 Ala. 472, 4 South. 630. See, also, the able and exhaustive discussion of this principle by Parker, C. J., in *Deming v. Terminal Ry. of Buffalo*, 169 N. Y. 1, 61 N. E. 983, 88 Am. St. Rep. 521, in which the Chief Justice states that a railroad company, "having accepted the privileges and benefits conferred upon it, * * * necessarily took with them all the obligations and liabilities in respect to the highway which its absolute dominion over it for the purpose of carrying it across the railroad track made necessary, among which was the duty of so guarding the obstructions to the highway which were made under its direction as to save passers-by from injury." As before stated, in the case now before the court the defendant owed a duty to the public to keep the part of the street occupied by it in a safe condition, and it could not escape liability by committing the work to a contractor. This principle differentiates this case from that of *Chattahoochee & Gulf Ry. v. Behrman*, 136 Ala. 508, 35 South. 132, where the injury was to a private lot, and also from the case of *Massey v. Oates* (Ala.) 39 South. 142, where the owner was a private citizen owing no special duty to the public to keep the street in repair. In that case, also, *McClellan, C. J.*, in referring to the first exception, draws a distinction between a case like that, where the injury resulted, not from doing of the thing which the contractor had been employed to do, and a case like this, where injury resulted from the thing

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which the contractor had been employed to do, to wit, to dig the excavation in the street. *Massey v. Oates*, supra.

Charge 1, requested by the defendant, was properly refused. It was confusing. There was no error in refusing to give the general charge requested by the defendant. From what has been said as to the liability of the defendant to keep the place in question in safe condition, the affirmative charges, requested as to counts 1, 3, 6, 8, 10, 11, 13, 14, and 15, respectively, were properly refused. Under the principles declared the contractor was the agent of the defendant.

Charge 6, requested by the defendant, was properly refused. The court cannot be required to declare to the jury that there was no evidence of a particular fact. *Jefferson v. State*, 110 Ala. 89, 92, 20 South. 434.

Charge 13, requested by the defendant, was properly refused. The fact that the city engineer might have been looking after the work did not release the defendant from the duty resting upon it to keep that part of the street in safe condition.

Charge 16, requested by the defendant, was properly refused. It was calculated to confuse the jury. It was liable to the construction that the court had charged them that the plaintiff had done or had failed to do something which contributed to her injury.

Charge 18 was properly refused. It was abstract, because the evidence was not contradicted that the plaintiff was crossing the street at a regular crossing when the accident occurred.

Charge 19 was properly refused. There was no evidence tending to show that any light had been placed at the place that evening, or that any one had extinguished any of them. The man whom Timberlake said he had employed to put lights on the work generally was not produced. Timberlake himself could not say they were there, and if they had been there and extinguished the lanterns still would have been there. The charge was abstract.

Charge 20 was properly refused, as the principle referred to does not apply where the duty rests on the defendant to keep the place in a safe condition, as heretofore shown.

Charge 21 was properly refused for the reason given as to charge 18, and because it was calculated to mislead the jury by making the impression that greater care was required when off the sidewalk than when on it. "The doctrine of heedlessness and inattention, as generally understood, by neglect to use reasonable care, does not arise when a person has the legal right to presume that he may proceed with safety, and no facts or circumstances are brought to his notice calculated to excite attention or care. A person traveling on the sidewalk of a municipal corporation in daytime is not required to be on the lookout for obstructions, nor is he required to feel his way at night. He may assume that they are in proper condition for public travel." *Mayor & Aldermen of Birmingham v. Tayloe*, 105 Ala. 178, 16 South. 576.

Charge 22, requested by the defendant, was properly refused

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for the same reason. As shown by said authority, it is not the duty of a traveler to "ascertain whether or not the way is clear," though it is his duty, after ascertaining that there is an obstruction, to exercise ordinary care to avoid injury.

Charge 23 should have been given. The evidence does not show whether the credit was given to the husband or to the wife, and in the absence of proof the presumption is that the credit was given to the husband.

Charge 25, requested by the defendant, should have been given. If the plaintiff knew of the dangerous excavation in the street, or had reason to believe that it existed, it was her duty, on approaching the place, to look for it and to avoid it.

The judgment of the court is reversed, and the cause remanded.

HARALSON, TYSON, and ANDERSON, JJ., concur.

LOGAN v. OLD COLONY ST. RY. CO.**WHITE v. SAME.**

(Supreme Judicial Court of Massachusetts, Suffolk, Jan. 3, 1906.)

[76 N. E. Rep. 510.]

Street Railroads—Injuries in a Collision—Contributory Negligence.*—It is not negligence as a matter of law to drive a team so near a street car track that a car going in the same direction will collide with it.

Same—Negligence—Question for Jury.—In an action against a street railway company for injuries sustained in a collision with a street car, evidence examined, and held, that the question of the negligence of the motorman was for the jury.

Exceptions from Superior Court, Suffolk County; Wm. Schofield, Judge.

Consolidated actions by Charles J. Logan and by Fergus J. White against the Old Colony Street Railway Company. There was a verdict for plaintiff in each case, and defendant brings exceptions. Exceptions overruled.

Fredk. J. Daggett and Jas. E. Young, for plaintiffs.

Henry F. Hurlburt and Damon E. Hall, for defendant.

MORTON, J. These two actions were tried together. That by Logan is for personal injuries. That by White for injuries

*For the authorities in this series on the subject of the care required in driving other vehicles on streets in which street cars are operated, see foot-notes appended to *McCarthy v. Boston Elev. Ry. Co.* (Mass.), 17 R. R. R. 856, 40 Am. & Eng. R. Cas., N. S., 856; foot-notes appended to *Marden v. Portsmouth, etc., St. Ry.* (Me.), 17 R. R. R. 821, 40 Am. & Eng. R. Cas., N. S., 821; *Riley v. Shreveport Traction Co.* (La.), 16 R. R. R. 785, 39 Am. & Eng. R. Cas., N. S., 785; *Wood v. Boston Elev. Ry. Co.* (Mass.), 16 R. R. R. 475, 39 Am. & Eng. R. Cas., N. S., 475.

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to the horses, harnesses, and wagon. The accident occurred on Coddington street, in Quincy, at about half past 7 in the evening of October 3, 1902, and was caused by a rear-end collision between the team belonging to the plaintiff White, which Logan was driving, and a car of the defendant company. The usual questions of due care on the part of the plaintiff and of negligence on the part of the defendant are presented. There was a verdict for the plaintiff in each case, and the cases are here on exceptions by the defendant to the refusal of the court to rule as requested, and to such portions of the charge as were inconsistent therewith.

It would serve no useful purpose to attempt to review and analyze all of the testimony, and we content ourselves with a brief summary and with saying that we think that there was evidence for the jury on both questions. It was for the jury, taking all of the circumstances into account, the kind of night, whether cloudy and misty or not, the manner in which Logan was driving, his knowledge or want of knowledge of the road and of the running of the cars, the extent to which he had a right to rely upon the signals of the motorman, his own condition from the want of sleep, and such other matters as they deemed bore upon the issue, to say whether Logan was or was not in the exercise of due care. It could not be ruled as matter of law that he was not, or that it was negligence on his part for him to allow his team to be so near the track that a car going in the same direction would collide with it. *Vincent v. Norton & Taunton St. Ry.*, 180 Mass. 104, 61 N. E. 822.

There was evidence tending to show that the wagon was loaded with 12 piles, each from 25 to 30 feet long, and that the car struck the wagon with such force as to bend the axle and drive the wheel up against the body of the wagon and shove the wagon along about 12 feet, making gouges in the road; that the wagon was a heavy two-horse caravan, 15 or 16 feet long, and about 7 feet wide, and 12 feet to the highest point of the load; that the place of the accident was level and the road straight in the direction from which the car came for several hundred feet, and that no gong was rung after passing Newcomb street, which was several hundred feet away, till just as the collision occurred. There was, on the other hand, testimony tending to show that the car was going at a much less rate of speed than the force of its impact with the wagon would seem to indicate; that the night was dark so that objects could only be seen at a comparatively short distance; and that the motorman did all that he could to avoid a collision, as soon as he saw the wagon. Whatever the weight of the evidence may have been, it was for the jury to say, we think, taking all the circumstances into account, whether there was or was not negligence on the part of the motorman. We see no error in the manner in which the court dealt with the case.

Exceptions overruled.

GLENN'S ADM'R *v.* LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky, Feb. 14, 1906.)

[90 S. W. Rep. 975.]

Railroads—Trespasser on Track—Notice to Station Agent—Agent's Negligence.*—Where a station agent was notified that a trespasser, in a state of helpless intoxication, was on the track ahead of a train then standing at the station, the agent's failure to notify the operatives of the train rendered the company liable for the trespasser's death.

Appeal from Circuit Court, Gallatin County.
"Not to be officially reported."

Action by George Glenn's administrator against the Louisville & Nashville Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

E. E. Winn, J. L. Vest, and J. G. Tomlin, for appellant.
Benjamin D. Warfield and John S. Gaunt, for appellee.

O'REAR, J. The plaintiff, administrator of George Glenn, deceased, in a petition filed in the Gallatin circuit court against the Louisville & Nashville Railroad Company, charges that in February, 1904, on a day named, the deceased, while in a state of helpless intoxication, wandered upon the track of defendant's line of railway in Gallatin county a few minutes before a train was due to pass at Sparta Station, at which station the train stopped; that appellee's station agent at that station was notified of the fact that decedent was then on appellee's line of railway in a helpless, drunken condition, 75 yards ahead of the train, and that he received such notice before the train came to a stop at that station; that it stopped there for one minute before passing on, but that the agent failed to give notice to those in charge of the train that decedent was then on the railway; that, had he done so, the train could have been stopped without damage or loss to appellee or to its passengers, and the life of the decedent could have been saved; but that, having failed to give such notice, the engineer of the train, being in ignorance of the facts, ran the

*For the authorities in this series on the subject of the care due trespassers and licensees on railroad tracks, see foot-notes appended to *Barmore v. Vicksburg, etc., Ry. Co.* (Miss.), 17 R. R. R. 841, 40 Am. & Eng. R. Cas., N. S., 841; *Engelking v. Kansas City, etc., R. Co.* (Mo.), 17 R. R. R. 800, 40 Am. & Eng. R. Cas., N. S., 800; *Gilham v. Texas & P. Ry. Co.* (La.), 17 R. R. R. 786, 40 Am. & Eng. R. Cas., N. S., 786; *Ray v. Chesapeake & O. Ry. Co.* (W. Va.), 17 R. R. R. 779, 40 Am. & Eng. R. Cas., N. S., 779; *Seaboard & R. R. Co. v. Vaughan's Adm'r* (Va.), 17 R. R. R. 600, 40 Am. & Eng. R. Cas., N. S., 600; foot-notes appended to *Hamlin v. Columbia & P. S. R. Co.* (Wash.), 17 R. R. R. 1, 40 Am. & Eng. R. Cas., N. S., 1; *St. Louis S. W. Ry. Co. v. Purcell* (C. C. A.), 16 R. R. R. 779, 39 Am. & Eng. R. Cas., N. S., 779; *Ayers v. Wabash R. Co.* (Mo.), 16 R. R. R. 470, 39 Am. & Eng. R. Cas., N. S., 470; *Clemans v. Chicago, R. I. & P. Ry. Co.* (Iowa), 16 R. R. R. 413, 39 Am. & Eng. R. Cas., N. S., 413.

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train against and over the decedent and killed him. A demurrer was sustained to the petition, and it was dismissed.

The court is of the opinion that the petition stated a cause of action. Although George Glenn was admittedly a trespasser upon appellee's railway track and right of way at the time he was injured, yet, with knowledge of his peril and condition, appellee should not have injured him, if it could have avoided it. Notice to its station agent at Sparta was notice to appellee of the fact of decedent's perilous position. It was his duty to have notified the other employees of the company in charge of the train, if he had such notice. This the petition shows he could have done. Failing to do so, the company is liable as though the engineer in charge of the train had known the same fact in time to have avoided the injury. A corporation doing business of the nature of that done by appellee necessarily must act through numerous agents. Notice to any one of such agents in the line of his employment is notice to the principal, because the principal has chosen to do this business at that point by that agent. Such agent's knowledge, obtained while on duty and in the course of his employment, which it was proper and possible for the agent to have used to save human life or property in peril from the master's train, must be deemed knowledge of the master. Indeed, the knowledge of such an agent, situated as this one was, was a more practicable way of getting the information to the proper person than if it had been communicated that moment to the president of the company, for this agent was in a position where he could have communicated it to the engineer or conductor in charge of the train before it passed over the spot where the helpless person was, and it was as much his duty to communicate it as if it had been the company's property that was in peril, instead of the life of a stranger, at the hands of the company.

Wherefore the judgment is reversed, and the cause remanded, with directions to overrule the demurrer to the petition.

VICKSBURG, S. & P. RY. CO. v. BARMORE.

(Supreme Court of Mississippi, Feb. 5, 1906.)

[39 So. Rep. 1013.]

Railroads—Operation—Accident to Person on Track—Contributory Negligence—Willful Injury.*—Where plaintiff was injured by the gross negligence of an employee of defendant, who, knowing plaintiff's perilous situation on a railroad track, wantonly ran over him with a railroad tricycle, the contributory negligence of plaintiff is no defense.

*See foot-notes appended to *St. Louis, etc., Ry. Co. v. Evans* (Ark.), 16 R. R. R. 788, 39 Am. & Eng. R. Cas., N. S., 788; foot-note appended to *Rapp v. St. Louis Transit Co.* (Mo.), 16 R. R. R. 419, 39 Am. & Eng. R. Cas., N. S., 419; foot-notes appended to *Yeaton v. Boston & M. R. R.* (N. H.), 17 R. R. R. 160, 40 Am. & Eng. R. Cas., N. S., 160.

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Appeal from Circuit Court, Warren County; O. W. Catchings, Judge.

Suit by Thos. B. Barmore against the Vicksburg, Shreveport & Pacific Railway Company for damages for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

For a full statement of the facts, see 38 South. 210 et seq.

McWillie & Thompson, for appellant.

McLaurin, Armistead & Brien, for appellee.

TRULY, J. We adhere in every particular to the opinion of the court delivered in this case on the former appeal. 85 Miss. 426, 38 South. 210. It is sound both in principle and policy. So adhering, nothing remained for the trial court to determine upon practically the same testimony, except the fact of the injury and the amount of damage inflicted upon the appellee. The trial judge correctly interpreted the opinion of the court, and the instructions granted were in perfect harmony therewith. The jury, being governed by the overwhelming preponderance of the evidence, found that appellee was injured by the gross negligence of an employee of appellant who, knowing appellee's perilous situation, wantonly ran the tricycle against him and caused the injury complained of. This being true, contributory negligence would constitute no defense. So expressly decided on former appeal. See last clause of opinion. But, aside from this, the record contains no evidence on which to predicate the defense of contributory negligence.

We find no error of law, and the judgment is affirmed.

LAKE SHORE & M. S. RY. CO. v. BARNES.

(Supreme Court of Indiana, Jan. 24, 1906.)

[76 N. E. Rep. 629.]

Railroads—Crossing Accident—Speed—Negligence.*—There being no statute regulating the rate of speed at which a railroad train may pass over a highway crossing in the country, it is not negligence per se for such railroads to run their trains over country crossings at any speed they choose consistent with the safety of the persons and property in their charge.

Same—Extrahazardous Crossing—Personal Injuries—Complaint.—A complaint, in an action for injuries to plaintiff at a railroad crossing, charging that defendant negligently ran its train over the Michigan road crossing, situated, etc., at a reckless and dangerous rate of speed, without making any attempt to stop or check the train, and that such road was at the time the main highway between two places, and that a great many persons were constantly traveling thereon and crossing the track, was insufficient to characterize the crossing as so extrahazardous as to require the railroad company to restrict the speed of its trains in passing over the same.

Appeal—Pleading—Demurrer—Harmless Error.—Where evidence

*See foot-notes appended to *Vizacchero v. Rhode Island Co.* (R. I.), 14 R. R. R. 172, 37 Am. & Eng. R. Cas., N. S., 172.

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was admitted to support a cause of action alleged in a paragraph of the complaint to which a demurrer had been erroneously overruled, the judgment in favor of plaintiff cannot stand, unless it affirmatively appears to have been founded on the good count alone.

Appeal from Circuit Court, La Porte County; Jno. C. Richter, Judge.

Action by Jennie Barnes against the Lake Shore & Michigan Southern Railway Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, as authorized by Burns' Ann. St. 1901, § 1337u. Reversed.

Miller, Drake & Hubbell, for appellant.

Jos. G. Orr, for appellee.

HADLEY, J. Suit by appellee for personal injuries received at a railroad crossing, alleged to have been caused by the appellant's negligence. Upon issues joined there was a verdict and judgment for the plaintiff, from which the defendant appeals.

The complaint is in two paragraphs. The first charges that the defendant negligently ran its train of cars over the grade crossing at the Michigan road, situate 200 feet east of the east corporation line of the town of New Carlisle, at the dangerous speed of 50 miles an hour, without sounding the engine whistle, or ringing the bell, or otherwise warning the plaintiff of the approach of said train. In the second paragraph the negligence charged is that the defendant negligently ran its train over the Michigan road crossing, situate 200 feet east of the east corporation line of the town of New Carlisle, at a reckless, dangerous, and negligent rate of speed, to wit, 50 miles an hour, without making any attempt to stop or check the train, thereby colliding with the buggy in which the plaintiff was riding and causing her to be greatly injured, without fault on her part; that said Michigan road was, at the time, the main highway between the city of South Bend and the town of New Carlisle, and a great many persons were constantly traveling thereon and crossing said track. Separate demurrers were overruled to each paragraph of the complaint, and separate exceptions reserved to each ruling.

The first paragraph is conceded to be good by failure to set it out in the brief, or to question its sufficiency in any way. A vigorous assault, however, is made upon the second paragraph, which is worthy of serious consideration. It will be noted that the second paragraph does not charge the omission of any of the signals required of trainmen in approaching grade crossings; neither does it allege that there existed any obscurity to the railroad, nor that there was any obstruction to sight or hearing to persons at or near the crossing. Therefore, as against the pleader in ruling upon the demurrer, we must presume that at the crossing the railroad, in both directions, was straight, open, and free from obstructions of any kind for a distance of more than 80 rods, and that the whistle was sounded and bell rung as provided by the statute. The question, therefore, arising upon

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the demurrer is twofold: first, can we say as a matter of law that running a train at the rate of 50 miles an hour over an ordinary country highway grade crossing, observing in the doing of it all the signals and warnings enjoined by the statute, constitutes negligence per se; and second, if the first is answered in the negative, then do the facts averred in the second paragraph concerning the amount of travel over the crossing—the environments being ordinary—present such a mixed question of law and fact as calls for its submission to the jury? If it is not of itself an act of negligence to run its train over the crossing in question at a speed of 50 miles an hour, and if the paragraph exhibits no other actionable fault, there can be no recovery upon this paragraph, and it becomes immaterial whether the plaintiff was hurt by a pure accident, or her own want of care. In other words, it must affirmatively appear that the defendant was guilty of some negligent act or omission, or there can be no recovery. *Lake Erie, etc., R. R. Co. v. McFall* (at this term, December 7th) 76 N. E. 400.

First, then, is it unlawful to drive a railway train over a country and suburban highway crossing at a velocity of 50 miles an hour? Under the laws of the state, corporations are permitted to form, and have been given a license to appropriate private property, and locate, and operate a railroad on the shortest or most practicable route between points. The chief consideration for this important grant of power was to enable such corporations to better serve the public by transporting passengers and freights more speedily than can be accomplished by ordinary conveyances. It was obvious to the Legislature that to require a train to be stopped, or slowed down, at every country road, whenever its managers shall observe a traveler in a common vehicle approaching the railroad at a rate of speed that will carry him to the crossing at the same moment it will be reached by the train, would, on account of the frequency of the crossings in this state, and the length of time required to get trains under way, practically defeat the legislative purpose in granting railroad franchises. Such requirement would be plainly incompatible with rapid transportation. It was the better and faster conveyance desired by the people that inspired the building of railroads and the development of speed, and it is what they expected in return for the rights surrendered for the construction of such roads. So, when the General Assembly, with full power to regulate the speed of trains in suburban and rural districts, as well as to authorize it to be done by the cities and towns of the state, wholly failed to exercise its power with respect to the former, the failure may be accepted as implied authority for railroad companies to run their trains in the open country, where they may be seen and heard for long distances, and over ordinary public crossings therein, at any speed they choose that is consistent with the safety of the persons and things in their charge. *Telfer v. Northern R. R. Co.*, 30 N. J. Law, 188; *Newhard v. Penna. R. Co.*, 153 Pa. 417, 26 Atl. 105, 19 L. R. A. 563; *Warner*

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v. N. Y. Central R. Co., 44 N. Y. 465; *Childs v. Penna. R. Co.*, 150 Pa. 75, 24 Atl. 341; *Custer v. Railroad Co.*, 206 Pa. 529, 55 Atl. 1130; *Sutton v. Chicago, etc., R. Co.*, 98 Wis. 157, 73 N. W. 993; *Atchison, etc., R. Co. v. Judah*, 65 Kan. 474, 70 Pac. 346; *New York, etc., R. R. Co. v. Kistler*, 66 Ohio, 326, 64 N. E. 130; *Lake Erie, etc., R. R. Co. v. McFall* (at this term, December 7th) 76 N. E. 400; *Terre Haute, etc., R. Co. v. Clark*, 73 Ind. 168; *Elliott on R. R.*, § 1160.

To protect the public against fast running, and to enable travelers on intersecting highways, who may be on, or about to enter upon, the crossing, to reach a place of safety, all enginemen are required, as a warning notice of an approaching train, when not more than 100, nor less than 80 rods, from a public crossing, to sound the whistle of the engine distinctly three times, and ring the bell continuously from the sounding of the whistle until the crossing is passed. Section 5307, Burns' Ann. St. 1901. In the open country, where trains may be seen or heard for the distances designated in the statute, a traveler who is alert, as the law requires him to be, and who promptly heeds the signals, can hardly fail to get out, or keep out, of harm's way from a train running at any usual speed. Thus, a train running 60 miles an hour will require 15 seconds from the sounding of the whistle and ringing of the bell to reach the crossing, a long time for him who is on the crossing to drive off, and a short time for him to wait for the train to pass, who is about entering upon it. In cities and towns the conditions are generally different. The crossings are at short intervals, and the houses usually built close together and up to the line of the railroad. These not only obstruct the view of an approaching train, but retard the flow of sound from the warning signals, and, in contrary winds, tend to make the latter misleading, and difficult, if not impossible, to hear in time for those upon the crossing to escape a rapidly approaching train. This most excellent reason for the legislative warrant for restricting the speed of trains within the corporate limits of cities and towns does not apply to the country.

Second. Is the averment "that said Michigan road was at the time the main highway between the city of South Bend and the town of New Carlisle, and a great many persons were constantly traveling said highway, and crossing said tracks," sufficient to characterize the crossing as so extrahazardous as would form an exception to the rule and entitle the plaintiff to carry the question of the defendant's negligence to the jury? Compliance with the statute in the giving of signals may not always constitute due care in running over country crossings. There may be cases where excessive or unusual speed, considered with other facts and surrounding circumstances, may become an element of negligence, even though statutory signals have been given, but such exceptional conditions must be averred in the complaint. *Railroad Co. v. Kistler*, 66 Ohio, 326, 334, 64 N. E. 130; *Cleveland, etc., R. R. Co. v. Miller*, 149 Ind. 490, 506, 49 N. E. 445. But no attempt is made to set up in the paragraph under consideration an

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exceptional crossing, except as to the number of persons using it. As we must view the complaint, it exhibits a perfectly open crossing, a straight, clear track, properly given signals, and the only fault charged to the defendant is the rate of speed maintained over a crossing that was constantly being passed by a great number of persons. In the first place, "a great number of persons" is a term so indefinite, as to the number intended, that it has no significance in pleading; and, in the second place, we are unable to see how the number of persons daily passing, or repassing, over the crossing between the town of New Carlisle and South Bend, can affect the rights and duties of appellant at the crossing, in the absence of any showing that the number was known to be so great as to impede progress, or in some other way make the crossing more difficult and dangerous to travelers. Persons having eyes and ears must use them at grade crossings, each for himself, whether alone or in a great company, and, when by the exercise of due care each may escape injury, it makes no difference in the company's right to speed its train over a crossing whether there is one or many in the act, or about to pass over the same. This leads us to the conclusion that there is no act or omission charged against appellant in the second paragraph of complaint that affords a ground for recovery for negligence, and the court erred in overruling the demurrer thereto.

Third. It is a familiar rule that a judgment for a plaintiff cannot stand when rendered upon a complaint containing a bad paragraph, which has been held good on demurrer, unless the record affirmatively shows that the judgment rests exclusively upon a good paragraph. *Lake Erie, etc., R. R. Co. v. McFall* (this term, December 7th) 76 N. E. 400, and cases cited; *Baltimore, etc., Co. v. Jones*, 158 Ind. 87, 91, 62 N. E. 994. We are unable to determine from the record where the verdict and judgment are rooted—whether in one, or the other, or in both, paragraphs of the complaint. It is clear that testimony, distinctly in support of the second paragraph, was allowed to go to the jury, over appellant's objection. Notably, one witness was permitted to testify to the number of persons he saw and counted using the crossing in 12 hours about two years before the plaintiff's accident. Another testified that the country along the Michigan road between New Carlisle and South Bend was thickly populated. How far, if at all, this testimony influenced the verdict is beyond our power to ascertain, and under the rule above announced the judgment must be set aside. There are divers other questions presented—chiefly on instructions given and refused and on the admission and rejection of evidence—which are not likely to arise again, and are therefore not considered.

Judgment reversed, with instructions to sustain appellant's demurrer to the second paragraph of the complaint.

BYRD v. SOUTHERN EXPRESS CO.

(Supreme Court of North Carolina, Oct. 17, 1905.)

[51 S. E. Rep. 851.]

Negligence—Proximate Cause—Necessity of Establishment.*—The fact that defendant has been guilty of negligence, and that such negligence has been followed by an injury, does not render defendant liable for such injury, unless the connection of cause and effect is established and defendant's negligent act is shown to have been the proximate cause of the injury.

Same—Burden of Proof.†—Plaintiff, in an action for death by wrongful act, has the burden of showing that defendant's negligence proximately caused the death of plaintiff's intestate.

Same—Character of Proof Required.†—Proof that defendant's negligence proximately caused the injury complained of must be of such a character as to reasonably warrant an inference of that fact, and it is not enough that it be merely sufficient to raise a surmise or conjecture as to its existence.

Same—Evidence—Sufficiency.†—In an action against an express company for negligently delaying the delivery of medicine intrusted to it for plaintiff's intestate, evidence held insufficient to show that

*See generally, extensive note, 17 R. R. R. 236, 40 Am. & Eng. R. Cas., N. S., 236.

†For the authorities in this series on the question as to who has the burden of proving actionable negligence, or its absence, irrespective of the relation between defendant and the injured person, see *Elwood v. Connecticut Ry. & Lighting Co.* (Conn.), 12 R. R. R. 518, 35 Am. & Eng. R. Cas., N. S., 518 (burden of proof thrown on defendant by suffering a default); *Roberts v. Port Blakely Mill Co.* (Wash.), 6 R. R. R. 403, 29 Am. & Eng. R. Cas., N. S., 403; note, 10 Am. & Eng. R. Cas., N. S., 584 (actions for death by wrongful act); note, 12 Am. & Eng. R. Cas., N. S., 543; *Central R. & B. Co. v. Ogletree* (Ga.), 2 Am. & Eng. R. Cas., N. S., 382; *Heckle v. Southern Pac. Co.* (Cal.), 15 Am. & Eng. R. Cas., N. S., 584; *Michigan Cent. R. Co. v. Lauricella* (Tex.), 2 Am. & Eng. R. Cas., N. S., 382; *Parker v. South Carolina & G. Ry. Co.* (S. Car.), 6 Am. & Eng. R. Cas., N. S., 731; *Cox v. Norfolk & C. R. Co.* (N. Car.), 12 Am. & Eng. R. Cas., N. S., 390; *Crouse v. Chicago & N. W. Ry. Co.* (Wis.), 14 Am. & Eng. R. Cas., N. S., 780; *St. Louis & S. F. Ry. Co. v. Townsend* (Ark.), 22 Am. & Eng. R. Cas., N. S., 123 (action for death by wrongful act); *Augusta Southern R. Co. v. McDade* (Ga.), 12 Am. & Eng. R. Cas., N. S., 548; *Burr v. Pennsylvania R. Co.* (N. J.), 16 Am. & Eng. R. Cas., N. S., 162; *Garrett v. Southern Ry. Co.* (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 529; *Louisville & N. R. Co. v. Victory* (Ky.), 12 Am. & Eng. R. Cas., N. S., 538; *Parker v. South Carolina & G. Ry. Co.* (S. Car.), 6 Am. & Eng. R. Cas., N. S., 731; *Rogers v. Louisville & N. R. Co.* (C. C.), 12 Am. & Eng. R. Cas., N. S., 813; *Tully v. Philadelphia, etc., R. Co.* (Del.), 23 Am. & Eng. R. Cas., N. S., 209.

†For the authorities in this series on the question as to what is, and is not, the proximate cause of an injury, see foot-notes appended to *Dean v. Oregon R. & Nav. Co.* (Wash.), 16 R. R. R. 237, 39 Am. & Eng. R. Cas., N. S., 237; foot-notes appended to *Birmingham Ry. Light & Power Co. v. Brantly* (Ala.), 15 R. R. R. 191, 38 Am. & Eng. R. Cas., N. S., 191; *Snow v. New York, etc., R. Co.* (Mass.), 15 R. R. R. 47, 38 Am. & Eng. R. Cas., N. S., 47; *Illinois Cent. R. Co. v. McIntosh* (Ky.), 14 R. R. R. 738, 37 Am. & Eng. R. Cas., N. S., 738; *Glassey v. Worcester Con. St. Ry. Co.* (Mass.), 14 R. R. R. 736, 37 Am. & Eng. R. Cas., N. S., 736; *Wabash R. Co. v. Billings* (Ill.), 14 R. R. R. 203, 37 Am. & Eng. R. Cas., N. S., 203.

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defendant's negligence was the proximate cause of the death of plaintiff's intestate.

Death—Actions—Damages Recoverable.—Under Code, § 1498 providing that whenever the death of a person is caused by a wrongful act of another, such as would have entitled the decedent to an action for damages had he lived, the person causing the death shall be liable to an action for damages by the administrator to the decedent, a father, who sues as his son's administrator to recover for the death of his son, is not entitled to recover damages for mental anguish, nor for the loss of the service of his son.

Appeal from Superior Court, Cumberland County; Ferguson, Judge.

Action by Rufus Byrd, administrator, etc., against the Southern Express Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Plaintiff sued to recover damages for the death of his intestate, alleged to have been caused by the negligence of the defendant. The intestate, plaintiff's son, about 18 years old, was ill with typhoid fever at Wade, N. C., on September 11, 1903. His physician, early in the day, gave a prescription for him to a druggist at Fayetteville, who prepared the medicine and handed the package containing it to the agent of defendant company at that place, to be sent to Wade, a station on the railroad about 12 miles north of Fayetteville, where the plaintiff, with his family, resided. The package was received by defendant's agent about 55 minutes before the train was due to leave for Wade, and the agent was told that it was important to ship at once, as it contained medicine for a man who was sick. It was not forwarded that day, and plaintiff did not receive it until he came to Fayetteville the next morning and got it from the defendant. There was testimony, not necessary to be stated, which clearly shows that no contributory negligence was imputable to the plaintiff in not going to Fayetteville sooner than he did. The attending physician testified, in answer to a question as to the effect the delay in receiving the medicine had upon the patient, that the loss of time would necessarily cause a break "in the chain of treatment," and would in his opinion lessen the chances of recovery; that he had an aggravated form of typhoid fever, and in such case it is required that the patient should have his medicine as regularly as possible. When asked whether, if the medicine had been received in time and taken according to his directions, it would probably have effected a cure or saved his patient's life, he answered that the prognosis in all aggravated cases of typhoid fever is very grave, and he believed that, had there been no interruption in the course of treatment, the chances of recovery would have been better, and that was as far as he could go. He was then asked if, in the condition of the boy at the time, it was necessary for his recovery that the medicine he prescribed should be taken at noon on the 11th day of September, and he answered as follows: "I would say that was the hope. The medicine was needful and necessary." A motion by the

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defendant for a nonsuit was sustained. Plaintiff excepted and appealed.

Thos. H. Sutton, for appellant.

Rose & Rose and Robinson & Shaw, for appellee.

WALKER, J. (after stating the case). If it is conceded that there was negligence on the part of defendant, we do not think there was sufficient evidence to be submitted to the jury that it caused the death of the plaintiff's intestate. There must always, in actions of this kind, be a causal connection between the alleged act of negligence and the injury which is supposed to have resulted therefrom. The breach of duty must be the cause of the damage. The fact that the defendant has been guilty of negligence, followed by an injury, does not make him liable for that injury, which is sought to be referred to the negligence, unless the connection of cause and effect is established; and the negligent act of the defendant must not only be the cause, but the proximate cause, of the injury. *Shear. & Redf. on Negligence* (4th Ed.) §§ 25, 26. The burden was therefore upon the plaintiff to show that defendant's alleged negligence proximately caused his intestate's death, and the proof should have been of such a character as reasonably to warrant the inference of the fact required to be established, and not merely sufficient to raise a surmise or conjecture as to the existence of the essential fact.

In *State v. Vinson*, 63 N. C. 335, this court thus states the rule: "We may say with certainty that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to the jury." And in *Brown v. Kinsey*, 81 N. C. 245, it is said: "The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue or furnish more than material for a mere conjecture, the court will not leave the issue to be passed on by the jury." In the later case of *Young v. Railroad*, 116 N. C. 932, 21 S. E. 177, the court says: "Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character as that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence." *Cobb v. Fogelman*, 23 N. C. 440; *Wittowsky v. Wasson*, 71 N. C. 451; *Sutton v. Maddre*, 47 N. C. 320; *Pettiford v. Mayo*, 117 N. C. 27, 23 S. E. 252; *Lewis v. Steamship Co.*, 132 N. C. 904, 44 S. E. 666. In the last-cited case, the subject is fully discussed by Connor, J., and the cases collected. It all comes to this: that there must be legal evidence of the fact in issue, and not merely such as raises a suspicion or conjecture in regard to it. The plaintiff must do more than show the possible liability of the defendant for the injury. He must go further, and offer at least some evidence which reasonably tends to prove every fact essential to his success.

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This has not been done in the case now before us. The right of recovery turns upon the testimony of the physician. He nowhere says that, if the medicine had been administered at the time fixed in his directions, the child would have recovered, or that in his opinion its recovery was even probable. It is evident that the doctor was unwilling to hazard such an opinion, and well might he have refrained from venturing so far. It must be admitted that he prescribed what he thought was best for the child, and directed it to be taken as soon as possible, in the hope of arresting the rapidly increasing ravages of this terrible disease, which was fast sapping the life of his patient; but it was hardly within the range of his knowledge to tell afterwards, with any degree of certainty, what the result would have been if his directions had been strictly followed. Under the circumstances of this case, it would be barely more than a guess; there being no certain data or process of reasoning upon which he could rely for an intelligent opinion. At any rate, the doctor was cautious enough to reduce to the narrowest limit the scope of his answer to the plaintiff's question as to the probable result of a compliance with his directions, when he said "that the chances of recovery would have been better; that is as far as I can go." But this falls very short of tending to prove that the failure to receive the medicine caused the intestate's death. The witness does not say the boy would have recovered, nor that, if the chances of recovery had been increased by taking the medicine at the appointed time, they would still be in his favor or against him. The condition of the patient might have been somewhat improved, and yet the chances of recovery still have been decidedly against him, or the prospect of ultimate recovery hopeless. Nor do we think that this uncertain and most unsatisfactory proof was aided in the least by what was afterwards said by the witness. He plainly did not intend to go beyond what he had already said. All that can be legitimately inferred from his last answer is that he entertained a hope that the medicine would stay the progress of the malady, and that he deemed it necessary for the boy to take the medicine at the time indicated in his instructions to the father. But it could hardly be said that this evidence was of the kind required by the law as a sufficient and reliable basis for a verdict. It would not be at all safe to form a conclusion on such proof, as the jury must not guess, but decide. They must use, not their imagination, but their reason; and there is no room here for anything more certain than rank conjecture.

The plaintiff brings this action, as administrator of his son, to recover the value of his life under the statute (Code, § 1498); and, of course, he is not entitled to any damages for mental anguish in this form of action, nor for the loss of the services of his child. Such damages can be assessed only in an action brought in his own name, if at all. We think his honor was right in dismissing the action.

No error.

LOUISVILLE, H. & ST. L. RY. CO. *v.* JOLLY'S ADM'X.

(Court of Appeals of Kentucky, Feb. 16, 1906.)

[90 S. W. Rep. 977.]

Railroads—Persons on Track—Duty of Railroad.*—A servant of a railroad who uses a tricycle on the track is bound to keep out of the way of trains, and it is not incumbent on the railroad to keep a look-out for him at places where the presence of persons on the track is not to be anticipated, and it owes him no duty until his presence on the track is actually discovered by those in charge of a train.

Evidence—Opinion Evidence—Conflict with Other Evidence.—Where the physical facts surrounding an accident are established, expert evidence that the result should have been different than it actually was will not be permitted to overcome the facts themselves.

Railroads—Persons on Tracks—Duty of Trainmen.*—A locomotive engineer, on discovering a servant on the track in front of him, is only required to exercise such care and promptness to avert an accident as may be reasonably used by a man of ordinary prudence under the circumstances.

Negligence—Action—Evidence—Weight and Sufficiency—Balance of Proof.—Where, on plaintiff's own evidence, it is as probable that the injury sued for was not due to defendant's negligence as that it was due to such negligence, plaintiff cannot recover.

Railroads—Persons on Tracks—Actions for Injuries—Sufficiency of Evidence.—In an action against a railroad for the death of a servant riding a tricycle on the track, evidence held insufficient to show that those in charge of the engine might have averted the injury by the exercise of proper care after discovering the presence of the servant on the track.

Nunn, J., dissenting.

Appeal from Circuit Court, Breckinridge County.

"Not to be officially reported."

Action by Bion Jolly's administratrix against the Louisville, Henderson & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Helm, Bruce & Helm and *Miller & Todd*, for appellant.

Claude Mercer, N. McC. Mercer, and Bennett H. Young, for appellee.

HOBSON, C. J. On May 19, 1903, Bion Jolly was struck and

*For the authorities in this series on the question of the care due from trainmen to licensees and trespassers on railroad tracks, see foot-notes appended to *Barmore v. Vicksburg, etc., Ry. Co.* (Miss.), 17 R. R. R. 841, 40 Am. & Eng. R. Cas., N. S., 841; *Engelking v. Kansas City, etc., R. Co.* (Mo.), 17 R. R. R. 800, 40 Am. & Eng. R. Cas., N. S., 800; *Gilliam v. Texas & P. Ry. Co.* (La.), 17 R. R. R. 786, 40 Am. & Eng. R. Cas., N. S., 786; *Ray v. Chesapeake & O. Ry. Co.* (W. Va.), 17 R. R. R. 779, 40 Am. & Eng. R. Cas., N. S., 779; *Seaboard & R. R. Co. v. Vaughan's Adm'x* (Va.), 17 R. R. R. 600, 40 Am. & Eng. R. Cas., N. S., 600; *Hamlin v. Columbia & P. S. R. Co.* (Wash.), 17 R. R. R. 1, 40 Am. & Eng. R. Cas., N. S., 1; foot-notes appended to *St. Louis, S. W. Ry. Co. v. Purcell* (C. C. A.), 16 R. R. R. 779, 39 Am. & Eng. R. Cas., N. S., 779; *Ayers v. Wabash R. Co.* (Mo.), 16 R. R. R. 470, 39 Am. & Eng. R. Cas., N. S., 470; *Clemans v. Chicago, etc., Ry. Co.* (Iowa), 16 R. R. R. 413, 39 Am. & Eng. R. Cas., N. S., 413.

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killed by a train on appellant's road, and this action was filed to recover for his death. The facts of the case are as follows: Jolly was in the employment of the railroad company as a painter. He resided at Irvington, and had orders to paint the depot building at Askins, a station west of Irvington; but the paint did not come, and was to come on the local on the evening of the 19th. On the morning of the 19th he and a man named Bryant, who was a fellow workman, were at Irvington, with apparently nothing to do. Jules Brashear, under whom they worked, came down on the passenger train in the morning and told them there would be a special along, and they must not put any trucks on the track. He then got back on the train, and went on. After this, Jolly sent a boy with a note to Custon, a station four miles east of Irvington, asking a man who kept a saloon there to send him a pint of whisky. The man declined to send the whisky, and as the boy was returning to Irvington he met Jolly about a quarter of a mile from the station on a tricycle going towards Custon. The boy told Jolly what the man said, and Jolly then told the boy that he would not have sent him if he had known he had to go up the road. Jolly then went on to Custon on the tricycle, and when he got there took two drinks at the saloon, and then went on to Ekron, a station three miles east of Custon. At Ekron he took two more drinks, and bought a bottle of whisky, which he put in his pocket. He then nailed on the stock pen some planks which had been knocked off, and, after fixing up his tricycle, got on it and returned to Custon. He was told by the agent that the special left Louisville at about 2:30, and that it would soon be along. After staying at Custon a while, and, perhaps, taking another drink, he got on the tricycle and started west to Irvington. When he had gone part of the way to Irvington he came to where there was a section gang at work on the road. Here he stopped and got some water. He then fixed up one of the pedals of his tricycle, and, after remaining there 15 or 20 minutes, started to get on his tricycle to go on to Irvington. The section foreman said to him that the special was about due, and he had better not go. He replied that it would never catch him. He got on his tricycle, and just as he started the special came around a curve to the east of the section men. They thereupon called to Jolly to stop, but he did not hear them and went on. When the train reached the section foreman he waved his hat to the engineer, giving him the stop signal; but before the train was stopped it struck Jolly, knocking him perhaps 45 feet, and killing him instantly.

While the proof shows that Jolly nailed the plank on the stock pen at Ekron when he was there, it does not show that he had an order from any of his superiors to go to Ekron on the tricycle. So far as the proof shows, the only person he talked with about it was Bryant, who was only a fellow workman and advised him not to go. And, however this may be, when he took the tricycle out on the railroad track, it was incumbent on him to keep out of the way of the train. It was not incumbent on the railroad

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company to keep a lookout for him at places where the presence of persons on the track was not to be anticipated, and it owed him no duty until his presence on the track was discovered by those in charge of the train. *Dilas' Administrator v. C. & O. R. R. Co.*, 71 S. W. 492, 24 Ky. Law Rep. 1347; *Jacob's Administrator v. C. & O. R. R. Co.*, 72 S. W. 308, 24 Ky. Law Rep. 1879. It remains, therefore, to determine whether, after his presence on the track was perceived by those in charge of the train, the injury to him might have been averted by proper care on their part.

The plaintiff introduced on the trial the railroad men as witnesses on her behalf. The train was a crowded excursion of about nine coaches, pulled by a heavy ten-wheeled freight engine, and was running about 40 miles an hour. The fireman was putting in coal, and knew nothing of the trouble until about the time the man was struck. The engineer was at his post, and testified that as he came around the curve he saw first the section men working along the track, but did not see Jolly until about the time he was signaled by the section boss; that Jolly was then 150 yards from him; that he shut off his engine, set the emergency brakes, put on the sand, and gave the alarm with the whistle; that the speed of the train was checked to 7 or 8 miles an hour before it reached Jolly; and that it ran about the length of the train after striking him. The section foreman and his men, who were scattered along the track, testified that when the section foreman signaled the engineer he cut off the steam from his engine and set the brakes, and that they could see that the train began checking up. These witnesses all testified in effect that everything was done that could be done to save the life of the unfortunate man. The plaintiff introduced, in addition to these witnesses, a survey which she had had made of the ground, which showed that it was 270 yards from where the section foreman was to where Jolly was killed, and that the train did not stop until it had run 400 yards beyond the point where Jolly was killed. The plaintiff also showed that there was a straight track for 290 yards east of the point where the section foreman stood, and that a man standing where Jolly was struck could be seen 650 yards back by a person looking across the curve. The engineer of the train stated on his direct examination that he could stop his train in 375 feet, but on his cross-examination he said that he meant 375 yards. Two other engineers were introduced for the plaintiff, who testified that such a train might be stopped in 300 or 400 yards. In view of this evidence, and the fact that the train ran over 400 yards after striking Jolly, it is insisted for the plaintiff that the engineer did not set his emergency brakes, or take any steps to save the unfortunate man, until just before he hit him. There would be great force in this, were it not for the positive testimony of the engineer, and all the other witnesses on the ground, to the effect that the engineer shut down his engine and applied his brakes as soon as the section foreman signaled to him. This testimony is also sustained by a

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number of the passengers on the train, who testified to hearing the whistle and that about 20 seconds elapsed after the brakes were set before the man was seen thrown from the track. A number of witnesses testify to the sharpness of the stop, showing that the speed of the train was suddenly arrested. A train running 40 miles an hour will run a mile in a minute and a half, or in 90 seconds. In 20 seconds it will run in round numbers 400 yards. Jolly had just started on his tricycle, and was moving slowly. If the train was 270 yards from him when the brakes were set, it would at this rate have reached him in less than 20 seconds. The proof conclusively shows that the engine was shut off, that the brakes were set, and the proper alarm given by the whistle; and it is also conclusively shown that the train was not stopped until it ran something like 670 yards. We must therefore conclude either that the expert testimony as to the distance in which the train could be stopped is based on conditions not existing in this case, or disregard either the opinions of the experts or the other testimony in the case as to what in fact occurred.

It was a very heavy train. It was pulled by a very heavy engine. The failure to stop the train as quick as estimated might be due to the condition of the brakes, or the failure of some part to work properly, or to the fact that the train was running faster than estimated, or that the witnesses, in estimating the distance in which the train might be stopped, did not make sufficient allowance for the speed and weight of this train. However this may be, where the physical facts are established, expert evidence that the result should have been different cannot be allowed to override the facts themselves; for mere opinions must always give way to established facts. The fact is that the train did not stop until after it had struck Jolly. The fact is, according to the evidence, the engineer, as soon as he saw the man on the track, shut off his engine and set the brakes. There was nothing else he could do. There is no evidence that he omitted anything, after he saw Jolly on the track, that he could have done. It is conceded that he stopped his train in 670 yards, which was about the distance which the train would run in half a minute at 40 miles an hour. It is evident that when the section boss signaled to him some seconds must elapse before the engineer could shut off his engine and set the brakes. It must also be evident that, when so heavy a body was rolling on a smooth surface 40 miles an hour, several seconds must elapse before the brakes would have any appreciable effect on the rapidly revolving wheels, and that, the greater the speed of the train and the greater the weight, the longer this would be. The engineer can only be expected to exercise such care and promptness as may be reasonably used by a man of ordinary prudence under the circumstances.

We attach no importance to the proof that a man might be seen across the curve 650 yards back, or that the track was straight for more than 270 yards. The engineer owed the intestate no duty until his presence on the track was discovered. The

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engineer was under no obligation to look out for him. When the engineer came around the curve and saw the section men along the track, naturally his eye would be upon them to see if they were safe or were giving him any signals, and not until he passed them in glancing along the track would he naturally see the man on the tricycle beyond. The company is not liable if he might have seen Jolly in time to have saved him. It is only liable if he might have saved him by proper care after he in fact saw. As there is no evidence in the case that the engineer in fact saw Jolly until about the time the section foreman gave him the stop signal, and as the train was then running 40 miles an hour, or going at the rate of about 55 feet a second, it must have covered something like half the distance to Jolly before the speed of the train was arrested at all, and that so heavy a train could after this have been stopped before striking Jolly seems to us clearly impracticable under the evidence. The law does not look to bare possibilities. It requires no more of the human machine than may be reasonably expected of it under the circumstances. When all the evidence as to what was done by those who witnessed the transaction is to the effect that the engineer did everything in his power, and there is no evidence that there was anything omitted which he should have done, the bare opinion of experts that the train might have been stopped sooner than it was stopped cannot be said to contradict the witnesses as to the physical facts; for necessarily the time within which a rapidly moving train may be stopped must depend on a number of circumstances, and vary with the facts of each case. Where on the plaintiff's own proof it is as probable that the injury was not due to defendant's negligence as that it was due to such negligence, the plaintiff cannot recover. Certainly under this rule there should be no recovery here; for it is equally as possible under the evidence that the brakes failed to act with the force supposed by the experts, or that the train was running faster than supposed, or that they did not give sufficient effect to the weight of the train, as that all the witnesses are mistaken as to the facts they testify to. The intestate knew the train was due. With this knowledge he went on the track, saying the train would never catch him, and the train came upon him immediately. His death was due to his own temerity.

The case of *Wilmuth's Adm'r v. Illinois Central Railroad Company*, 76 S. W. 193, 25 Ky. Law Rep. 671, is unlike this case. There the engineer and fireman both saw the boy some distance away, but gave no alarm signal to warn him of the approach of the train and took no steps for his protection. The injury occurred at a station, where there was another train on the side track. The boy's position showed he was not aware of the approach of the train, and had not the slightest warning.

We therefore conclude that on the plaintiff's testimony the court should have peremptorily instructed the jury to find for the defendant.

Judgment reversed, and cause remanded for a new trial.

NUNN, J., dissents.

CHOCTAW, O. & G. R. CO. v. COKER.

(Supreme Court of Arkansas, Dec. 2, 1905.)

[90 S. W. Rep. 999.]

Railroads—Personal Injuries—Frightening Animals Near Track—Whistling at Crossing.—In an action against a railroad for damages sustained by plaintiff, through being struck by a plow drawn by a horse which became frightened by the alleged negligent blowing of defendant's engine whistle and ran away, an instruction that the sounding of the whistle at any point required by the law would not make defendant liable for any injury ensuing therefrom unless the engine operatives knew, or reasonably knew, that by so doing injury would reasonably and proximately result, was erroneous, and the court should have charged that defendant's engineer was not negligent in blowing the whistle unless he knew or had reason to believe that the blowing of the whistle would frighten the horse.

Same.*—While a railroad has authority to make all noises incident to the working of its trains, including the proper danger signals, and is not liable, while exercising such right in a reasonable and prudent manner, for injuries occasioned by horses frightened in adjoining fields by such noises, it is liable for damages occasioned by failure of the train operatives, on discovering that a horse attached to a plow is frightened and attempting to run away, to refrain from doing any unnecessary or wanton act which would increase the fright or danger.

Appeal from Circuit Court, Yell County, Dardanell District; Jephtha H. Evans, Judge.

Action by Cordelia Coker, by her next friend, against the Choctaw, Oklahoma & Gulf Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

E. B. Pierce and Thomas S. Buzbee, for appellant.

Bullock & Davis, for appellee.

BATTLE, J. Cordelia Coker, by her next friend, sued the Choctaw, Oklahoma & Gulf Railroad Company, and stated her cause of action as follows:

"Further complaining, the plaintiff states that on the 24th day of April, 1901, she was at work on her father's farm, in a field at a point between mileposts numbered 206 and 207, along said railroad track, and that her father and next friend, the said James E. Coker, was in the field near her plowing with a horse, and that about 5 o'clock of the afternoon of the said 24th day of April, 1901, the west-bound passenger train of the said defendant, Choctaw, Oklahoma & Gulf Railroad Company, on its regular run along its said railroad track at and near the said field aforesaid, ran by where the said plaintiff and her said father were at

*For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to frightening teams, see foot-note appended to *Butler v. Easton & A. R. R. Co.* (N. J.), 17 R. R. R. 803, 40 Am. & Eng. R. Cas., N. S., 803; *Powell v. Nevada, C. & O. Ry.* (Nev.), 17 R. R. R. 295, 40 Am. & Eng. R. Cas., N. S., 295; foot-notes appended to *Western Ry. of Alabama v. Cleghorn* (Ala.), 17 R. R. R. 216, 40 Am. & Eng. R. Cas., N. S., 216.

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work, and in so passing and approaching the point last aforesaid the said train of cars, with its locomotive, was by the agents and servants of the said railroad company, then and there being in charge thereof, so negligently, carelessly, and improperly operated, run, and conducted on said road, as to cause the said horse, then and there being plowed by the said James E. Coker, to take fright to such an extent that he broke loose from all control, and ran away, and in his fright knocked down the plaintiff with great force, dragged the said plow against and over her body, causing the blade thereof to cut, gash, and wound the plaintiff in the thigh, and dragging her along the ground, and otherwise bruising and wounding the body of her, the said plaintiff, and all this without any default, negligence, or carelessness on the part of her, the said plaintiff; that said negligence consisted of a failure of the said defendant's agents and servants to ring the bell or blow the whistle at the public crossing next near the plaintiff's field, and when the said train had so carelessly entered the said field, and when opposite or near the plaintiff, and seeing the said horse already frightened, they unnecessarily blew the whistle and gave additional fright to the said horse."

The defendant answered, and specifically denied each allegation of the complaint. The plaintiff recovered judgment.

The evidence adduced at the trial tended to prove the following facts:

Plaintiff, at the time of the injury complained of, was working with her father and others in her father's field. The road of defendant ran through the field. The right of way was 100 feet wide and inclosed by a fence. The road approached the field from the east, on a curve from a northerly direction, and became straight about the time it entered the field, and then turned again on a slight curve to the north. The field was nearly a half mile wide. On the day of the accident defendant's west-bound train, running about 35 miles an hour, passed through the field. Plaintiff's father was plowing in the field near the railroad. His horse became frightened by the approach of the train, and the father was with much effort holding him, until the whistle of the train was blown after it had passed him about 75 feet, when the horse ran away, dragging the plow after him, running over plaintiff, and injuring her. She was knocked down, and the plow caught her, and she was dragged some distance, and severely wounded in the thigh. The evidence as to the fireman or engineer seeing the father and the horse just before or at the time the whistle was blown is in conflict.

The court gave to the jury the following, among other instructions, over the objections of the defendant:

"The law requires the defendant to ring the bell or sound the whistle 80 rods before reaching a public crossing, and to continue doing one or the other until the crossing is passed. Under this statute the sounding of the whistle at any point required by the law will not make the defendant liable for any injury that may ensue from it, unless the operatives of the engine who sound

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the whistle know, or reasonably knew, that by so doing injury will reasonably and approximately ensue."

And refused to give the following at the request of the defendant:

"You are instructed that defendant's engineer was not guilty of negligence in blowing the whistle in Croker's field, unless you also find that said engineer knew or had reason to believe that the blowing of said whistle would frighten the horse driven by Coker."

The instruction given was calculated to mislead the jury. They might have concluded from it that the operatives of the engine should have seen Coker and his horse at or about the time the whistle was blown, and reasonably have known that the horse would run away and injure some one. The instruction refused should have been given to prevent such an error.

"A railroad company has authority to operate its trains in the usual and ordinary way, including the right to make all noises incident to the working of its engines and cars, and also the right to give the usual and proper signals of danger, as by the sounding of whistles or the ringing of bells; and, while exercising such right in a reasonable and prudent manner, the railroad company is not liable for injuries occasioned by horses" in adjoining fields taking fright at such noises; but if the operatives of the engines of trains discover a horse frightened and attempting to run away with a wagon or plow, or threatening to do any other injury, they should recognize the situation, and refrain from doing any heedless, unnecessary, or wanton act which will increase the fright or danger, and if they fail to do so the railroad company will be liable for damages occasioned thereby.

Reverse and remand for a new trial.

DOLPHIN v. WORCESTER CONSOL. ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Worcester, Oct. 19, 1905.)

[75 N. E. Rep. 635.]

Carriers—Street Railroads—Injuries to Passengers—Rules—Negligence.—Where plaintiff's intestate, while sitting in an open electric car, was thrown therefrom as it was being driven around a curve at a high rate of speed, and while a wooden rail intended for the protection of passengers, running along outside of the stanchions, was up, and the company had provided by rule for a speed not exceeding three miles an hour on curves, the company was not guilty of negligence in failing to adopt a rule requiring the rail on the outer side of curves to be down when its cars are rounding such curves; the rails being intended only to prevent passengers from leaving the car on the inner side, where there are double tracks.

Same—Request to Charge—Gross Negligence.*—In an action for injuries to a passenger, a request to charge that the duty of exercis-

*See extensive note appended to *Thomasson v. Southern Ry. (S. Car.)*, 17 R. R. R. 226, 40 Am. & Eng. R. Cas., N. S., 226.

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ing the highest degree of care is incumbent on the defendant, and any failure on the part of its servants to exercise that degree of care is "gross negligence," was properly refused, as a failure to exercise the highest degree of care constitutes slight negligence only.

Negligence—Gross Negligence.*—A request to charge the term "gross," in the term "gross negligence," when used with reference to the degree of care required and not fulfilled, is merely an expletive, when the degree of care required is the very highest, was properly refused, since under such circumstances the term implies a gross failure to exercise that degree of care.

Carriers—Degrees of Negligence.*—There are degrees of negligence in an action against a carrier for the death of a passenger, under Rev. Laws, c. 111, § 267, providing that if a corporation operating a railroad, by reason of its negligence or by reason of the unfitness or gross negligence of its agents or servants while engaged in its business, causes the death of a passenger, etc., it shall be punished by a fine not less than \$500 nor more than \$5,000, which shall be paid to the executor or administrator, etc.

Exceptions from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by John Dolphin, as administrator, etc., against the Worcester Consolidated Street Railway Company. A verdict was rendered in favor of defendant, and plaintiff brings exceptions. Overruled.

Edwd. J. Melanefy, John H. Mathews, and Thos. A. McAvoy, for plaintiff.

T. H. Dewey, Chas. C. Milton, and Chandler Bullock, for defendant.

LORING, J. This is an action of tort, under Rev. Laws, c. 111, § 267, for the death of a passenger on a street railway.

The plaintiff's case was that, while sitting in an open electric car, his intestate was thrown out by the car being driven round a curve at a high rate of speed, while a wooden rail was up which runs along the outside of the stanchions supporting the roof of the car, and which is lowered to prevent passengers getting off or raised to allow them to do so. It appeared that the curve was a very sharp one, having a radius of 53.5 feet, and was in the busiest part of the town of Clinton; also, that the track was a single track. It also appeared that the conductor did not warn the intestate not to get off. The plaintiff put in evidence the following rules of the defendant railway:

"Rule 99. The speed of cars on sharp curves, frogs, switches, and cross-overs must not exceed three miles per hour."

"Rule 44. Conductor's signal to stop car, except in cases of emergency, must be given by him in ample season to allow motor-man to make such stop at the nearest stopping place."

"Rule 41. Three bells—to stop instantly."

"Rule 43. * * * Exercise especial care for women, children, infirm or aged persons."

"Rule 34. Conductors. Notify passengers desiring to leave car not to do so until the car has come to a full stop, and then

*See foot-note on preceding page.

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from the right-hand side only. Extreme care in this respect is necessary on open cars, as there is great danger in leaving the car from the left-hand side."

One of the plaintiff's witnesses testified that the car at the time of the accident was going around the curve at the rate of five or six miles an hour.

The defendant's case was that, after giving a signal to stop the car at a stopping post beyond the curve, and while the car was going 3 to 3¼ miles an hour, the plaintiff's intestate got down on the running board and stepped off the car, with her back to the front of it.

The plaintiff asked for the following rulings: "(1) If the jury find from all the evidence that the plaintiff's intestate left or was thrown from the car in consequence of the negligence of defendant corporation, and came to her death by reason of that negligence, and also find that she was at fault, and that the want of care on her part contributed to her injury, nevertheless the plaintiff may recover. (2) If the jury find that the defendant corporation should have provided barriers to prevent passengers from alighting from the left side of the car at this particular place, and did not do so, or if, having provided such barriers, that the defendant corporation failed to instruct its servants to so place them as to guard against and prevent any possible danger, so far as practicable, then the corporation was negligent, and the plaintiff may recover, if the jury consider her death attributable to such neglect. * * * (6) When the duty of exercising the highest degree of care is incumbent upon the defendant, any failure upon the part of its servants to exercise that degree of care is gross negligence. (7) The term 'gross' in the allegation 'gross negligence,' when used with reference to the degree of care required and not fulfilled, is merely an expletive, when the degree of care required is the very highest. (8) There are no degrees of negligence."

The plaintiff excepted to the refusal of the court to give the rulings requested, and to such parts of the charge as were in conflict with them. The defendant had a verdict, and the case is here on these exceptions.

1. The court was right in refusing to give the first and second rulings asked for. There was no evidence of negligence on the part of the corporation. The plaintiff's argument here is that the injury would not have happened, as he claimed it happened, if the railing had been down. That may be conceded. But that is not the question. The question is whether it was negligence on the part of the corporation to have failed to adopt a rule requiring the rail on that side of the car, which is on the outer side of the curve, to be put down, when one of its cars is going around curves like the curve here in question. The corporation had provided by rule for a speed not exceeding three miles an hour on sharp curves. It is manifest that the rails in question were intended to prevent passengers from leaving a car on the inner side, where there are double tracks. In our opinion there is no

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such probability of a passenger's being thrown bodily out of his seat while the car is going around a curve as to require the corporation, in the exercise of the highest degree of care, to adopt a rule which should insure his being held in his seat by physical force. *McKimble v. Boston & Maine Railroad*, 139 Mass. 542, 2 N. E. 97, and *Id.*, 141 Mass. 463, 5 N. E. 804, cited by the plaintiff, does not help him.

2. The judge was right in refusing to give the sixth ruling asked for. A failure to exercise the highest degree of care is slight negligence.

3. The seventh ruling requested was wrong. The term "gross negligence," in a case where the degree of care due is the highest degree of care, means that there has been a gross failure to exercise that degree of care.

4. There are degrees of care in cases under Rev. Laws, c. 111, § 267, by force of that act.

Exceptions overruled.

WARREN v. CITY ELECTRIC RY. CO. et al.

(Supreme Court of Michigan, Sept. 19, 1905.)

[104 N. W. Rep. 613.]

Electricity — Injuries — Inspection—Reasonableness.*—In an action for injuries caused by a live electric wire, the reasonableness of the inspection depends, not only on the condition of the line, but also on the nature of the danger to be feared.

Evidence—Judicial Notice.—Judicial notice will be taken of the fact that electricity is dangerous and so generally recognized.

Electricity — Care Required — Instructions—Prejudice.*—In an action for injuries caused by a live electric wire, an instruction requiring of defendant the exercise of such care as ordinarily careful and prudent persons would exercise in dealing with electricity under similar circumstances was not prejudicial to it.

Same—Time for Repairs—Question for Jury.—Plaintiff's child was injured by coming in contact with a live telephone wire, which received its dangerous current from a trolley span wire belonging to defendant, through being pressed against the span wire by the limb of a tree, which was broken by a storm the previous evening at a considerable distance from the point where the wire parted and fell and where plaintiff was injured. There was evidence that the span wires were not properly insulated and were not protected from impact with other wires. Held, that whether defendant was guilty of negligence in these respects was for the jury, notwithstanding the short time that elapsed between the breaking of the wire and the accident in which to discover and make repairs.

Same—Proximate Cause.†—Where plaintiff was injured by coming

*For the authorities in this series on the question of the care required of street railways to prevent persons from being injured by their electric wires, see foot-note appended to *Metropolitan St. Ry. Co. v. Gilbert* (Kan.), 15 R. R. R. 428, 38 Am. & Eng. R. Cas., N. S., 428.

†For the authorities in this series on the question what is, or is not, the proximate cause of an injury, see foot-notes appended to *Dean v. Oregon R. & Nav. Co.* (Wash.), 16 R. R. R. 237, 39 Am.

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in contact with a live telephone wire, which had been pressed down against an improperly insulated trolley span wire by the limb of a tree, which was broken by a severe storm the previous evening, the failure to guard the span wire and the want of insulation were concurring causes establishing a liability, and the breaking of the tree was not the sole proximate cause of the injury.

Evidence—Expert Testimony—Competency of Witness.§—In an action for injuries caused by a live electric wire, witnesses who were experienced in the use of certain alleged defective insulators used were entitled to testify as to their experience in their use, and to give their opinion as to their effectiveness, as well as their tendency to fall into disuse in places where formerly used.

Same—Demonstrative Evidence.§—In an action for injuries caused by a live electric wire, it was proper to introduce an insulator or hanger in evidence which was alleged to be defective and insufficient.

Appeal—Review—Harmless Error.—In an action for injuries by a live electric wire, defendant was not prejudiced by a question, asked of its foreman on cross-examination, as to whether it was not common knowledge among defendant's employees that defendant's span wires were charged, where it did not appear that the witness admitted such fact.

Electricity—Personal Injuries—Actions—Evidence.—In an action for injuries by a live electric wire, which had become hot by contact with defendant's trolley span wire, it was proper to ask defendant's foreman on cross-examination whether he had not warned line-man against hot span wires.

Error to Circuit Court, St. Clair County; Harvey Tappan, Judge.

Action by Wells Warren, by his next friend, against the City Electric Railway Company and another. From a judgment in favor of plaintiff, defendant railway company brings error. Affirmed.

Argued before MCALVAY, BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ.

Phillips & Jenks, for appellant.

S. A. Graham and George G. Moore, for appellee.

HOOKER, J. The plaintiff, a lad of 11 years of age, was seriously injured by coming in contact with a live telephone wire, which lay upon the ground in a public street in Port Huron. The

& Eng. R. Cas., N. S., 237; foot-notes appended to Birmingham Ry. Light & Power Co. v. Brantley (Ala.), 15 R. R. R. 191, 38 Am. & Eng. R. Cas., N. S., 191; foot-notes appended to Snow v. New York, etc., R. Co. (Mass.), 15 R. R. R. 47, 38 Am. & Eng. R. Cas., N. S., 47; foot-notes appended to Illinois Cent. R. Co. v. McIntosh (Ky.), 14 R. R. R. 738, 37 Am. & Eng. R. Cas., N. S., 738; foot-note appended to Glassey v. Worcester Con. St. Ry. Co. (Mass.), 14 R. R. R. 736, 37 Am. & Eng. R. Cas., N. S., 736; foot-notes appended to Wabash R. Co. v. Billings (Ill.), 14 R. R. R. 203, 37 Am. & Eng. R. Cas., N. S., 203.

§For the authorities in this series on the question of the admissibility of expert and opinion evidence, see foot-note appended to Schultz v. Union Ry. Co. (N. Y.), 15 R. R. R. 777, 38 Am. & Eng. R. Cas., N. S., 777.

§See extensive note appended to Louisville Ry. Co. v. Hoskins' Adm'r (Ky.), 17 R. R. R. 484, 40 Am. & Eng. R. Cas., N. S., 484.

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proof shows that the telephone wire received its dangerous current from a trolley span wire belonging to appellant, through its being pressed down upon said span wire by the limb of a tree, which was broken by a severe storm the previous evening, at a considerable distance from the point where the wire parted and fell, which was the place where the boy was injured. Action was brought against the telephone company and the appellant, and a verdict and judgment of \$9,000 was returned against the latter; a verdict being directed in favor of the telephone company. The acts of negligence charged against appellant were as follows: (1) Failure to properly insulate the span wires of the trolley line; (2) to properly and at reasonable time inspect said insulation; (3) to place guard wires over the span wires, to prevent contact with other wires; (4) to remove such other wires as should come in contact with the span wires. There was proof tending to show that the insulators used were ineffective, and that they were not reasonably safe and fit for the purpose. There was also testimony as to the nature and frequency of inspections.

These questions were for the jury, unless it can be said that the proof as to the former was improperly admitted and that the inspection was conclusively shown to be reasonable. Whatever may be said of the former, we cannot say as matter of law that the inspection proved was reasonable and proper. That is a question for the jury, depending as it does upon the condition of the line and the nature of the danger to be feared. The frequency and care required in inspections depend much upon the character of the apparatus, or machinery, or other agent from which danger is to be feared, and as its destructiveness and danger is increased the duty of care increases. In other words, the degree of hazard attending the use of a dangerous article has a direct relation to the care which is requisite in its use. Electricity is to be classed with gunpowder, dynamite, and other treacherous and destructive agents, of whose dangerous qualities we may take judicial notice, as well as of the fact that society recognizes them, and acts accordingly. No prudent man handles these things with a low degree of caution. We find it unnecessary to say, as some courts have said, that the use of electricity imposes the duty of the greatest possible care. The circuit judge did not so charge, but contented himself with saying that the duty requisite was such as ordinarily careful and prudent persons would exercise in dealing with electricity under similar circumstances. This was sufficiently favorable to the defendant, although it involved the idea, before expressed, that the nature of the hazard is an element in determining the question. The frequency and nature of the inspections required depend in a measure upon this. The following authorities, suggested by plaintiff's brief, show the trend of decisions upon this subject: *Friesenhan v. Telephone Co.*, 134 Mich. 292, 96 N. W. 501; *Wolpers v. N. Y. & Q. Elec. Co.* (Sup. 86 N. Y. Supp. 845; *Paine v. Elec. Co.* (Sup.) 72 N. Y. Supp. 279; *Will v. Edison Co.* (Pa.) 50 Atl. 161, 86 Am. St. Rep. 732; *Denver Con. Electric Co. v. Lawrence*,

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(Colo. Sup.) 73 Pac. 39; Economy L. & P. Co. v. Hiller (Ill.) 68 N. E. 72; Memphis St. Ry. v. Kartright (Tenn.) 75 S. W. 719; Lexington Ry. Co. v. Fain (Ky.) 71 S. W. 628; Lutolf v. United Elec. Co. (Mass.) 67 N. E. 1026; Richmond & P. Elec. Ry. Co. v. Rubin (Va.) 47 S. E. 834; Keasbey, Elec. Wires, §§ 242, 269; 3 Current Law, 1182; 1 Current Law, 996; City Elec. Co. v. Conery, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262; 3 Current Law, 1185.

Counsel contend that the evidence shows that a reasonable time for appellant to discover the danger and make repairs had not elapsed, and that the jury should have been so instructed. Were it conclusively shown that defendant's line was in such perfect condition that the live wire was only chargeable to the effect of an extraordinary storm, this point would merit more consideration. But there was a claim of negligence in not properly insulating the span wire and in not protecting it from the impact of other wires, both of which questions were for the jury.

In this connection it is urged that the proximate cause of the injury was not the want of insulation, nor the failure to guard the span wire, but it was the breaking of the tree. It is generally the case that an accident is the result of concurring causes. If the rain and snow never fell and the wind never blew, wires would be less likely to fall and break. In this case the span wire was hot where it was not intended to be. The telephone wire was pressed upon it when it was not so intended. The wire burned in two from the intense heat taken off from the span wire, and the ends fell. All of these were things to be anticipated and guarded against. If this was not done to the extent that a prudent man would do it, there was a failure of duty, which might be a concurring cause of the accident, making defendant liable. Thus we held that, where a horse was caused to struggle and injure his master through getting his foot through a hole in a bridge, the defect in the bridge was a proximate cause, of the accident.

One Wager was allowed to testify to efficiency of the insulators used to prevent hot span wires. He was not permitted to testify that they were unfit, but gave his experience in their use. He said he came in contact with many hot span wires during the five years that he worked where such insulation were used in Lapeer and Port Huron. Harry Hoffman, shown, we think, to be experienced and an expert, gave his experience and also his opinion as to the effectiveness of this kind of insulators, as well as their tendency to fall into disuse in places where formerly used. We think that both of these witnesses were competent to give opinions upon the effectiveness of these insulators; also, that it was proper to introduce the insulator or hanger in evidence.

Walker, a foreman of defendant, was asked on cross-examination if it was not common knowledge and common talk among the defendant's employees that the span wires were charged. If this was not proper on cross-examination, the answer did not injure defendant; for our attention is not called to an admission

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that it was so. It was not improper to show on cross-examination that he may have warned linemen against hot span wires.

It is claimed that the damages were excessive. On motion for a new trial they were reduced to \$6,000, in which plaintiff acquiesced. The injury was serious, and we think the judgment should not be reversed on this ground.

Complaint is made of the intemperate discussion of the case, but we are not satisfied that defendant was injured by what was said. We think it unnecessary to discuss other questions.

We have found no error, and the judgment is affirmed.

DRYDEN v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, May 1, 1905.)

[61 Atl. Rep. 249.]

Accident at Railroad Crossing—Contributory Negligence.*—Where the evidence in an action against a railroad company shows that deceased, killed at a railroad crossing, could not have looked and listened at any reasonable place before driving on the track, the speed of the train, the distance at which it might have been seen from the crossing, or that the crossing was particularly dangerous, are immaterial.

Same.†—Where decedent, who had hired a buggy and a driver, was not driving himself at the time of an accident at a crossing, his widow cannot recover for injuries received, where contributory negligence was conclusively established.

Appeal from Court of Common Pleas, Berks County.

Action by Elizabeth S. Dryden against the Pennsylvania Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The facts as stated by the court were as follows: On the forenoon of August 21, 1901, the plaintiff's husband hired a buggy, with driver, in Leesport, to go to a nearby place. The road crosses the railway diagonally at grade, and then runs almost parallel with it for some distance, at a level depressed below that of the railway, a hedge intervening between the two. On the opposite side of the road, and between it and a canal, there is a line of willow trees arching over the road. Returning along

*For the authorities in this series on the subject of the combined effect of negligence and contributory negligence in actions for injuries sustained at railroad crossings, see foot-note appended to *Cowen v. Dietrick* (Md.), 17 R. R. R. 359, 40 Am. & Eng. R. Cas., N. S., 359; foot-notes appended to *Woolf v. Washington Ry. & Nav. Co.* (Wash.), 16 R. R. R. 846, 39 Am. & Eng. R. Cas., N. S., 846; foot-note appended to *Feitle v. Chicago City Ry. Co.* (Ill.), 14 R. R. R. 798, 37 Am. & Eng. R. Cas., N. S., 798.

†See foot-notes appended to *Hampel v. Detroit, etc., Ry. Co.* (Mich.), 14 R. R. R. 732, 37 Am. & Eng. R. Cas., N. S., 732; *Evensen v. Lexington & B. St. Ry. Co.* (Mass.), 14 R. R. R. 159, 37 Am. & Eng. R. Cas., N. S., 159; foot-note appended to *Lightfoot v. Winnebago Traction Co.* (Wis.), 14 R. R. R. 1, 37 Am. & Eng. R. Cas., N. S., 1.

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this road at a leisurely pace, with the top of the buggy raised, but without curtains, the team collided at the crossing with an express train going south, and both men were killed. Before reaching the turn in the road towards the track, which begins about 60 feet from the center of the track, there is a railway crossing caution board. At a point further on in the approach to the crossing, and variously stated to be 15, 23, and 36 feet from the track, there is an unobstructed view of the same to the north for at least 1,325 feet, to a whistling board. There the whistle of the train was sounded. There is nothing to indicate that the horse had become frightened and unmanageable. The train was slightly behind time, and was running fast; the engineer, called by plaintiff, says 60 miles an hour, though from the testimony of some of the plaintiff's other witnesses the speed may be figured up to 90 or 100. The court entered a compulsory nonsuit which it subsequently refused to take off.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and ELKIN, JJ.

H. R. Green and Henry Maltzberger, for appellant.

Cyrus G. Derr, for appellee.

PER CURIAM. The learned judge below, after stating the facts in his opinion refusing to take off the nonsuit, continued: "The collision occurred the instance the carriage reached the track. There was testimony that the sound of the locomotive whistle was liable to be obscured by the hedge, etc., already referred to. But, no matter to what extent that may be true, and no matter which of the figures named are accepted as correctly giving the speed of the train or the distance from the crossing at which it might have been seen by the occupants of the buggy, it is too plain for dispute that they could not have stopped, looked, and listened at any reasonably proper place without seeing the train close upon the crossing, and realizing the manifest peril of an attempt to pass ahead of it. *Holden v. Penna. R. R. Co.*, 169 Pa. 1, 32 Atl. 103. The failure to do so constitutes per se such negligence as bars a recovery. *Penna. R. R. Co. v. Beale*, 73 Pa. 504, 13 Am. Rep. 753; *Whitman v. Penna. R. R. Co.*, 156 Pa. 175, 27 Atl. 290; *Gray v. Penna. R. R. Co.*, 172 Pa. 383, 33 Atl. 697; *Gleim v. Harris*, 181 Pa. 387, 37 Atl. 515. Nor, in view of the contributory negligence thus conclusively established, is it of any importance to inquire whether this crossing was particularly dangerous, or, assuming it to be such, whether there may not have been negligence in the defendant company in running its trains at so great a speed over it. Where the bar of contributory negligence is not in the way, these questions may arise. *Ellis v. Lake Shore, etc., R. R. Co.*, 138 Pa. 506, 21 Atl. 140, 21 Am. St. Rep. 914. But the exceptionally dangerous character of a crossing has a bearing upon the degree of care to be exercised by the traveler as well as of the railway company using it. The greater the danger of the crossing, the more obligatory the duty of the traveler approaching it to stop; and, if unable to get a sufficient view from

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his carriage, then to get out of it, and go forward on foot. *Penna. R. R. Co. v. Beale*, 73 Pa. 504, 13 Am. Rep. 753; *Kinter v. Penna. R. R. Co.*, 204 Pa. 497, 54 Atl. 276, 93 Am. St. Rep. 795. The matter of speed, on the other hand, is wholly immaterial where, so far as the evidence goes, it is manifest that the party injured could not have been caught by the engine except for his failure to use his senses and heed the warning they were bound to give him had he used them. Nor can it be contended that these principles are inapplicable here because the plaintiff's husband was not the driver of the horse drawing the carriage in which he rode. The rule in *Borough of Carlisle v. Brisbane*, 113 Pa. 544, 6 Atl. 372, 57 Am. Rep. 483, *Carr. v. Easton*, 142 Pa. 139, 21 Atl. 822, *Finnegan v. Foster Tp.*, 163 Pa. 135, 29 Atl. 780, and similar cases, is predicated of the negligence of a voluntary carrier, over whose actions and omissions the persons riding with him and injured had no rightful control, not of one hired by, or for the time being in the employ of, such person, and subject to his direction and restraint. As shown by the decisions in *Crescent Tp. v. Anderson*, 114 Pa. 643, 8 Atl. 379, 60 Am. Rep. 367, and *Dean v. Penna. R. R. Co.*, 129 Pa. 514, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733, even in the former class of cases the immunity accorded is not absolute to the extent of excusing reasonable caution in the face of patent danger."

The judgment is affirmed on this opinion.

ALABAMA GREAT SOUTHERN R. CO. v. CLARK.

(Supreme Court of Alabama, June 30, 1905.)

[39 So. Rep. 816.]

Railroads—Fires—Contributory Negligence—Vicarious Negligence.*

—In an action against a railroad for burning cotton in a warehouse by negligently emitting sparks from its engine, contributory negligence of the warehouse company in permitting other cotton to remain on the open platform of the warehouse, where it was liable to be set on fire by sparks, was not chargeable to plaintiff, who had intrusted his cotton to the warehouse company.

Appeal—Assignments of Error—Complaint of District Rulings.—An assignment of error to the sustaining of several causes of demurrer to several pleas will be overruled, if any of the causes of demurrer were properly sustained.

Damages—Assessment—Questions for Jury.—In an action for the negligent destruction of cotton, where plaintiff proves the market price of cotton, but fails to prove the grade of the cotton destroyed,

*For the authorities in this series on the subject of imputed negligence, see foot-notes appended to *Colorado & S. Ry. Co. v. Thomas* (Colo.), 17 R. R. R. 167, 40 Am. & Eng. R. Cas., N. S., 167; foot-notes appended to *Markowitz v. Metropolitan St. Ry. Co.* (Mo.), 16 R. R. R. 838, 39 Am. & Eng. R. Cas., N. S., 838; foot-notes appended to *Sluder v. St. Louis Transit Co.* (Mo.), 16 R. R. R. 293, 39 Am. & Eng. R. Cas., N. S., 293; *St. Louis & S. F. R. Co. v. McFall* (Ark.), 16 R. R. R. 243, 39 Am. & Eng. R. Cas., N. S., 243; *Chicago Traction Co. v. Leach* (Ill.), 16 R. R. R. 220, 39 Am. & Eng. R. Cas., N. S., 220.

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whether it should be presumed that plaintiff's cotton was of the average grade or of the lowest grade is a question for the jury.

Railroads—Fires—Evidence.—In an action against a railroad for destroying property by negligently emitting sparks from an engine, evidence of what the engine was doing a little before or about the time the fire was discovered at and near the place of the fire was admissible on the question as to whether the fire was caused by a spark from the engine.

Same—Actions—Question for Jury.—In an action against a railroad for destroying property by negligently emitting sparks from an engine, whether the engine was operated near enough in point of time and position, and in the proper direction with reference to the wind, to have caused the fire, was a question for the jury.

Witnesses—Impeachment—Contradictory Statements.—A paper containing a series of questions and answers relating to matters in issue, taken down in shorthand during a conversation between a witness and another and read over to the witness, but not signed by him, was read to the witness on the trial, and he identified it as the paper previously read to him, and said that he stated that it was correct, except in certain specified particulars. The person with whom the conversation was had then identified the paper as the one which was read to the witness, and testified that the witness stated that it was all correct, and did not deny anything contained in it. Held, that the paper was admissible in impeachment of the witness.

Railroads—Fires—Destruction of Property—Actions—Evidence.—In an action against a railroad for destroying property by negligently emitting sparks from an engine, plaintiff's counsel was properly permitted to ask a witness for defendant on cross-examination whether the railroad men were not hurrying the movements of the engine.

Same—Instructions.—In an action against a railroad for destroying property by negligently emitting sparks from an engine, a charge that the uncontroverted evidence showed that the engine was in good condition was properly refused, where there were circumstances from which the jury were at liberty to infer that the engine was not properly equipped, especially with reference to its spark arrester.

Same.—In an action against a railroad for destroying property by negligently emitting sparks from an engine, instructions that plaintiff was not entitled to recover if defendant's engine was carefully operated, nor unless it was improperly handled, were properly refused, in that they ignored the condition of the engine as to its appliances for preventing fires.

Appeal from Circuit Court, Greene County; S. H. Sprott, Judge.

"To be officially reported."

Action by J. P. Clark against the Alabama Great Southern Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed on rehearing.

Rehearing denied January 9, 1906.

Statement A, referred to in the opinion, was a series of questions and answers which were propounded to Henry Pippin by Mr. Smith and answered by said Pippin. It was shown by the testimony of Pippin and Smith that this conversation took place between them previous to the trial, was taken down in shorthand and read over to Henry Pippin, but not signed by him. The same related to the conditions surrounding the depot and warehouse, the operation of trains, and his knowledge of what occurred just previous to the fire and during the continuance of

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the fire. Plaintiff's counsel on cross-examination asked witness Hinds this question concerning the movement of the cars and engines in the yards: "You were hurrying the work up, were you not?" Defendant objected to this question. The court overruled the objection, and witness answered: "We were doing the switching in the usual way. We hurried every day. We do it as quickly as we can in order to make the time." The defendant moved to exclude this testimony, and the court overruled the motion. Plaintiff's counsel asked witness Gray on direct examination: "What was the first thing that you observed that the engine did there?" Witness answered: "It was on the main line, and was pulling a car right where the seed house was. This car was about half way of the seed house, and the engine was pushing it north up the track." There was objection to the question and answer, which was overruled.

The following charges, requested by defendant, were refused: "(4) The court charges the jury that the evidence is uncontroverted that the engine which it is alleged caused this fire was in good condition at the time of the injury complained of. * * * (23) If the jury should believe from the evidence that the damage complained of in the complainant's complaint was caused by sparks from the defendant's engine run and operated on its road, the plaintiff is not entitled to recover if the jury should further believe from the evidence that the defendant's engine was carefully operated by a competent person near and around the warehouse on the day of the fire. (24) The court charges the jury that, unless they believe from the evidence that defendant's engine was improperly handled at the time of the fire, they must find for the defendant."

A. G. & E. D. Smith and L. P. Pounders, for appellant.

Harwood & McKinley and Vandergraff & Sprott, for appellee.

SIMPSON, J. This was an action for damages for the burning of 115 bales of cotton of the plaintiff (appellee) in the warehouse of the Planters' Warehouse & Commission Company, at Eutaw, Ala.; and it is claimed that said burning was caused by the negligence of defendant (appellant), from whose engine it is claimed sparks were emitted, setting fire to cotton on the platform adjoining said warehouse, which fire extended to the warehouse, destroying plaintiff's cotton. Defendant claimed that the warehouse company was guilty of contributory negligence in permitting cotton to remain on the open platform, where it was liable to be set on fire by sparks necessarily escaping from defendant's engines in the necessary prosecution of its business.

The first point raised by the argument is whether or not the plaintiff can be held liable for the consequences of the contributory negligence of the warehouse company, to which plaintiff had committed the care of its cotton. The doctrine of contributory negligence is based upon the principle that the plaintiff, having been guilty of negligence which proximately contributed to the injury received or the loss sustained, cannot recover be-

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cause he himself is in part responsible for it, although the defendant may also have been negligent. Without passing upon this general principle, the court holds that in this case the negligence complained of, being something not immediately connected with the bailment, to wit, placing other cotton on the platform, which had no necessary connection with the act of storing the plaintiff's cotton, the plaintiff could not be charged with contributory negligence on that account.

One assignment of error is to the sustaining of all of the 54 causes of demurrer against the pleas numbered from 2 to 8 inclusive, so that, if any one of the causes of demurrer was properly sustained, the assignment is not sustained. We have treated the matter as argued.

While it is true that the burden was on the plaintiff to prove the quality of his cotton which was burned, yet one of the elements necessary in ascertaining what his cotton was worth was the prevailing price of cotton in that market; and if the plaintiff failed to produce proof as to the other elements, then it was a matter of argument to go to the jury as to whether they had sufficient data from which to ascertain the liability, and as to whether, in the absence of proof, they should presume that the cotton of plaintiff was of the average grade or of the lowest grade. *Berry v. Nall & Duxeberry*, 54 Ala. 446.

Referring to the objection made to the question to the witness Gray, and the answer thereto, about the "pulling" of a car by the the engine, as the claim of the plaintiff was that the fire was caused by a spark from the engine, it was proper to allow proof as to what the engine was doing a little before, or about the time the fire was discovered, at and near the place of the fire, as a circumstance from which, with other evidence, the jury could determine whether or not the spark from the engine caused the fire. As to whether the operation of the engine was near enough, in point of time and position, and in the proper direction with reference to the wind, to have caused the fire, were matters for the consideration of the jury.

It is competent to impeach a witness by proving contradictory statements about a material matter made out of court, and it is not necessary that such contradictory statements should be signed, or even to be in writing. A certain paper was read to the witness Pippin, and the witness identified it as the paper which had been read to him the night before by Mr. Smith, and that "he stated to Mr. Smith that it was all correct, except the fire being at the covered platform; that he also stated that this statement was not correct with reference to that part of it; that he stated, also, that it was not correct in that he said the engine was standing before coming from the upper part of the yard." Mr. Smith also identified the paper as the one which had been read to the witness, and testified that the witness said that it was all correct, and "that he did not deny anything in that statement, either by intimation or by direct declaration." When this case was first before the court, there being a large "A" in the space, referring to the state-

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ment "which is as follows," this was understood as a reference mark to an exhibit which could not be found; but it appears now that the "statement," which consists of a series of questions and answers, and which the court at first considered only as a continuation of the cross-examination of the witness, is in the record, and the court holds that the trial court erred in sustaining the objection to the introduction of such statement, after it had been identified and referred to in the testimony of two witnesses. 1 Wigmore on Evidence, § 754; *Foster & Rudder v. Smith*, 104 Ala. 248, 16 South. 61.

In view of the latitude allowed in cross-examination, it was competent to prove the manner in which they were operating the engine. There was no reversible error in overruling the objections to the question to the witness Hines.

There was no error in refusing to give charges numbered 4, 23, and 24, requested by defendant. As to charge 4, while there was no direct proof as to the condition of the engine, except that produced by defendant, yet there were circumstances from which it was proper to leave it to the jury to consider whether the engine was properly equipped, and particularly as the spark arrester was submitted for their inspection, and it was for them to examine it and determine, in connection with other evidence, whether it was a proper appliance. Charge 23 ignores entirely the condition of the engine as to appliances for preventing fires, and the same remark applies to charge 24.

The judgment of the court is reversed, and the cause remanded.

MCCLELLAN, C. J., and TYSON, DOWDELL, and DENSON, JJ., concur.

ELLINGTON v. GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota, Nov. 10, 1905.)

[104 N. W. Rep. 827.]

Railroads—Operation of Road—Personal Injuries—Negligence.*—

To render a railroad company liable for injuries resulting from the operation of its trains or other conduct of its business and affairs, it must appear that the company failed in the performance of some duty it owed to the injured party.

Same—Injuries to Trespasser.†—A railroad company as a general rule owes no duty to a trespasser upon its premises, child or adult, except to refrain from wantonly or willfully injuring him.

Same—Injuries to Child.‡—On the facts disclosed by the record, which are stated in the opinion, it is held that plaintiff's intestate was, at the time of the injury resulting in his death, to recover for which

*See generally, extensive note appended to *Thomason v. Southern Ry.* (S. Car.), 17 R. R. R. 226, 40 Am. & Eng. R. Cas., N. S., 226.

†For the authorities in this series on the question of the care due licensees and trespassers, see foot-note appended to *Means v. Southern Cal. Ry. Co.* (Cal.), 13 R. R. R. 411, 36 Am. & Eng. R. Cas., N. S., 411; *Quantz v. Southern Ry. Co.* (N. Car.), 15 R. R. R. 259, 38 Am. & Eng. R. Cas., N. S., 259; *Fremont, etc., R. Co. v. Hagblad* (Neb.),

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this action was brought, a trespasser upon defendant's premises, and defendant owed him no duty to discover his presence thereon before moving cars which ran upon and killed him. The general rule that a railroad company is under no legal obligation to keep a lookout for trespassers upon its premises, adults or children, except to avoid injury to them after discovering their presence, applies.

Same—Fences.—A fence constructed in accordance with the provisions of Gen. St. 1894, § 2055, is a sufficient compliance with the statutes requiring a railroad company to fence its right of way, even though the road so fenced extends parallel to and within 100 feet of a public highway.

Same—Statutes—Repeal.—Gen. St. 1894, § 2698, requiring every railroad company to fence its line of road, when operated along and within 100 feet of a public highway, with a suitable and substantial post and board or stone fence, was repealed by implication by the statutory enactments referred to in the opinion.

Same—Failure to Fence—Negligence.†—The failure of a railroad company to fence its road as required by statute is prima facie, but not conclusive, evidence of negligence. When not fenced, the question whether a properly constructed fence would have prevented a child of tender years from going upon the right of way is a question of fact.

(Syllabus by the Court.)

Appeal from District Court, Polk County; William Watts, Judge.

Action by Lewis Ellington, administrator of Hans Hermand Arneson, against the Great Northern Railway Company. Verdict for defendant. From an order denying a new trial, plaintiff appeals. Affirmed.

Ole J. Vaule and Wm. P. Murphy, for appellant.

M. L. Countryman and A. C. Wilkinson, for respondent.

BROWN, J. The facts in this case are as follows: The line of defendant's railroad extends through the village of Carman, a suburb and within the limits of the city of Crookston. In the vicinity of the place where the accident complained of occurred its yards are located, within which are a coal shed, icehouse, and

15 R. R. R. 226, 38 Am. & Eng. R. Cas., N. S., 226; *Anderson v. Seattle-Tacoma Interurban Ry. Co.* (Wash.), 14 R. R. R. 380, 37 Am. & Eng. R. Cas., N. S., 380.

For the authorities in this series on the question of the care due trespassing children, see foot-note appended to *Mattson v. Minnesota & N. W. R. Co.* (Minn.), 16 R. R. R. 502, 39 Am. & Eng. R. Cas., N. S., 502.

For the authorities in this series on the subject of the duty to look-out for trespassing children, see foot-notes appended to *Wagner v. Chicago & N. W. Ry. Co.* (Iowa), 14 R. R. R. 749, 37 Am. & Eng. R. Cas., N. S., 749 (on or about cars); foot-notes appended to *Jordan v. Grand Rapids & I. Ry. Co.* (Ind.), 13 R. R. R. 397, 36 Am. & Eng. R. Cas., N. S., 397; foot-notes appended to *Monehan v. South Covington & C. St. Ry. Co.* (Ky.), 12 R. R. R. 671, 35 Am. & Eng. R. Cas., N. S., 671.

†For the authorities in this series on the subject of the liability of railroad companies for injuries to children as affected by failure to fence right of way, see foot-notes appended to *Dalin v. Worcester Consol. St. Ry. Co.* (Mass.), 16 R. R. R. 476, 39 Am. & Eng. R. Cas., N. S., 476.

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several side tracks, all upon the right of way. The land on each side of the track is platted into lots and blocks, with a street extending along the line of and between the right of way and the platted lots; but no streets extend across the right of way. Deceased, a boy four years of age, lived with his parents on one of the platted lots, a short distance away, where they had resided for some time prior to the accident. On August 9, 1904, at about 7:30 o'clock in the evening, the servants of defendant backed one of its engines down the side track leading to the coal shed for the purpose of taking on coal. Two freight cars stood in the way on the same track, and the engineer pushed or "shunted" them forward a distance of 200 feet or more, where they collided with and were stopped by a loaded car standing further down this track. The impact sent the loaded car forward 30 or 40 feet. Soon after plaintiff's intestate was found dead underneath the forward end of the two cars so shunted down the track. How the child came to be at the point of collision between the cars, or just how the accident happened, was not made clear by the evidence. There was evidence showing that his parents had, just prior to the accident, sent him on an errand to a neighbor living on the opposite side of the track. This action was brought to recover for the boy's death upon two grounds of alleged negligence: First, that defendant had failed and neglected to fence its right of way at the place of the accident; and, second, that the servants and agents of defendant were negligent and careless in the manner of moving the cars which stood in the way of the approach of the engine to the coal shed, and that no precautions were taken before doing so to ascertain whether any children or others were in or about the yards at a place of danger. The defense was, in addition to the contention that the absence of the fence was not the proximate cause of the accident, that the parents of deceased were guilty of contributory negligence in sending him on an errand to the neighbor residing at the opposite side of the yards; there being no crossing over the right of way at this place. The jury returned a verdict for defendant, and plaintiff appealed from an order denying his motion for a new trial. Several errors are assigned, which will be disposed of in the order stated in the brief.

1. It was conceded on the trial that the right of way was not fenced as required by statute, and the trial court instructed the jury that such failure on the part of defendant constituted evidence of negligence on its part, but submitted to them the question whether the absence of the fence was the proximate cause of the accident; and, further, that a fence constructed in accordance with the provisions of section 2055, Gen. St. 1894, would be a compliance with the law requiring defendant to fence its right of way, and left it to the jury to say whether such a fence, had it been constructed, would have prevented the deceased from going upon the track at the time in question. It is contended on the part of plaintiff that the court erred in these instructions. We are unable to concur in this contention. Section 2692, Gen.

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St. 1894, requires all railroad companies owning or operating a railroad in this state to build and maintain a good and sufficient fence on each side of such road, and section 2693 provides that a failure of the company to comply with this requirement shall be deemed evidence of negligence on its part. In construing this statute, we have never held that a failure of compliance therewith was conclusive evidence of negligence. The most the court has said in any case has been declaratory of the statute, which makes such failure evidence of negligence against the company. Gen. St. 1894, § 2693; *Rosse v. Duluth Ry. Co.*, 68 Minn. 216, 71 N. W. 20, 37 L. R. A. 591, 64 Am. St. Rep. 472. It was in this view of the law that the trial court submitted to the jury the question whether, if a proper fence at the place of this accident had been erected, it would have prevented the deceased from going upon the right of way. It was held in the case of *Halverson v. M. & St. L. Ry. Co.*, 32 Minn. 88, 19 N. W. 392, that as to certain animals, such as horses, it would be clear, as a matter of law, that a fence would "turn" them, and as to other animals, such as sheep or swine, it would be a question of fact depending upon the size of the animal; and in a case like that at bar, whether a fence constructed as required by law would prevent children from passing it and going upon the right of way is a question of fact, to be determined according to the facts and circumstances presented by the evidence. In *Fezler v. Willmar & Sioux Falls Ry. Co.*, 85 Minn. 252, 88 N. W. 746, it was held as a matter of law that the absence of the fence was not the proximate cause of the injury there complained of. So on this feature of the case the trial court correctly instructed the jury.

It is also urged that the court erred in stating to the jury that a fence constructed in accordance with the provisions of section 2055, Gen. St. 1894, would be a compliance with the railroad fence law; it being insisted, in this connection, that as the right of way in question extended along and adjacent to a public street, the company was required to fence the same in accordance with the provisions of section 2698. That statute was passed in 1870, and is the first railroad fence law enacted by our Legislature. It provides that it shall be the duty of every railroad corporation within this state to cause its line of road, when operated along or upon the line of any public road or highway, or parallel thereto and within 100 feet distant therefrom, to erect and maintain a suitable and substantial post and board or stone fence, at least 5 feet in height, along or near the line of its road, so as to separate the same from the highway and prevent the passage of teams or animals over the track at places other than regular and properly constructed crossings. It is insisted that this statute is still in force, and that, as the evidence is conclusive of defendant's failure to comply with it, the court erred in instructing the jury that the fence provided for by section 2055 was sufficient. An examination of the various statutes on this subject leads to the conclusion that this statute has been repealed. Subsequent to its enactment the Legislature passed section 2692

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(chapter 24, p. 40, Gen. Laws 1876), by which all railroad companies were required to fence their tracks by good and substantial fences, and for a failure to do so imposed a liability for all damages suffered by any person in consequence of such neglect. Section 2055 was passed long subsequent to the passage of section 2698, and was held in *Halverson v. M. & St. L. Ry. Co.*, *supra*, to apply to railroad companies. That section provides that, in all cases where any law of this state requires to be erected or maintained any fence or fences for any purpose whatever, it shall be a sufficient compliance with such law if there shall be erected and maintained a barbed wire fence, consisting of two barbed wires and one smooth wire, with at least 40 barbs to the rod; the wire to be firmly fastened to posts not more than two rods apart. The language of that statute is broad and comprehensive, and must be taken to have been intended by the Legislature to cover the entire subject of fences; and, though repeals by implication are not favored, the conclusion is unavoidable that section 2698 was thereby repealed. We have examined the decisions of the court where the duty of a railroad company to fence its right of way has been involved, and in no case is section 2698 relied upon or referred to. From this, in view of the fact that many miles of railroad in this state extend along public highways, and this particular statute has never been invoked, the inference arises that it has been considered as repealed.

2. It is further insisted that the court erred in taking from the jury the question whether defendant was guilty of negligence in not taking precautions, before moving the cars which ran upon and killed the child, to ascertain if any children or other persons were in or about the yards. It is claimed that young children were in the habit of frequenting the right of way in this immediate vicinity, and that such practice was known to the agents of defendant, in view of which counsel contends that it was the duty of the company, before moving the cars about the yard, to take some steps to ascertain whether children were there, and, if so, to guard against injuring them. There was no error in the action of the court in withdrawing this question from the jury. The doctrine laid down by some of the courts, to the effect that a railroad company is under legal obligation to keep a constant lookout for trespassers particularly children and is liable for injuries resulting from a failure to do so, has never been followed or applied in this state. This court has steadily adhered to what seems to us the more just and equitable doctrine prevailing in most of the courts (23 Am. & Eng. Ency. Law [2d Ed.] 753), that to render a railroad company liable for injuries resulting from the operation of trains or other conduct of its business, it must appear that the company failed in the performance of some duty it owed the injured party; such failure being the proximate cause of the injury. *Akers v. C., St. P., M. & O. Ry. Co.*, 58 Minn. 540, 60 N. W. 669; *Wickenburg v. M., St. P. & S. S. M. Ry. Co.* (Minn.) 102 N. W. 713. We have always held that a railroad company owes no duty to a trespasser, except to refrain

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from wantonly or willfully injuring him. This rule has been applied both as to adults and children for many years. In *Scheffler v. M. & St. L. Ry. Co.*, 32 Minn. 518, 21 N. W. 711, it appeared that a child 18 months of age strayed from his home, a short distance from the railroad track, on the right of way at a point not a public crossing, and was killed by a passing train. The trial court charged the jury in that case that, if the engineer in charge of the train could by the exercise of reasonable care have seen the child upon the track in time to have averted the accident, the company was liable. On review in this court the instruction was held erroneous. In disposing of the question the court said that defendant did not owe the child, a trespasser, the duty of having its engineer look to see if he was upon the track, and therefore the fact that the engineer could have seen him if he had looked did not make the company liable. In *Hepfel v. St. P., M. & M. Ry. Co.*, 49 Minn. 263, 51 N. W. 1049, the court said: "A railway company is not ordinarily obliged to keep a lookout for trespassers, whether adults or children, on its cars or track, nor to presume that they will expose themselves to danger thereon; but, having notice of their presence and that they are in danger, its servants controlling the movements of its cars or machinery are bound to use reasonable care to avert it." See also, *Studley v. St. P. & D. Ry. Co.*, 48 Minn. 249, 51 N. W. 115.

The precise question here before us was presented and argued in the case of *Mattes v. G. N. Ry. Co.* (Minn.) 104 N. W. 234, and, though not covered by the opinion, it was not regarded as consistent with the rules on the subject theretofore applied in similar cases. Of course, in all cases where the presence of trespassers is known, proper care must be exercised to avoid injuring them. *Sloniker v. G. N. Ry. Co.*, 76 Minn. 306, 79 N. W. 168. And where the company expressly or by silent acquiescence permits its yards and premises to be frequented or used by the public generally, or permits such conditions respecting the use thereof to exist as to make it reasonable to anticipate the presence of trespassers, proper precautions must be taken to ascertain whether any are present, that injury to them may be avoided. But such is not this case. The evidence fails to show that the company, expressly or impliedly, permitted children to frequent its yards for the purpose of play or otherwise, and therefore no duty to anticipate their probable presence existed. No highway extended over the railroad yards, and we find no evidence in the record tending to show that people living in the vicinity were in the habit of crossing the track at this point or making use of the same as a highway. While the evidence shows that children were to some extent in the habit of going upon the yards—smaller ones at the icehouse, picking up particles of ice, and larger ones at the coal shed, shooting pigeons—it is clear that the agents of the company, whenever they were found there, drove them away, and the evidence does not show that they ever knowingly permitted them to remain. Deceased was not upon the

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premises as a licensee, by the express or implied invitation of defendant, but, on the contrary, was a trespasser, and the rule that a railroad company owes no duty to a trespasser, whether child or adult, except to refrain from knowingly or willfully injuring him after discovering his presence, applies. The only exception to this rule, so far as our decisions are concerned, is found in the so-called "turntable" and similar cases; but it can have no application to a case like that at bar. The doctrine of those cases is founded on the conduct of the owner of premises in keeping thereon unconcealed and unprotected dangerous instrumentalities, which are in their nature alluring and attractive to children of tender years. From such conduct on the part of the owner of the premises, the law implies an invitation to infants to enter thereon for the purpose of amusing themselves. But this court has declined to extend that doctrine to other cases, and it has been strictly limited to dangerous machinery and instrumentalities. *Keefe v. M. & St. P. Ry. Co.*, 21 Minn. 207, 18 Am. Rep. 393; *Mattson v. M. & N. W. R. Co.* (Minn.) 104 N. W. 443; *Erickson v. G. N. Ry. Co.*, 82 Minn. 60, 84 N. W. 462, 51 L. R. A. 645, 83 Am. St. Rep. 410; *Stendal v. Boyd*, 73 Minn. 53, 75 N. W. 735, 42 L. R. A. 288, 72 Am. St. Rep. 597; *Haesley v. W. & St. P. Ry. Co.*, 46 Minn. 233, 48 N. W. 1023, 24 Am. St. Rep. 220. Deceased was not lured or attracted to the railroad yards by unprotected machinery or other dangerous instrumentalities kept thereon by defendant, and the case does not come within the doctrine of the "Turntable Cases."

3. There was no error in the charge of the court on the subject of contributory negligence. From what has been said on the other branch of the case, it follows that defendant was not required to keep a lookout for trespassers, nor to exercise care to discover their presence upon its premises. The trial court correctly said to the jury that, if the parents of deceased sent him on an errand on the opposite side of the railroad yards, they were guilty of contributory negligence. There was no evidence that defendant's employees knew of the presence of deceased on the track, and the rule of willful and wanton negligence does not apply.

This disposes of all the assignments of error requiring especial attention and results in an affirmance of the order appealed from.

Order affirmed.

RIETVELD v. WABASH R. CO.

(Supreme Court of Iowa, Jan. 9, 1906.)

[105 N. W. Rep. 515.]

Railroads—Crossing Accident—Contributory Negligence*—Burden of Proof.—In an action for the death of one killed at a railroad crossing, the burden is not on defendant to show plaintiff's intestate guilty of contributory negligence.

Same—Instructions—Presumptions.—In an action for the death of one killed at a railroad crossing, defendant requested an instruction that, in the absence of eyewitnesses, there is a presumption, in the absence of other evidence, that deceased was exercising due care, but the presumption may be rebutted by evidence, and if the jury should find that plaintiff's intestate could not have been in the exercise of reasonable care, or by the exercise of his senses he could have discovered the train in time to have avoided the injury, the presumption as to due care was not to be given weight, unless there was other evidence from which the jury could find that plaintiff's intestate did not contribute to his injury. Held, that such instruction, or one similar in substance, should have been given.

Same—Comparative Negligence.†—In action for the death of one killed at a railroad crossing, the court instructed that, if deceased's negligence was the proximate cause of the accident, plaintiff could recover on the ground of defendant's negligence, and that by the term "proximate cause" was meant the cause which naturally led to and produced the result, and without which the injury would not have occurred. Held, that the instruction was erroneous, in that it virtually announced the rule of comparative negligence not prevailing in the state.

Trial—Instructions—Error Cured by Other Instructions.—In an action for the death of one killed at a railroad crossing, an instruction announcing a rule of comparative negligence was not rendered harmless by instructions stating the correct rule.

Death—Action—Who May Sue.—An administrator may sue for the death of his intestate, though he was an alien leaving no heirs or next of kin residents or citizens of the United States.

Evidence—Opinion Evidence.‡—In an action for the death of one killed at a railroad crossing, it was competent for one who had made actual observations as to the physical conditions of the crossing to state whether certain obstructions, conceded to exist, obstructed the view or were in the line of vision of the track.

*For the authorities in this series on the question whether there is a presumption of the exercise of due care by a person killed by a train or street car, see foot-notes appended to *Miller v. Boston & Maine R. Co.* (N. H.), 17 R. R. R. 564, 40 Am. & Eng. R. Cas., N. S., 564; foot-notes appended to *Texas & P. Ry. Co. v. Shoemaker* (Tex.), 14 R. R. R. 594, 37 Am. & Eng. R. Cas., N. S., 594; foot-notes appended to *Rollins v. Chicago, M. & St. P. Ry. Co.* (C. C. A.), 17 R. R. R. 291, 40 Am. & Eng. R. Cas., N. S., 291.

†For the authorities in this series on the subject of comparative negligence, see foot-notes appended to *Woolf v. Washington Ry. & Nav. Co.* (Wash.), 16 R. R. R. 846, 39 Am. & Eng. R. Cas., N. S., 846; foot-note appended to *Denver & R. G. R. Co. v. Maydole* (Colo.), 16 R. R. R. 762, 39 Am. & Eng. R. Cas., N. S., 762.

‡For the authorities in this series on the subject of the admissibility of expert and opinion evidence, see foot-notes appended to *Macon Ry. & Light Co. v. Mason* (Ga.), 17 R. R. R. 201, 40 Am. & Eng. R. Cas., N. S., 201; foot-notes appended to *Birmingham Ry., L. & P. Co. v. Enslen* (Ala.), 17 R. R. R. 127, 40 Am. & Eng. R. Cas., N. S., 127; *German Ins. Co. v. Chicago, etc., Ry. Co.* (Iowa), 16 R. R. R. 494, 39 Am. & Eng. R. Cas., N. S., 494.

Rietveld v. Wabash R. Co

Appeal from District Court, Marion County; James D. Gamble, Judge.

Action at law to recover damages for the death of plaintiff's intestate, who was struck and killed by one of defendant's trains at a highway crossing in Marion county, Iowa. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals. Reversed.

George S. Grover and Kinhead & Mentzer, for appellant.

DEEMER, J. Plaintiff's intestate and a companion, who were riding in a standing position in a bobsled, were struck and killed, at a place where a public highway crosses defendant's right of way, by a train which was being operated by defendant's employees. The negligence charged against these employees is failure to sound the whistle and to ring the bell of the engine as it approached the crossing, as required by statute. There is a conflict in the evidence regarding the giving of the statutory signals, and, as the jury settled this conflict in plaintiff's favor, we must treat the case as if the negligence charged was established.

The real question relates to the conduct of plaintiff's intestate at the time of and just before the accident occurred. Was he in the exercise of that care required of him in attempting to cross the right of way ahead of the engine? Plaintiff's intestate and his companion were each instantly killed, and the only eyewitness of the transaction was the engineer of the train which struck and killed the men. This engineer was a witness for the defendant. As bearing upon the question of contributory negligence, the trial court gave the following, among other instructions: "It is a recognized rule of human conduct that persons in their sober senses naturally and instinctively seek to avoid danger. Therefore it must be presumed, until the contrary appears, that the deceased in this case, prompted by this natural instinct, did exercise care in approaching and going upon the crossing in question. But whether the circumstances, as disclosed by the evidence as introduced on the trial hereof, are sufficient to overcome the presumption that deceased, prompted by the instinct of self-preservation, did exercise the care required of him under the law at the time of the injury, is a question for the jury, and for the jury alone, to determine." This instruction in effect cast the burden upon defendant of showing that plaintiff's intestate was guilty of contributory negligence, and was for that reason manifestly erroneous. *Bell v. Clarion*, 113 Iowa, 126, 84 N. W. 962. Instruction No. 15 was practically to the same effect, and was erroneous for the same reason. See, also, *Golinaux v. R. R. Co.* (Iowa) 101 N. W. 465; *Salysers v. Monroe*, 104 Iowa, 74, 73 N. W. 606.

Defendant asked the following instruction, intended to cover this point, which was refused: "You are instructed that, where there are no eyewitnesses to the accidental killing of a person by

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a railroad train, the presumption is, in the absence of other evidence and circumstances to the contrary, that the deceased was exercising due care, but this presumption is not conclusive, and may be rebutted by evidence to the contrary; and if then you find, taking into consideration the location of the highway with reference to said crossing, and the distance from said crossing on said highway, from which said approaching train could have been seen, and taking into consideration all other circumstances surrounding said injury, as disclosed by the evidence in this case, you will find that plaintiff's intestate could not have been at or immediately prior to said accident in the exercise of reasonable care on his part, or you find that by the exercise and use of his senses of seeing and hearing he could have discovered the approaching train in time to have avoided injury thereby, with the exercise of reasonable care on his part, then said presumption as to due care is not to be given any weight by you, and, unless there is other evidence from which you can find that plaintiff's intestate did not contribute to said injury by his own negligence, then your verdict should be for the defendant." This, or something conveying the same thought, should have been given. See *Ames v. Transit Co.*, 120 Iowa, 640, 95 N. W. 161; *Beem v. R. R. Co.*, 104 Iowa, 563, 73 N. W. 1045.

2. In instruction No. 10, the trial court said that a railroad company and a traveler passing over a highway crossing of a railroad right of way have equal rights at the crossing, and that each must be exercised with a view to the rights of the other, and in such a manner as not to interfere with them. This was followed by a statement that, while each have equal rights, the traveler must yield the right of way, and will be guilty of contributory negligence if he knowingly goes upon the track in the presence of an approaching train. Complaint is made of this instruction. It seems to have support in *Hart v. R. R.*, 56 Iowa, 166, 7 N. W. 9, 9 N. W. 116, 41 Am. Rep. 93, and *Black v. R. R.*, 38 Iowa, 515. The latter part of the instruction seems to bring it within the rule of these cases. Indeed, it seems to have been copied therefrom.

3. Instruction 11, given by the trial court, reads as follows: "Ordinarily, when a person is injured by a passing railway train upon a public highway or street crossing, and such injury has been caused by his own negligence and carelessness, he is not entitled to recover damages by reason thereof; and the burden is upon the plaintiff to establish by a preponderance of the evidence, not only that the injury complained of was caused by the negligence of the defendant, its officers, agents, or employees, but also that the person injured was free from negligence contributing thereto. And in this case if you find from the evidence that deceased's carelessness or negligence was the proximate cause of the accident causing the injury, then the plaintiff cannot recover on the ground of negligence alleged, to wit, the failure to sound the whistle or ring the bell, as alleged in the petition; and in such case you should find for the defendant. By the term

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"proximate cause" is meant the cause which naturally led to and produced the result complained of, and without which the injury would not have occurred." This was erroneous in the form in which it was given, in that it virtually announced the rule of comparative negligence which does not prevail in this state. Of course, the plaintiff's negligence must be such as contributes proximately to his injury; but, if it does so in whole or in part, in any manner or to any degree, there can be no recovery on his behalf. *Jerolman v. R. R.*, 108 Iowa, 177, 78 N. W. 855; *Banning v. R. R. Co.*, 89 Iowa, 74, 56 N. W. 277; *McAunich v. R. R.*, 20 Iowa, 338; *Muldowney v. R. R.*, 39 Iowa, 615; *Deeds v. R. R.*, 69 Iowa, 164, 28 N. W. 488. True, other instructions announced the correct rule, but there is no way of telling which one the jury followed in arriving at its verdict. *Kerr v. Topping*, 109 Iowa, 150, 80 N. W. 321.

4. Defendant contends that as plaintiff's intestate was an alien, who left no heirs or next of kin residents or citizens of this country, action by plaintiff as his administrator will not lie. That question is ruled adversely to it in *Romano v. Capital City Co.* (Iowa) 101 N. W. 437, 68 L. R. A. 132. The question of pleading, suggested by counsel, need not now be determined in view of the conclusion reached on the case as a whole.

5. In ruling on the admission and rejection of testimony, the trial court seemed to be of opinion that it was incompetent for one who had made actual observations as to the physical and topographical conditions of the crossing to state as to whether certain obstructions, conceded to exist, obstructed the view or were in the line of vision of the track east of the crossing, from which direction defendant's train which struck the intestate was coming. This was an erroneous view of the law. *Brown v. R. R. Co.*, 94 Iowa, 309, 62 N. W. 737; *Trott v. R. R.*, 115 Iowa, 80, 86 N. W. 33, 87 N. W. 722; *Bizer v. Bizer*, 110 Iowa, 248, 81 N. W. 465. Such questions called for facts, and not for mere opinions, and answers thereto should have been received. Plaintiff's counsel made a fervid and heated argument to the jury, and, if he did not pass outside the bounds of legitimate comment, he came so close to the line as to call for the suggestion that on a future trial, if one is had, it would be better to adhere more closely to the facts as disclosed by the evidence, and to omit all appeals calculated to arouse prejudice against the defendant because of its character, wealth, etc.

6. It is stoutly insisted that the evidence shows, without conflict or dispute, that plaintiff's intestate was guilty of such contributory negligence that there should be no recovery. Having no argument for appellee, we are not disposed to decide that question at this time. The case is close, and, in view of the reversal which must follow the errors above pointed out, we are disposed to let the case follow the ordinary channels, without making any pronouncement upon this proposition. The record

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may not be the same on another trial, and it does not seem necessary at this time to do more than point out the errors of law committed by the trial court.

For the reasons suggested, the judgment must be, and it is, reversed.

PALOS COAL & COKE CO. v. BENSON.

(Supreme Court of Alabama, Dec. 21, 1905.)

[39 So. Rep. 727.]

Master and Servant—Torts of Servant—Master's Liability.*—A master is not liable for the servant's torts, unless done in or about the duties assigned him, or in the accomplishment of objects within the line of his duties.

Same—Evidence.*—A mining company was not liable for an assault by its general superintendent on a driver of one of its cars while the superintendent was riding on it, in the absence of evidence that the assault was committed in pursuance of his duties.

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

"Not officially reported."

Action by Will Benson against the Palos Coal & Coke Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Plaintiff sues for \$5,000 damages for an assault and battery committed by one of the defendant's servants or agents, and avers that the agent of defendant, whose name is John Kelley, was then and there acting in the line of his said agency. The second count is for an assault and battery by the same person, and it alleges a willful, wanton, or intentional injury to plaintiff by striking him on the head with a hard substance by Kelley, who was superintendent and while in the exercise of such superintendence. The third count is the same as the first count. The proof showed that Kelley was the superintendent of all the defendant's mines at Palos, and that as such superintendent he had other superintendents under him. The plaintiff was a driver of cars for defendant, and while driving the car, and while Kelley was riding on his car, he struck him.

Ward & Drennen, for appellant.

Shugart & Bell, for appellee.

*See foot-note appended to *Peterson v. Middlesex & Somerset Traction Co.* (N. J.), 15 R. R. R. 672, 38 Am. & Eng. R. Cas., N. S., 672; foot-notes appended to *Waler v. Great Northern Ry. Co.* (S. Dak.), 14 R. R. R. 819, 37 Am. & Eng. R. Cas., N. S., 819; foot-note appended to *St. Louis, etc., Ry. Co. v. Grant* (Ark.), 17 R. R. R. 343, 40 Am. & Eng. R. Cas., N. S., 343; *Chicago Term. Transfer Co. v. Schiavone* (Ill.), 17 R. R. R. 339, 40 Am. & Eng. R. Cas., N. S., 339; *Berry v. Boston Elevated Ry. Co.* (Mass.), 17 R. R. R. 338, 40 Am. & Eng. R. Cas., N. S., 338; *Obertoni v. Boston & M. R. R.* (Mass.), 17 R. R. R. 332, 40 Am. & Eng. R. Cas., N. S., 332.

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SIMPSON, J. It is undoubtedly the law of this state, under former decisions, that a master, whether corporate or individual, is liable for the torts of the servant or employee, "done or caused to be done in or about the duties or business assigned to them"; but it is equally clear that this liability is "confined to abuses perpetrated in the line of duties assigned them." The act must be, not only "within the scope of his employment," but also "committed in the accomplishment of objects within the line of his duties, or in and about the business or duties assigned to him by his employer." *L. & N. R. R. Co. v. Whitman*, 79 Ala. 328; *M. & O. R. R. Co. v. Seales*, 100 Ala 368, 13 South. 917; *Case v. Hulsebush*, 122 Ala. 212, 221, 26 South. 155; *City Delivery Co. v. Henry*, 139 Ala. 161, 34 South. 389.

In the case at bar the only proof as to what were the duties of John Kelley (who, it is claimed, by inference, without direct proof, made the assault) is by the plaintiff himself, that "he was general superintendent of all the defendant's mines at Palos. He had superintendents under him. Mr. Hemphill was the boss driver, or bank boss over me. Mr. Kelley would just look around in the mines, and tell the other superintendents under him what to do. The bank boss has the superintendence and management of the inside of the mines, and the general superintendent would see that he carried on the work properly. Mr. Hemphill hired and discharged the men who worked in the mines, and Mr. Kelley employed and discharged the superintendents." The witness Hemphill swore that he was "bank boss," that the drivers were under him, that he had the hiring and entire control and management of them, and that Mr. Kelley directed him. The witness Drennen testified that he was vice president and general manager, and had exclusive management of the mines, and hired superintendents; that he employed Kelley as general superintendent of the mines, and that Kelley's duties was to employ the bank bosses, have supervision over them, and look after the outside work around the mines; that the bank boss had entire management and superintendence on the inside of the mines, and exclusive control and supervision of the drivers and track men; that the general superintendent has nothing to do with the drivers, or track men, in the mines. Jones, the bookkeeper, testified to the same effect.

There is no controversy about the facts that the plaintiff was a driver in the mines at the time he claims to have been assaulted, and that Kelley was riding on the car. It does not appear from the testimony that, if Kelley was guilty of the abuse claimed, it was "perpetrated in the line of the duties assigned him, or committed in the accomplishment of the objects within the line of his duties." It was simply his personal act. *Western Ry. of Ala. v. Milligan*, 135 Ala. 205, 33 South. 438, 93 Am. St. Rep. 31. It follows that charge 1, requested by the defendant, being the general charge, should have been given.

It is unnecessary to consider in detail the various matters of

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pleading and rulings on charges, which really raise in different ways the principles herein decided.

The judgment of the court is reversed, and the cause remanded.

HARALSON, TYSON, and ANDERSON, JJ., concur.

WAGNER v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, June 21, 1905.)

[74 N. E. Rep. 919.]

Licensee—Employee of Subcontractor—Running of Cars—Care Due from Railroad.*—Where plaintiff was working on defendant's elevated railroad structure as an employee of a subcontractor, he was a licensee to whom defendant owed the duty of using due care to prevent his being injured from exposure to unusual dangers, not known to him, that might be caused by the negligent running of defendant's surface cars beneath the platform where plaintiff was working.

Same—Fall from Elevated Railway—Collision with Trolley Pole of Surface Car—Assumption of Risk.†—Where plaintiff, an employee of a subcontractor engaged at work on defendant's elevated railroad, was thrown from a platform by the trolley pole of a car as it passed under the platform, while the car was being operated around a curve at a high and unusual rate of speed, on a loose trolley wire, and it did not appear that plaintiff voluntarily exposed himself to such danger with a full appreciation thereof, whether he assumed the risk was for the jury, though he had knowledge of the existence of such danger.

Fellow Servants.†—Where plaintiff, an employee of a subcontractor, was injured by the negligence of defendant's servants, he was not a fellow servant of the latter.

Same—Same—Same—Contributory Negligence.—Where a servant of a subcontractor of defendant railway company was injured while working on its elevated structure by the negligence of defendant's employees in operating a street car under the structure, plaintiff was not guilty of contributory negligence, as a matter of law, in placing himself in the position in which he was injured; his place to work having been furnished him by his employer.

*As to who are licensees, see foot-notes appended to *Booth v. Union Terminal Ry. Co.* (Iowa), 14 R. R. R. 768, 37 Am. & Eng. R. Cas., N. S., 768.

As to the care due licensees, see foot-note appended to *Lovett v. Gulf, etc., Ry. Co.* (Tex.), 11 R. R. R. 339, 34 Am. & Eng. R. Cas., N. S., 339; *Bishop v. Illinois Cent. R. Co.* (Ky.), 11 R. R. R. 328, 34 Am. & Eng. R. Cas., N. S., 328 (care due bystander assisting passenger at conductor's request); *Sullivan v. Minneapolis, etc., R. Co.* (Minn.), 11 R. R. R. 725, 34 Am. & Eng. R. Cas., N. S., 725 (no duty owed to person who goes to station, at night, to find her husband, who, she supposed, was there on business, with respect to condition of platform); *McConkey v. Oregon R. & Nav. Co.* (Wash.), 12 R. R. R. 267, 35 Am. & Eng. R. Cas., N. S., 267 (duty to keep railroad bridge in repair for use of); *Hortenstine v. Virginia-Carolina Ry. Co.* (Va.), 12 R. R. R. 616, 35 Am. & Eng. R. Cas., N. S., 616 (railroad owes to trespassers and licensees no duty of providing safe appliances); *Means v. Southern Cal. Ry. Co.* (Cal.), 13 R. R. R. 411, 36 Am. & Eng. R. Cas., N. S., 411 (care due licensees on depot premises).

†For the authorities on the question whether employees of different

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Assumption of Risks by Employees.†—The rule that a servant impliedly agrees to take things as he finds them, and assumes the ordinary dangers incident to the service, does not apply to or include concealed risks or subsequent negligence of the master.

Injury to Employee—Exemption from Liability—Validity.§—A contract creating an exemption from liability for injuries caused to a servant by the master's negligence during the employment is in violation of Rev. Laws, c. 106, § 16, and is unenforceable.

Injury to Employee of Subcontractor—Exemption of Railroad from Liability—Application of Contract.—A contract for the construction of an elevated railroad, providing that defendant railroad company would not be responsible for any accident caused by the trolley, feed, or other wires to men or materials on or about the work in connection with the performance by the contractor of his work under the contract did not relieve the railroad company from liability to a servant of a subcontractor for injuries caused by the negligent operation of a surface car under the elevated structure, by which the servant was knocked from a platform by the escape of a trolley from a loose wire.

Exceptions from Superior Court, Suffolk County; Robert R. Bishop, Judge.

Action by C. A. Wagner against the Boston Elevated Railway Company. From a judgment in favor of plaintiff, defendant brings exceptions. Overruled.

Plaintiff was a workman in the employ of subcontractors employed in erecting a structure of the elevated railway on Washington street, in Boston. Defendant elevated railway company had contracted with the A. & P. Roberts Company to build the elevated railway, and this company had sublet a portion of the work to plaintiff's employers. The elevated structure was to be built over the tracks of the defendant company, then existing on the surface of the street, on which defendant continued to run electric cars during the work. A gang of men working at night put up the heavy iron posts and girders supporting the structure; the lower girders on which the superstructure rested running lengthwise of the track, and spanning the distance between the posts. Another gang followed to do the riveting of the connecting parts, which worked in the day-time, and plaintiff was a member of this gang. There was a provision in the contract between the company and the contractor that defendant might fix its trolley wires for the running of surface cars to the elevated structure, and such trolley wire was suspended about 18 inches below the cross-braces from a wooden plank running longitudi-

masters may be fellow servants, see foot-notes appended to *Chicago Term. Transfer Co. v. Vandenberg (Ind.)*, 17 R. R. R. 740, 40 Am. & Eng. R. Cas., N. S., 740.

†For the general principles involved in the doctrine of assumption of risks by employees, see foot-notes appended to *Foster v. Chicago, etc., Ry. Co. (Iowa)*, 14 R. R. R. 538, 37 Am. & Eng. R. Cas., N. S., 538; *Chicago, etc., Ry. Co. v. Barnes (Ind.)*, 14 R. R. R. 531, 37 Am. & Eng. R. Cas., N. S., 531; *Meehan v. Holyoke St. Ry. Co. (Mass.)*, 14 R. R. R. 331, 37 Am. & Eng. R. Cas., N. S., 331; *Shaw v. Manchester St. Ry. (N. H.)*, 14 R. R. R. 275, 37 Am. & Eng. R. Cas., N. S., 275.

§See monograph appended to *New v. Southern Ry. Co. (Ga.)*, 5 R. R. R. 101, 28 Am. & Eng. R. Cas., N. S., 101.

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nally, and hanging from the cross-braces. At the time plaintiff was injured he was engaged in riveting the iron post which had been put in position, standing on short planks placed cross wise, and resting on the flanges of the girders. Plaintiff claimed that as he was standing on the planks, engaged in his work, a surface car came round a curve at a rapid rate of speed where the trolley wire was loose and sagged, and that the trolley flew off the wire against the planks with such force as to knock the planks off the flanges and threw plaintiff off and into the air; that he fell on the ground and received the injuries complained of.

S. A. Fuller and W. E. Bowden, for plaintiff.

P. H. Cooney and L. F. Hyde, for defendant.

BRALEY, J. At the time the plaintiff received his injuries he was helping to build an elevated railway for the defendant, within the location granted to it by St. 1894, p. 761, c. 548. The part upon which he was engaged was being built by his employers under a contract with the A. & P. Roberts Company, who had a general contract with the defendant to build the entire structure. It follows, and is to be assumed, that he was lawfully upon the premises by the defendant's invitation, who thus owed to him the duty of using due care to prevent his being injured from exposure to unusual dangers not known to him that might be caused by the negligent running of its surface cars beneath the platform where he was at work. *Wendell v. Baxter*, 12 Gray, 494; *Sweeny v. Old Colony & Newport Railroad Co.*, 10 Allen, 368, 87 Am. Dec. 644; *Corrigan v. Union Sugar Refinery*, 98 Mass. 577, 96 Am. Dec. 685; *Carlton v. Franconia Iron & Steel Co.*, 99 Mass. 216; *Severy v. Nickerson*, 120 Mass. 306, 307, 21 Am. Rep. 514; *Shea v. Gurney*, 163 Mass. 184, 39 N. E. 996, 47 Am. St. Rep. 446; *Cowen v. Kirby*, 180 Mass. 504, 62 N. E. 968.

There was evidence on the part of the plaintiff which tended to show that the platform upon which he stood was suspended over a curve in the surface track, and, although the trolley wire sagged, the trolley pole would not become disengaged if the car ran slowly. It further appeared that the car the trolley pole of which caused the accident was running at an unusual speed, of from five to seven miles an hour, notwithstanding orders had been given by the defendant to its motormen to reduce speed when passing under the overhead structure where the men were at work. An electrical expert, who testified in his behalf, stated that if the conducting wire was slack, and the car moved rapidly, the trolley would be thrown, for the higher the speed the more danger there was of such an occurrence. If this testimony was believed, the jury could find that through the negligence of the defendant's servants the trolley pole left the conducting wire, flew up, struck the platform, and, by the violence of its impact, caused it to fall.

The defendant, however, urgently claims that the plaintiff was not in the exercise of due care, and that by his conduct he as-

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sumed the risk of all accidents that might arise under his employment, even if caused by its negligence. To support this contention it principally relies on the case of *Woodley v. Metropolitan District Railway Co.*, L. R. 2 Ex. D. 384. It was there said by the majority of a divided court that the plaintiff had assumed the risk of negligence on the part of the defendant's servants, though at the time of his injury he was in the employment of a contractor, and rightfully upon the defendant's premises under his master's contract. But it was held in the later cases of *Yarmouth v. France*, 19 Q. B. D. 647, *Thrussel v. Handyside*, 20 Q. B. D. 359, 365, and *Smith v. Baker* (1891) A. C. 325, that knowledge by the servant did not conclusively limit the liability of the master, and it was a question of fact whether he voluntarily took the chance of injury. This last case was referred to with approval in *Mahoney v. Dore*, 155 Mass. 513, 519, 30 N. E. 366, 367, where it was said by Mr. Justice Knowlton, "We are not aware of any adjudications in this commonwealth which are necessarily inconsistent with this just and reasonable doctrine, although different opinions have been expressed on this point by eminent judges both here and in England." If a servant assumes known and obvious risks, mere knowledge that they exist is not sufficient, as there must be a voluntary exposure of himself, with a full appreciation of the danger that may be incurred. *Leary v. Boston & Albany Railroad Co.*, 139 Mass. 580, 2 N. E. 115, 52 Am. Rep. 733; *Scanlon v. Boston & Albany Railroad Co.*, 147 Mass. 484, 18 N. E. 209, 9 Am. St. Rep. 733; *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537. It is true that these suits were by a servant for his master's negligence, which was not impliedly assumed by his contract of employment. But as the doctrine is held to be applicable where, as in the present case, this relation does not exist, to bar a recovery similar conditions of knowledge and consent must be found. *Wood v. Locke*, 147 Mass. 604, 18 N. E. 578.

Because they were not subject to the control of a common master, the plaintiff was not in any sense a fellow servant of the defendant's employees. *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101; *Reagan v. Casey*, 160 Mass. 374, 36 N. E. 58; *Delory v. Blodgett*, 185 Mass. 126, 69 N. E. 1078, 64 L. R. A. 114, 102 Am. St. Rep. 328; *Smith v. Steel*, L. R. 10 Q. B. 125.

The plaintiff's evidence was to the effect that up to the time of his injury he had observed that the speed of the cars slackened when they passed over the curve, and the pole followed the trolley wire. Whether, in the exercise of due care, he ought reasonably to have anticipated that they might run faster, with the corresponding probability of injury to himself, or whether by his conduct he willingly exposed himself to what finally occurred, were issues of fact for the jury. *Powers v. Boston*, 154 Mass. 60, 63, 27 N. E. 995; *Hannah v. Connecticut River Railroad Co.*, 154 Mass. 529, 533, 28 N. E. 682; *Ryan v. New York, New Haven & Hartford Railroad Co.*, 169 Mass. 267, 271, 47

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N. E. 877; Meagher v. Crawford Laundry & Machine Co., 187 Mass. 586, 73 N. E. 853.

The plaintiff then cannot be held, as a matter of law, to have been negligent in placing himself in a position concerning the full danger of which he claims to have had no knowledge, simply because he chose to continue his work in a place provided for him by his employer. *Mahoney v. Dore, ubi supra; Bell v. New York, New Haven & Hartford Railroad Co., 168 Mass. 443, 47 N. E. 118; Murphy v. Marston Coal Co., 183 Mass. 385, 388, 67 N. E. 342.*

But the defendant further contends that the plaintiff agreed to incur the particular danger by which his injuries were caused, and therefore he cannot recover. By the usual contract of employment it is settled, whether at common law or under the statute, that the servant impliedly agrees to take things as he finds them, and, for the wages paid, to expose himself to the ordinary dangers incidental to the service, but this does not include concealed risks or subsequent negligence of the master. *O'Maley v. South Boston Gaslight Co., 158 Mass. 135, 136, 32 N. E. 1119, 47 L. R. A. 161; Garant v. Cashman, 183 Mass. 13, 66 N. E. 599.* Here the plaintiff sustained no contractual relation to the defendant whatever, unless it be found in the general contract for the entire work. To this agreement he was not a party. Neither is there any evidence that it was brought to his knowledge. Moreover, he was in the employment of contractors who not only were strangers to it, but also are not shown to have known of its terms. *Abbey v. Chase, 6 Cush. 54; Burt v. Boston, 122 Mass. 223, 227; Leydecker v. Brintnall, 158 Mass. 292, 297, 33 N. E. 399; Railton v. Taylor, 20 R. I. 279, 38 Atl. 980, 39 L. R. A. 246.*

If this contract could be treated as creating an exemption of the defendant from liability for injuries caused to him by its negligence while in its employment, such an agreement would be in violation of Rev. Laws, c. 106, § 16, and unenforceable. But as the relation of master and servant did not exist, a general release by him would have been valid.

In the building of the elevated railway the contract provided that the work of construction should proceed in connection with the usual operation of the surface road, which was located directly under the overhead structure. That during the progress of the undertaking accidents thereby might be caused to the employees of each of the contracting parties, or to others whether passengers upon the defendant's cars, or travelers upon the public ways, was apparent. Upon an examination of its provisions so far as they relate to the question raised, the contractor agrees to indemnify the defendant for all damages it may sustain by reason of suits, by whomsoever brought, for injuries arising from the negligence of workmen who may be employed under the contract, but for which the defendant primarily would be responsible. *Carlton v. Franconia Iron & Steel Co., ubi supra; Sturges v. Theological Educational Society, 130 Mass. 414, 39*

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Am. Rep. 463; *Woodman v. Metropolitan Railroad Co.*, 149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213, 14 Am. St. Rep. 427. The only language found which gives even a semblance to the defendant's argument is contained in section 55: "* * * The company will not be responsible for any accident caused by the trolley, feed, or other wires to men or materials upon or about the work in connection with the performance by the contractor of his work hereunder, and the contractor agrees to hold the company harmless and indemnified in respect to any claims for such accidents." In our opinion, this clause does not support such a view.

The instructions under which the case was submitted to the jury were full and accurate, and, so far as proper, the rulings requested by the defendant were adopted.

Exceptions overruled.

ATCHISON, T. & S. F. RY. CO. *v.* RINGLE.

(Supreme Court of Kansas, March 11, 1905.)

[80 Pac. Rep. 43.]

Personal Injuries—Evidence as to Plaintiff's Children.*—Admission of evidence in a personal injury case as to the number of plaintiff's children and their ages is prejudicial error.

Punitive Damages.†—Punitive damages are not recoverable in a negligence case unless the negligence is so gross as to amount to wantonness.

Same—Instructions.—It is the law of the case that punitive damages are not recoverable therein, instructions excluding such element from consideration having been given without objection.

Personal Injuries—Evidence as to Plaintiff's Children.—Though plaintiff in a personal injury case has testified without objection that he has children, permitting him to further testify to the number thereof and their ages is not harmless.

Error from District Court, Montgomery County; Thos. J. Flannelly, Judge.

Action by William W. Ringle against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

A. A. Hurd, O. J. Wood, and Wm. Dunkin, for plaintiff in error.

Albert L. Wilson, for defendant in error.

*For the authorities in this series on the subject of the effect of, or the admissibility of evidence of, the financial circumstances, or size of family, etc., of parties, in negligence cases, see foot-note appended to *St. Louis, etc., Ry. Co. v. Adams* (Ark.), 16 R. R. R. 843, 39 Am. & Eng. R. Cas., N. S., 843.

†For the authorities in this series on the question as to when punitive damages are, and are not, recoverable, see foot-note appended to *Chicago Union Traction Co. v. Lauth* (Ill.), 17 R. R. R. 606, 40 Am. & Eng. R. Cas., N. S., 606.

Atchison, etc., Ry. Co. v. Ringle

PER CURIAM. Defendant in error had judgment for his personal damages in the sum of \$7,000 against the plaintiff in error, to reverse which it prosecutes this proceeding.

The first error to which our attention is called, and the only one we deem it necessary now to consider, is in the admission of evidence as to the size of the plaintiff's family. The evidence referred to is as follows: "Q. Have you any children? A. Yes, sir. Q. How many? (Objected to by defendant as immaterial, objection overruled, to which ruling of the court the defendant at the time excepted.) A. Four. Q. What are their ages? (Objected to as irrelevant and immaterial. Objection overruled.) A. The oldest one is 19, and the youngest one is 12." Under the unbroken line of decisions of this court, the admission of this evidence must be held to have been erroneous and prejudicial. In *K. C., F. S. & M. R. R. Co. v. Eagan*, 64 Kan. 421, 67 Pac. 887, Chief Justice Doster, in passing upon a question almost identical with this, held the admission of such testimony "a very grievous error," and cited many cases in support of that conclusion. This was followed by this court in *Union Pacific Railway Company v. Hammerlund*, 79 Pac. 152. The defendant in error, however, very strenuously insists that the facts of this case render this well-settled doctrine not applicable here, and this because, in cases where punitive damages may be allowed, all of the surroundings and conditions of the parties may be shown, and such inquiry includes all such items as the financial condition of both parties, the condition of their families, standing in society, etc. If we shall grant this claim, we do not find the principle applicable to the facts of the case here. It is well settled in this state that, in order to warrant the recovery of punitive or exemplary damages because of the negligence of the defendant, such negligence must be so gross as to amount to wantonness, where no willful or malicious acts are proven. *K. C., F. S. & G. R. R. Co. v. Kier*, 41 Kan. 671, 21 Pac. 770, 13 Am. St. Rep. 311, and cases cited.

While it is here strenuously contended that the evidence shows gross and wanton, if not malicious, negligence, we have carefully examined the evidence upon this point, and are fully persuaded that such is not the case. The court also, in its instructions to the jury, excluded this element from their consideration. This was done without objection, and is now the law of this case.

Again, it is contended that inasmuch as the question, "Have you any children?" was answered without objection, the farther questions as to their number and ages were harmless, and should not be considered, within the rule. We are not able to agree with this contention. The same condition of the proof will be found in *Railroad v. Eagan*, *supra*. The reason of the rule is more strongly appealed to by the answer to the questions objected to than by the preliminary question.

It is farther suggested that the rule which forbids the introduction of this kind of evidence ought to be abandoned, because the information imparted to the jury by the answer to these

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questions might have been obtained by them as well by the calling of the children as witnesses or by their presence in court. This reasoning does not appeal to us as being sound. That incompetent evidence may sometimes reach the jury as an inseparable element of competent evidence does not warrant courts in permitting the introduction of the incompetent evidence alone. This class of evidence has been condemned because of the prejudice or bias which it is likely to excite in the minds of a jury, and in this case, after carefully examining the evidence relative to the character of the injury, we are not prepared to say, in view of the size of the judgment, that they were not unduly influenced thereby.

The judgment of the court below will be reversed, and the case remanded for farther proceedings.

STORRS v. GRAND TRUNK WESTERN RY. CO.

(Supreme Court of Michigan, Dec. 22, 1905.)

[105 N. W. Rep. 764.]

Railroads—Accident at Crossing—Contributory Negligence.*— Where plaintiff, on approaching a railroad crossing, saw the steam from an engine and heard the whistle, and, though he could not see the train, whipped up his horses to cross, he was guilty of contributory negligence.

Error to Circuit Court, Eaton County; Clement Smith, Judge.

Action by William Storrs against the Grand Trunk Western Railway Company. From a judgment for plaintiff, defendant brings error. Reversed.

Argued before MOORE, C. J., and McALVAY, GRANT, BLAIR, and HOOKER, JJ.

Harrison Geer, for appellant.

J. M. & J. L. Powers, for appellee.

McALVAY, J. Plaintiff brought suit against defendant to recover damages for injuries to himself and his team, wagon, and harness by reason of a collision between a construction train on defendant's road and plaintiff's wagon at a street crossing in the city of Charlotte. He was acquainted with this crossing. About 7 o'clock in the morning of the day in question he drove from his home, going to his work, and coming on to Munson street, when

*For the authorities in this series on the question whether there can be a recovery for injuries sustained in an attempt to cross railroad tracks in front of an approaching train which was seen by the highway traveler to be approaching before he made the attempt, see foot-note appended to *Criss v. Seattle Elec. Co.* (Wash.), 17 R. R. R. 853, 40 Am. & Eng. R. Cas., N. S., 853; *Coats v. Seattle Elec. Co.* (Wash.), 17 R. R. R. 165, 40 Am. & Eng. R. Cas., N. S., 165; foot-notes appended to *Southern Ry. Co. v. Carroll* (C. C. A.), 16 R. R. R. 488, 39 Am. & Eng. R. Cas., N. S., 488.

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at least 70 feet from the railroad crossing, heard the whistle of an approaching train, looking he saw the steam rising over the embankment along defendant's right of way. On account of the embankment he could not see the oncoming train. He thought the engine was about 80 rods down the track, and decided to pass across ahead of it. He struck his horses with the whip and went down to and upon defendant's track without stopping to look and listen to discover where the train really was. When his horses stepped upon the track, he discovered that this engine was pushing a string of flat cars ahead of it, and that the first car was right upon him. He jumped to save himself, and striking the frozen ground was injured in one hip. The wagon was demolished, the harness broken, and the horses injured. Plaintiff was familiar with this crossing, having often passed over it. He knew that defendant was at work putting in a double track east of the crossing, and that during the day construction trains passed here frequently, drawing gravel to the east, and, in going back west, the empty gravel cars were pushed ahead of the engine. He says he did not expect the gravel train so early in the morning. He thought it was a freight train coming up there. On the trial it was claimed that the speed of the train at 10 to 12 miles an hour was contrary to the provisions of a city ordinance regulating the speed of trains within the city limits, and the court permitted the ordinance to be introduced subject to exception by defendant. No proofs were offered on the part of the defendant. A request to direct a verdict for defendant on account of the contributory negligence of the plaintiff was refused. This is the error relied upon by defendant; error assigned upon the admission of the ordinance having been waived upon argument.

The plaintiff testified as follows: "I heard an approaching engine whistle and looked up and saw the steam of the engine over the bank. The engine was, I judge, 80 rods away when I first saw it. I could not see a thing of any train of flat cars. After observing the engine that distance—80 rods from me—I undertook to cross the track. I hadn't only about 60 or 70 feet to cross the track, and the locomotive, I supposed, was drawing a freight up the grade. I thought I had plenty of time to cross the track. When I saw the engine, or the steam from the locomotive, I thought I had plenty of time to cross the track, and whipped my horses. They started on a trot, trotted right down on the track before ever I see a thing. Just as they got right onto the track, so far that I couldn't stop, that train backed right down from behind the bank to my left. I couldn't see it until after I was right on the track. I don't think the rear of the rear flat car was over half of the length of the car from me when I first could see it. I threw off the lines and jumped. I thought that was my only salvation." On cross-examination he said: "It was a cloudy morning, about 7 o'clock Standard time. I drove east on Amity street until I came out on Cochran avenue and crossed it to Munson street, and then tried to cross the railroad. Besides the embankment, there were some trees and houses—

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apple trees, for one thing. That was some 40 rods east of the depot. Q. Did you listen for any train? A. I didn't have to listen. I heard the train whistle. I had not been accustomed to crossing there so often as at several other places. I have crossed there several times. At that time the company was double tracking the railway somewhere along down there—not right there. I don't know how far east of there. I had been teaming right along around the town; I hadn't been so very much in the north part of town. Q. You knew they were running gravel trains or construction trains right along? A. I have seen them go through here; yes, sir. Q. You knew it was necessary for them to run back when they run down with a load— A. (interrupting). I didn't know anything about it. I have seen them run back and I have seen them run ahead. Q. You have seen them back up? A. Yes, sir. Q. You knew they were accustomed doing that—going out and unloading and then backing up? A. It seems they was; yes. Q. You knew all about that? A. I have seen them, I said. Q. You knew they were running back and forth? A. Of course they were there. Q. That they were drawing gravel through town? A. They had to run backwards and forth. Q. There was no place where they put an engine ahead of it—where they run down and unloaded—you knew that? A. I didn't know anything about it, for I hadn't been on the road. They had to run backwards and forth. Q. You didn't stop before you went to cross the road? A. I didn't have to. I saw the train—was watching it; I saw the locomotive and was watching it. I couldn't see the cars behind the locomotive because of the bank. I saw the steam of the locomotive—not the locomotive itself at first. When I heard the whistle, I looked up that way. I could see the steam. I couldn't see anything else. I supposed it was a freight coming. I know right where it was. I heard it whistle. My team was on a walk when I first heard it, but I picked up my whip, hit them, and they started on a trot. I knew the train was coming west by the steam. Q. You knew the road was constructing its road there at that time, you knew the company was constructing the new road there? A. Yes, sir. Q. Yes; double-tracking its road? A. I couldn't help but. Q. They had been constructing right along there, had they not? A. No, sir; not that I ever noticed. Q. You knew they were graveling the road there? A. Not there they were not. Q. Hadn't you seen those loads of gravel go through here? A. Yes; but I don't know where the train went. Q. And turned back empty? A. Yes. Q. And you knew every time they run back after drawing a load of dirt, they run back with flat cars ahead of the engine? A. I have seen them run back that way. Q. You knew that was the way they did; you saw them unload the gravel down there? A. No, sir; I did not. I had seen train loads of gravel go through here and return empty. I have seen them run back with the flat cars ahead of the engine. I saw them going back and forth. I did not anticipate at that time that they might be running back, because it was early in the morning. I didn't see

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any gravel train. I didn't think there was any. I thought it was a freight train coming up there. It was so far off, I didn't think that I had to investigate it. Q. Didn't any one alarm you before you went on the track? A. No; not that I heard. Q. You can't see on the road? A. Not until you get on the track. I was sitting on the wagon seat. I watched for the engine, supposing it was a freight train. I looked for the train. I couldn't see anything but the engine until I drove right on the track; I saw the steam of it. I looked for it; was looking right at it, right that way. Q. When you got up in 20 feet of the track, did you look for the engine? A. I couldn't look for the engine in 20 feet of the track because this house stands there that hides the whole of it. You can't see when that was 20 feet from the track. It is not true that you can see down the track when 20 feet away from the track. I don't know how far that house stands back from the track. Q. If the house stood there, how did you happen to see the steam of the engine? A. I saw the steam of the engine before I come up to the house; that is, before the house come in range of me. I heard the engine whistle and saw the steam of it coming up there, just when I turned from Cochran avenue into Munson street. There is one house on the north side of Munson street, between Cochran avenue and the railroad. Cochran avenue is probably 60 or 70 feet from the track. I measured it once. Q. When was it you struck your team and put them on a trot? A. Just as I heard the whistle. I had just turned my team in on Munson street. I made up my mind that I had plenty of time to cross the track before the engine got there. I heard no one trying to alarm me—to stop me. I did not listen for any one. The ground was frozen and my wagon making a noise. I looked all around and didn't see anybody. I did not stop, I drove right along, because I supposed I had plenty of time. When I kept my eye on the engine, I supposed I had plenty of time to cross the track. The house hid my view when I got against the house. I saw the smoke before I reached the house, and heard the whistle before I reached the house. Q. Did you see anybody on the train that day? A. I did, sir. I was looking all the time at the steam of the engine; I couldn't see any cars from where I was. I was watching it, my horses on the trot. I heard nobody trying to stop me, and I saw nobody trying to stop me from going on the track; I saw nobody, and I heard nobody holler. I was watching the engine because I didn't want it to run onto me. I was watching to see how close they were coming to me before I got to the track. Q. Didn't you know that it would be possible for them to run a gravel train back there? A. I didn't think anything about a gravel train. I didn't suppose it was necessary for a man to see a train coming for 80 or 100 rods to stop and look very much. I knew that at that place they were double tracking it. I looked all around on account of the double track. I looked around to see if there was a train coming from the other way. I didn't see nothing. My horses were on a slow trot. The Court: I do not understand there was a train coming from the

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other way. The witness: No, sir; there was not. I was looking to see if there was."

Plaintiff heard the whistle. He saw the steam from the engine all the time he was approaching the track. He was familiar with the place. His view of the train was obstructed by the embankment. He did not stop and listen; but, thinking the engine was far enough away, he whipped his horses to hurry across. Plaintiff was not put in a place of danger by defendant. He had absolute control of his own movements. Approaching the track after he heard the whistle and saw and continued to see the smoke, at a place where the train could not be seen, his testimony shows he did not take the slightest precaution to protect himself from the injuries he received. He was guilty of contributory negligence. *Shufelt v. Railway Co.*, 96 Mich. 327, 55 N.W. 1013. In this case it was held: "These trains must run by cuts, by embankments, by trees, and other things. He who does not choose to stop and listen where he cannot see must suffer the consequences of his own negligence." Also see *Brinker v. Railway Co.*, 121 Mich. 283, 80 N. W. 28. Plaintiff's knowledge of the approaching train was a warning to him of the possible danger, and he had no right to make the attempt to cross the track ahead of the oncoming train without exercising the ordinary precautions for his own safety. *Graf v. Railway Co.*, 94 Mich. 579, 54 N. W. 388; *Korrady v. Lake Shore Ry. Co.*, 131 Ind. 264, 29 N. E. 1069; *Railroad Co. v. Houston*, 95 U. S. 702, 24 L. Ed. 542. Plaintiff knew that the train was upon this road and coming toward this crossing. The fact that he thought it was a freight train, and did not expect the construction train so early in the day, did not relieve him from stopping, as he had ample opportunity to do, for the purpose of ascertaining the actual situation confronting him, before he attempted to cross. *Boutell v. Railway Co.*, 133 Mich. 486, 95 N. W. 568; *Brinker v. Railway Co.*, 121 Mich. 283, 80 N. W. 28.

There is no dispute in the case as to what the plaintiff saw and what he did just before and at the time of the accident. The dispute in the testimony as to where the lookout man stood on the rear of the backing train is, therefore, not material, as the case is determined upon the question of the plaintiff's contributory negligence. Plaintiff knew a train was approaching. He knew that the construction train sometimes backed over that crossing in going west. He says he thought this was a freight train. He could not see this train on account of the embankment. He had knowledge of its approach, and needed no other warning. There is not in the evidence the slightest indication that he observed any precaution whatever. *Haas v. Railroad Co.*, 47 Mich. 401, 11 N. W. 216; *Lake Shore, etc., R. R. Co. v. Miller*, 25 Mich. 274. The court should have instructed a verdict for defendant as requested.

The judgment is reversed, and a new trial ordered.

COPP v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine, Dec. 19, 1905.)

[62 Atl. Rep. 735.]

Railroads—Negligence—Trespassers on Railroad Track.*—That a railroad company does not prosecute persons walking upon its railroad track between crossings and stations, in violation of Rev. St. c. 52, § 77, does not authorize persons to so use its tracks.

Same.—Persons walking upon railroad tracks are bound to apprehend that locomotives may be swiftly approaching at any time, and are bound to be continually on the watch for them, and to leave the track in season to avoid collision with them.

Same—Negligence of Engineer.†—Engineers running locomotives are not bound to stop, or even decrease the speed of the locomotive, merely because they see persons walking upon the track. They may ordinarily assume that such persons have made themselves aware of the approach of the locomotive and will seasonably leave the track for its free passage.

Same.‡—If such engineer makes all possible effort to stop the locomotive as soon as he has reason to believe that a person walking

*For the authorities in this series on the question as to what does, and does not, constitute a license to use railroad tracks as a foot-path, see foot-notes appended to *Hamlin v. Columbia & P. S. R. Co.* (Wash.), 17 R. R. R. 1, 40 Am. & Eng. R. Cas., N. S., 1; foot-note appended to *Curtis v. Oregon R. & Nav. Co.* (Wash.), 17 R. R. R. 377, 40 Am. & Eng. R. Cas., N. S., 377; foot-note appended to *St. Louis S. W. Ry. Co. of Texas v. Shiflet* (Tex.), 17 R. R. R. 373, 40 Am. & Eng. R. Cas., N. S., 373; *Elgin, etc., Ry. Co. v. Thomas* (Ill.), 17 R. R. R. 356, 40 Am. & Eng. R. Cas., N. S., 356; foot-note appended to *Hern v. Southern Pac. Co.* (Utah), 17 R. R. R. 179, 40 Am. & Eng. R. Cas., N. S., 179; foot-notes appended to *Willis v. Vicksburg S. & P. Ry.* (La.), 16 R. R. R. 590, 39 Am. & Eng. R. Cas., N. S., 590.

†For the authorities in this series on the subject of the right of those in charge of trains or cars to assume that persons on or near tracks will avoid danger, see foot-note appended to *Seaboard & R. R. Co. v. Vaughan's Adm'x* (Va.), 17 R. R. R. 600, 40 Am. & Eng. R. Cas., N. S., 600; foot-notes appended to *Woolf v. Washington Ry. & Nav. Co.* (Wash.), 16 R. R. R. 846, 39 Am. & Eng. R. Cas., N. S., 846; *Markowitz v. Metropolitan St. Ry. Co.* (Mo.), 16 R. R. R. 838, 39 Am. & Eng. R. Cas., N. S., 838; *St. Louis S. W. Ry. Co. v. Purcell* (C. C. A.), 16 R. R. R. 779, 39 Am. & Eng. R. Cas., N. S., 779; *Montgomery St. Ry. v. Rice* (Ala.), 16 R. R. R. 499, 39 Am. & Eng. R. Cas., N. S., 499.

‡For the authorities in this series on the subject of the care due from trainmen to licensees and trespassers on railroad tracks, see foot-notes appended to *Barmore v. Vicksburg, etc., Ry. Co.* (Miss.), 17 R. R. R. 841, 40 Am. & Eng. R. Cas., N. S., 841; *Engelking v. Kansas City, etc., R. Co.* (Mo.), 17 R. R. R. 800, 40 Am. & Eng. R. Cas., N. S., 800; *Gilliam v. Texas & P. Ry. Co.* (La.), 17 R. R. R. 786, 40 Am. & Eng. R. Cas., N. S., 786; *Ray v. Chesapeake & O. Ry. Co.* (W. Va.), 17 R. R. R. 779, 40 Am. & Eng. R. Cas., N. S., 779; *Seaboard & R. R. Co. v. Vaughan's Adm'r* (Va.), 17 R. R. R. 600, 40 Am. & Eng. R. Cas., N. S., 600; *Hamlin v. Columbia & P. S. R. Co.* (Wash.), 17 R. R. R. 1, 40 Am. & Eng. R. Cas., N. S., 1; *St. Louis S. W. Ry. Co. v. Purcell* (C. C. A.), 16 R. R. R. 779, 39 Am. & Eng. R. Cas., N. S., 779; foot-notes appended to *Ayers v. Wabash R. Co.* (Mo.), 16 R. R. R. 470, 39 Am. & Eng. R. Cas., N. S., 470; *Clemans v. Chicago, etc., Ry. Co.* (Iowa), 16 R. R. R. 413, 39 Am. & Eng. R. Cas., N. S., 413.

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upon the track is in fact not aware of the approach of the locomotive, he is not guilty of negligence.

Same—Evidence.—In this case the engineer, besides the customary whistles at crossings, blew sharp warning whistles as he approached the plaintiff, who was walking on the outside of the left rail. He also shut off steam, but let the locomotive drift, expecting the plaintiff would, at the last, step off out of the way of the locomotive. As soon as it became evident to him that the plaintiff might not do so, he did all he could to avoid running upon her, but without avail. He was not guilty of negligence in not sooner apprehending she would not leave the track.

(Official.)

Report from Supreme Judicial Court, Somerset County.

Action on the case by Lillian G. Copp against the Maine Central Railroad Company to recover damages for personal injuries sustained by the plaintiff, and caused by the alleged negligence of the defendant by one of its servants, a locomotive engineer. Tried at the March term, 1905, of the Supreme Judicial Court, Somerset county. Plea, the general issue. At the conclusion of the evidence the case was reported to the law court for decision upon so much of the evidence as was competent and legally admissible. Judgment for defendant.

Argued before EMERY, STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

S. W. Gould and Fred F. Lawrence, for plaintiff.

Nathan & Henry B. Cleaves, Stephen C. Perry, White & Carter, and Walton & Walton, for defendant.

EMERY, J. While the plaintiff, a woman 28 years old, was walking along on the defendant company's railroad track on her way to visit a friend, she was overtaken and injured by a locomotive operated by the defendant in the regular course of its business at that place. She did not look behind her, nor take any other measures to become apprised of the approach of trains or locomotives, though she was aware that the track where she was walking was used, not only for the passage of regular trains, but also for shifting cars, making up trains, etc.

To extricate herself from the position of a trespasser upon the track, she showed that other persons frequently, and even habitually, walked upon the track at that place without being forbidden by the defendant company. This however did not give her any right to walk on the track. Not only was the railroad company entitled to the exclusive use of its track between crossings and stations, as this place was, but she was forbidden by statute to walk upon it. Rev. St. c. 52, § 77. That the defendant company did not prosecute violators of this statute did not legalize her act, nor protect her from its consequences.

To relieve herself from the inference of gross carelessness on her part, she says she was walking on the outside of the left-hand rail, and thought she was walking far enough from it to be out of danger. Her opinion that she was in no danger does not alter

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the patent fact that she had voluntarily placed herself, and was voluntarily remaining, in a position conspicuously fraught with imminent danger. She says she was hard of hearing, but that very fact made it all the more reckless for her to walk on the track.

Finally she claims that, however great her own negligence, it was past and over before the locomotive struck her, and hence was no part of the proximate cause of the collision and her injury; that the engineer was negligent in not stopping the locomotive, as he might have done after he saw her and before he reached her; that her negligence was anterior to his, and hence his was the sole proximate cause of the injury.

Of course, even if she were a trespasser, the defendant company's servants could not lawfully disregard her presence on the track, and recklessly run over her, but even if she were a licensee, as she claims, they owed her no special duty of care such as they owed to those whose right or duty it was to be on the track.

It is common knowledge that people frequently walk on railroad tracks, and, if locomotive engineers were bound to stop or decrease speed every time they saw a person on the track, the operation of the railroad would be greatly hindered, to the detriment of the public. It is also common knowledge that persons thus walking on railroad tracks, and aware of the approach of a locomotive, will often remain on the track until the locomotive is within a few feet of them before they step aside.

In this case the engineer could rightfully assume that the plaintiff was of ordinary intelligence, that she was aware of the danger of her position, that she would exercise the care due in such a position, that she would seasonably look or listen for trains and locomotives, and seasonably step out of their way. He had given the usual warning signals, loud enough for the neighborhood to hear distinctly. He even shut off steam, and let the locomotive drift, when he saw she did not step off at once. As she was on the left of the track and he on the right, he supposed she had stepped off, and, when it was seen by the fireman on the left that she had not, it was too late to prevent the collision, though every reasonable effort was made to do so. In all this there is no evidence that the engineer was negligent.

The plaintiff, however, claims that a high bank of snow at her left, formed by railroad snowplows, prevented her stepping aside, and that the engineer should have known it. The evidence does not support that theory. She did not try to step aside, and it is not established that she could not, much less that the engineer should have known that she could not.

The case is similar in principle to the case *Garland v. Maine Central R. R. Co.*, 85 Me. 519, 27 Atl. 615. There the plaintiff, in driving a loaded team across the railroad track at a highway crossing, became stuck on the crossing. The engineer saw the team, and even saw it was not moving, but did not then proceed to stop his train. As soon as he saw that the team could not be

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moved, he did all he could to stop his train, but it was too late to avoid the collision. It was held that there was no evidence of his negligence; that he was not in fault in not sooner comprehending that the plaintiff would haul a load on the crossing he could not haul off. So, in the case now at bar, we hold that the engineer was not in fault in not sooner comprehending that for any reason the plaintiff would not at last step aside.

We base our decision on the absence of sufficient evidence of negligence on the part of the engineer, and hence have no occasion to determine whether the plaintiff's negligence was contributory.

Judgment for the defendant.

CINCINNATI, N. O. & T. P. RY. CO. v. SAULSBURY.

(Supreme Court of Tennessee, Dec. 12, 1905.)

[90 S. W. Rep. 624.]

Railroads—Fires—Contracts Exempting from Liability.*—Where a contract between a railroad authorized the other party to erect a mill on the right of way, a provision exempting the railroad from liability for injury to the mill by fire was not void as contrary to public policy.

Same—Construction of Contract—Mill and Contents—Materials Included.—Where a contract between a railroad and plaintiff authorized the latter to erect a stave mill on the right of way, and exempted the railroad from liability for the destruction of the mill and contents by fire, the railroad was not liable for damages to staves piled on the right of way near the mill; it appearing that use of a part of the right of way was necessary for the piling of staves.

Carriers—Goods Loaded for Shipment—Damage by Fire.†—A railroad was liable as a common carrier for staves destroyed by fire while loaded in a freight car ready for shipment.

Appeal from Circuit Court, Scott County; G. McHenderson, Judge.

Action by E. G. Saulsbury against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

H. Clay James and Head & Anderson, for appellant.

Denton & Robinson and Baker & Keene, for appellee.

McALISTER, J. The plaintiff below recovered a verdict and judgment against the railroad company for the sum of \$1,895.87 as damages for the destruction of a lot of staves by fire alleged to have been occasioned by the negligent operation of its trains.

*See foot-note appended to *Blitch v. Central of Georgia Ry. Co.* (Ga.), 17 R. R. R. 362, 40 Am. & Eng. R. Cas., N. S., 362.

†For the authorities in this series on the question as to what constitutes delivery of freight to the carrier, see foot-note appended to *Pine Bluff & A. R. Ry. Co. v. McKenzie* (Ark.), 16 R. R. R. 50, 39 Am. & Eng. R. Cas., N. S., 50; *Lennon v. Illinois Cent. R. Co.* (Iowa), 16 R. R. R. 45, 39 Am. & Eng. R. Cas., N. S., 45.

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Saulsbury & Co., it appears, had been granted a license by the railroad company to erect a stave mill on its right of way, under a written lease or contract which, among other conditions, provided as follows:

"That they [meaning Saulsbury & Co.] will save and hold harmless the trustees of the Cincinnati Southern Railway and the said railway company, from all damages that may arise from the destruction or injury of said stave mill and contents by fire or from any cause whatever."

The theory of the plaintiff below is that defendant company is not protected from liability by the terms of said contract for the reason: First, that the fire was caused by the negligence of the company and its agents; and, second, that the staves destroyed were not a part of "the mill and its contents," which were alone exempted in said written lease.

It does not appear from the record that the mill itself and its immediate contents were destroyed, but the fire consumed about 34,398 staves which were stacked on the right of way near the mill, and 6,000 staves which had been loaded onto a freight car ready for shipment. A portion of the staves destroyed were undressed and had been stored on the right of way for use in the mill, while another portion of the staves destroyed had been dressed and were ready for shipment. It appears that the staves that were burned were lying between the mill and the railroad on the north side of the mill near the corner of the mill. The mill is described in the record as a shed open on three sides. The fire originated in the collision of two trains on the company's right of way near this mill, and as a result of the collision several tanks of oil burst, the oil caught fire, and was communicated to these staves. It further appears that, during the progress of the fire, the employees of the railroad company, for the purpose of preventing the destruction of the passenger track, diverted the flow of the burning oil to the staves of the plaintiff. The passenger track, it appears, was located on the opposite side of the premises of the plaintiff. It thus appears from the proof that the employees of the railroad, in order to save the property of the company, turned the contents of a tank of oil into these staves, which otherwise would not have flowed in that direction. It should be stated, however, that this phase of the case is not presented in the declaration.

It should be remarked that there is no direct evidence of negligence on the part of the company in bringing two of its trains into collision, except such as arose from the mere fact of the collision. It does appear, however, that this railroad company used what is known as the block system, and that the display of the red signal could have been seen by the engineer for a distance of half a mile. The block is illuminated in red by means of electricity transmitted through a wire along the rails. It is shown in the proof that a red block was displayed, and that, under the rules, it was the duty of the engineer to send a flagman ahead and wait five minutes. The company failed to introduce any

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proof explaining the cause of the collision, and the jury was warranted in drawing an inference of negligence on the part of the company as a matter of fact. We do not hold that negligence should be inferred as a presumption of law. *Young v. Bransford*, 12 Lea, 234.

This is a substantial statement of the facts attending the loss of plaintiff's property.

The assignments of error on behalf of the company are based upon the instructions of the trial judge to the jury and upon the refusal of the court to give certain supplemental requests.

The first assignment is that the court erred in giving the following instruction to the jury, viz.:

"While in this case the defendant railway company might make a contract that would exempt itself from liability for negligence as applicable to the mill building and contents, which it allowed the plaintiff to construct and operate upon its right of way, or ground belonging to the railroad company, * * * the contract entered into would be construed strictly, because it is derogatory of the general law upon that subject, and the limitations of that contract would be construed most strongly against the railroad claiming the benefit of it, and so would be extended, by implication of law, to include anything not expressly included by the contract itself. So, in construing this paper, I instruct you that, while the defendant railway company might claim the benefits, and are entitled to the benefits secured to it under this contract entered into and signed by both parties, still the clause, 'They will save and hold harmless the trustees of the Cincinnati Southern Railway and the said railway company from all damage that may arise from the destruction or injury of said stave mill and contents by fire, or from any cause whatever, could not be construed to extend beyond the limitation expressly stipulated for in that contract. If you should find that the damage resulting to the plaintiff from this accident was done to the stave mill and contents, then I instruct you, under the contract, your verdict would be in favor of the defendant. But, if you shall find that the damages sued for in this case were not for injury done to the stave mill and contents, but were for damage done to the plaintiff by the burning up of staves that had been manufactured in his mill and were in a car standing on its side track, and other staves that had been manufactured and placed alongside of the track to be shipped off on defendant's road, and were for staves burned up which had been shipped in there on defendant's train and unloaded to be worked and dressed and then to be shipped off, if you should find that sort of injury, according to this contract, would not limit the liability of the defendant as to that character of damage, * * * I instruct you that he is entitled to recover."

Counsel for plaintiff in error, in order to present his contentions under a proper construction of the contract, submitted the following requests, which were declined by the trial judge, viz.:

"(1) If the plaintiff placed staves in the rough, which were to

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be worked up, on the railroad's right of way outside instead of in the mill, or under the shed of the mill, then such staves were, under the contract, and under the law, 'contents of the mill,' and, being burned, he could not recover therefor.

"(2) 'Contents,' as used in this contract, include staves in the rough placed there to be worked up in the mill, whether stacked on the right of way under or outside of the mill shed.

"(3) If plaintiff had staves which had been worked up and dressed in the mill and were ready for sale and shipment, and plaintiff stacked or placed such staves outside of the mill instead of under the shed, then the plaintiff cannot recover therefor.

"(4) 'Contents,' as used in that contract, will also include dressed staves stacked or placed outside of the mill shed, as well as on the inside of the mill shed."

Recurring to the instructions given by the trial judge in his general charge, it will be remarked that he upheld the validity of the clause in the written lease providing for an exemption of the company from liability to the lessee for the loss of the mill and contents by fire, or from any cause whatever. It was contended on behalf of the plaintiff below that this stipulation was void, as against public policy, and the cases were cited holding that a common carrier may not limit its common-law liability as against acts of negligence on its part. It is to be observed, however, that in executing this contract the railroad company was not acting in its capacity as a common carrier, but simply as the owner and lessor of the premises. Nor was this contractual capacity at all affected by the clause appearing in the written lease and relied on by counsel for plaintiff below, viz.: "And to use the said stave mill as a place for manufacture, storage and shipment upon the company's road."

So that it is apparent that the validity of this contract is not to be determined by the right of the railroad company to limit its common-law liability as a common carrier, but the right to make the contract as an ordinary owner of premises. What, then, is the law governing this situation of the parties and determining the measure of liability?

Says Mr. Elliott, in his work on Railroads (volume 3, § 1236):

"So far as we have been able to discover, there are few cases in the books governing the validity of a contract exempting a railway from liability for negligently firing and burning property. We think that ordinarily a contract exempting a company from liability for negligently burning property not on the right of way or premises of the company would be held void. But where property is placed on a railway right of way by virtue of a contract in which the owner releases the railroad company from any and all liability on account of fire, and the property is afterwards destroyed by fire, negligently set by the railway company, the contract is not void, and the company cannot be held liable"—citing *Griswold v. Ill. Central R. R. Co.*, 90 Iowa, 265, 57 N. W. 843, 24 L. R. A. 647.

In the case of *Hartford Fire Ins. Co. v. Chicago, M. & St. P.*

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storage and shipment," and, in view of the size of this mill, as shown by the proof, it was never contemplated that its operation should be confined strictly to the building, but it was necessary that a part of the right of way should be used for rough material as it might be received, and another portion for the product of the mill as it might be turned out ready for shipment; and such was the practical construction of this contract by the parties themselves during the continuance of this lease. It is, moreover, a principle of construction that, where a man grants a thing, he grants with it everything necessary to its enjoyment. Easements necessary for the enjoyment of a grant of land are created ex necessitate, and pass by the grant, although not expressly named. 14 Ency. of Law, 1166.

It is perfectly apparent from the record that, without the right of storage on the company's right of way, near the track, the business of Saulsbury & Co. could not have been carried on, since the mill erected by them, with the consent of the company, was too small for the accommodation of its working material. This fact was known to the company, and no objection interposed by it at any time to the storage of material on its right of way. So that in our opinion all the staves on the right of way appurtenant to the mill should fall under the designation of "mill and its contents," and the company is not liable for their destruction "by fire or from any cause whatever." We are of opinion, however, that the company is liable as a common carrier for the staves loaded into the freight car and which were ready for shipment. This is practically conceded by counsel for the company in the brief. Unless, therefore, there is a remittitur of all the damages except the value of the car load of staves, the judgment will be reversed, and the cause remanded.

CARLSON v. CHICAGO & N. W. RY. CO.

(Supreme Court of Minnesota, Dec. 22, 1905.)

[105 N. W. Rep. 555.]

Railroads—Accident at Crossing—Contributory Negligence.*—In an action to recover damages for the death of a person, caused by a collision with a train of defendant at the intersection of a street and the railroad track, where the uncontradicted evidence conclusively shows that when decedent was 50 feet distant from the railroad track a train could have been seen at a distance of 2,500 feet from such crossing, and where the testimony shows that the deceased looked and listened for the train at that point, the law conclusively presumes either that he did not look and listen, or that if he did look and listen, or both, he afterwards heedlessly disregarded the knowledge thus obtained, and negligently went into an obvious danger.

*See generally, foot-notes appended to *Rollins v. Chicago, M. & St. P. Ry. Co.* (C. C. A.), 17 R. R. R. 291, 40 Am. & Eng. R. Cas., N. S., 291; *Woolf v. Washington Ry. & Nav. Co.* (Wash.), 16 R. R. R. 846, 39 Am. & Eng. R. Cas., N. S., 846.

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Same.—Negligence of the defendant's employees in failing to whistle or ring a bell at a crossing is no excuse for negligence on the part of the person about to cross in failing to use his senses.

Same—Care Required.—That the train which collided was an extra did not relieve either party to the collision from the duty of the exercise of care.

Same—Presumptions.†—The presumption that one who was killed while crossing a railway track looked and listened before attempting to cross it is destroyed where the plaintiff introduces direct and affirmative evidence as to exactly what occurred, and where it also appears from the undisputed evidence, that if the deceased had looked and listened before going upon the crossing he must have seen and heard the train approaching.

(Syllabus by the Court.)

Appeal from District Court, Nicollet County; B. F. Webber, Judge.

Action by Andrew Carlson, as administrator of Erick Pehrson, against the Chicago & Northwestern Railway Company. Verdict for defendant. From an order denying a new trial, plaintiff appeals. Affirmed.

Davis & Olsen and *A. A. Stone*, for appellant.

Brown, Abbott & Somsen, for respondent.

JAGGARD, J. This was an action brought to recover damages from the defendant for causing the death of Erick Pehrson by negligence. According to the appellant the facts are as follows: On August 17, 1903, plaintiff's intestate was proceeding along a public street in the city of St. Peter, called Hartew street. He was driving in a jump-seat top buggy, hitched to a single horse. The horse was very gentle. The top on the buggy was up. The curtains of the top were down, but the one on the right-hand side, where deceased was sitting, was fastened only at the top. The front or jump-seat on the buggy was down, and the other seat in place over the same. He was accompanied by his daughter, 13 years of age. On the right-hand side of the street was a corn field, which obstructed entirely the view of the defendant's railroad track and right of way until the deceased arrived at a point 50 feet east of the center of the railroad track of defendant. As the deceased approached the defendant's railroad track he was driving very slowly, and when he reached a point at the corner of the right of way fence, 50 feet east of the center of defendant's railway track, he pulled up his horse and looked and listened for trains. In order to do so, the deceased had to stand up in the buggy and put his head outside of the buggy top. He then proceeded very slowly forward and onto the railway track of defendant, when he was struck by one of defendant's locomotives and a train of cars and instantly killed. The train was running very fast, more than 50 miles an hour, and in violation of an ordinance of said city, which ordinance is admitted to have been in force by the pleadings. The train which caused the death of plaintiff's

†See foot-notes appended to *Southern Ry. Co. v. Carroll* (C. C. A.), 16 R. R. R. 488, 39 Am. & Eng. R. Cas., N. S., 488.

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intestate was an "extra," and arrived at the said crossing about 30 minutes after the regular passenger had gone down in the morning. There was no other regular train on this railroad, either way, for about three hours later than the time this "extra" arrived. There was a whistling post about 1,300 feet north of the Hartew street crossing, and near the city limits on the north. This "extra" train, which caused the death of plaintiff's intestate, approached this crossing, passing said whistling post, without giving any signals by bell or whistle. At any point between the center of the railroad track and the east line of the right of way, 50 feet east, a train could have been seen for a distance of 2,500 feet to the north of said crossing, where a sharp curve prevented seeing it any further. The railroad track ran almost north and south at the place where it intersected Hartew street, which runs east and west. The day was still, clear, and warm. The court granted the motion of the defendant to direct a verdict on the ground that the plaintiff's decedent was guilty of contributory negligence, and subsequently denied the plaintiff's motion for a new trial.

The essential question in this case concerns the contributory negligence of plaintiff's intestate. The defendant insists that it has demonstrated to a mathematical certainty that, if the deceased had been traveling at from $1\frac{1}{2}$ mile to 3 miles per hour, and if the train had been going upwards of 100 miles per hour, and a fortiori if the train had been going at less speed, the engine would necessarily have been in plain sight of the plaintiff's decedent, if he had looked at the point his daughter says he did look. The photographs taken and introduced in evidence tend to sustain this contention. Counsel for plaintiff presented no clear refutation of the correctness of this calculation. Without, however, accepting it as unqualifiedly true, we are of the opinion that upon the record it conclusively appears that if the deceased had looked at this point he must have seen the moving train. The principles of law applicable to this state of facts are definite and well settled. When the uncontradicted evidence conclusively shows that the colliding train must have been plainly visible from the point at which the testimony shows that the injured or killed person looked and listened for the train, the law conclusively presumes either that he did not look and listen, or that if he did look or listen, or both, he afterwards heedlessly disregarded the knowledge thus obtained and negligently went into an obvious danger. In neither view is the company operating the train responsible under ordinary circumstances for the damages consequent upon the collision, of which the person injured or killed was the proximate cause. *Brown v. St. P. Ry. Co.*, 22 Minn. 165, 167; *Miller v. Truesdale*, 56 Minn. 274, 57 N. W. 661; *Weyl v. Railway Co.*, 40 Minn. 350, 42 N. W. 24; *Howe v. Railway Co.*, 62 Minn. 78, 64 N. W. 102, 30 L. R. A. 684, 54 Am. St. Rep. 616; *Nelson v. Railway Co.*, 76 Minn. 193, 78 N. W. 1041, 79 N. W. 530; *Schmidt v. Railway Co.*, 83 Minn. 105, 85 N. W. 935; *Kemp v. Railway Co.*, 89 Minn. 139, 142, 94 N. W.

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439; *C. & N. W. Railway Co. v. Andrews*, 130 Fed. 65, 64 C. C. A. 399; *Railway Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; *Wardner v. G. N. Railway Co.* (decided this term) 104 N. W. 1084. If that point be so far distant from the track as to enable the person injured or killed to know of the approaching train in due season to avoid the collision with it, he is guilty of contributory negligence as a matter of law, and there is nothing for a jury to pass upon. *Blount's Adm'r v. Grand Trunk Ry. Co.*, 61 Fed. 375, 9 C. C. A. 526; *Straugh v. Detroit, L. & N. Ry. Co.*, 65 Mich. 706, 36 N. W. 161; *Huggart v. Mo. Pac. Ry. Co.*, 134 Mo. 673, 36 S. W. 220; *Stopp v. Fitchburg Ry. Co.*, 80 Hun, 178, 29 N. Y. Supp. 1008; *Morris v. Lake Shore Ry. Co.*, 148 N. Y. 182, 42 N. E. 579; *Maryland v. Pittsburg, etc., Ry. Co.*, 123 Pa. 487, 16 Pa. 624, 10 Am. St. Rep. 541; *Butler v. Gettysburg, etc., Ry. Co.*, 126 Pa. 160, 19 Atl. 37.

The present case is obviously distinguishable from *Hendrickson v. G. N. Ry. Co.* The environment and the cause of the accident in that case was essentially different. When *Hendrickson* emerged from a ravine at a point 50 feet from the railroad, the engine came in view in a cut about 150 feet away and at once gave short and shrill danger whistles, whereby the horses became frightened and unmanageable, reared, and plunged forward towards the rails, notwithstanding the driver's efforts to control them, whereby the collision occurred. *Collins, J.*, in *Hendrickson v. G. N. Ry. Co.*, 49 Minn. 251, 51 N. W. 1044, 16 L. R. A. 261, 32 Am. St. Rep. 540; *Id.*, 52 Minn. 340, 54 N. W. 189.

"Another principle is well established: That a person crossing as deceased was could not rely upon signals to remind him of danger. He is bound to be awake and alive for his own protection." *Lewis, J.*, in *Sandberg v. Railway Co.*, 80 Minn. 442, 83 N. W. 411. Accordingly, the failure of plaintiff's intestate to look and listen would be negligence or not according to the circumstances, but without being controlled by the defendant's failure to do its duty. *Beach on Con. Neg.* § 185; *Schneider v. Railway Co.*, 81 Minn. 383, 84 N. W. 124. Negligence of the defendant's employees in failing to whistle or ring a bell at a crossing is no excuse for negligence on the part of the person about to cross in failing to use the senses to discover danger. *Railway Co. v. Houston*, 95 U. S. 697, 702, 24 L. Ed. 542; *N. P. R. Co. v. Freeman*, 19 Sup. Ct. 763, 43 L. Ed. 1014. And see cases collected in *Judson v. G. N. R. Co.*, 63 Minn. 248, 254, 65 N. W. 447.

The duty of exercising caution in attempting to cross a railway track, a place of known danger, is not relaxed by the opportunity or occasion for theorizing or difference of opinion as to whether a train is or is not likely to pass. Observation, not logic, is the proper precaution. *Dodge, J.*, in *Guhl v. Whitcomb*, 109 Wis. 69, 85 N. W. 142, 83 Am. St. Rep. 889. That the train which did the damage in this case was an "extra" did not relieve either party from the respective duty of the exercise of care. Swiftly moving and irregular trains are to be expected, and

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it is the duty of persons about to go upon crossings to look and listen for such trains, as well as those on time or which run slowly. *Collins, J.*, in *Judson v. G. N. Ry. Co.*, 63 Minn. 248, 254, 65 N. W. 447. It is true that, in the absence of evidence to the contrary, there is sometimes a presumption that one who was killed while crossing a railroad track stopped, looked, and listened before attempting to cross the track. *Texas & Pac. Ry. Co. v. Gentry*, 163 U. S. 353, 366, 16 Sup. Ct. 1104, 41 L. Ed. 186; *Baltimore & P. R. Co. v. Landrigan*, 91 U. S. 461, 474, 24 Sup. Ct. 137, 48 L. Ed. 262. But in this case the plaintiff introduced evidence of the daughter of deceased, who was driving with him, as to what happened. Moreover, when it appears from the undisputed evidence that, if deceased had looked and listened before driving upon the crossing, he must have seen and heard the train approaching, as was the case here, the presumption is destroyed. *Rollins v. C. M. & St. P. Ry. Co. (C. C. A.)* 139 Fed. 639.

Accordingly, upon appellant's own view of the facts in this case, that deceased looked up the track at a point 50 feet from it, it is not necessary to determine how far there is to be applied to it the ordinary rule that one who attempts to cross a railroad is bound to use his senses continually while approaching and while crossing the place of known danger (*Rogstad v. Railway Co.*, 31 Minn. 208, 17 N. W. 287; *Sandberg v. Railway Co.*, 80 Minn. 442, 83 N. W. 411; Cf. *Wright v. Cincinnati, etc., Ry. Co.*, 94 Ky. 114, 21 S. W. 581; *Renwick v. N. Y. C. Ry. Co.*, 36 N. Y. 132; *Whitman v. N. P. Ry. Co.*, 156 Pa. 175, 27 Atl. 290; *Thompson v. N. Y. C. Ry. Co.*, 110 N. Y. 636, 17 N. E. 690; *Moore v. Chicago, etc., Ry. Co.*, 102 Iowa, 595, 71 N. W. 569), in view of the fact that he was riding in a covered carriage, making it inconvenient for him to look up and down the road. See *Stackus v. N. Y. C. Ry. Co.*, 79 N. Y. 464; *Hicks v. N. Y. C. Ry. Co.*, 164 Mass. 424, 41 N. E. 721, 49 Am. St. Rep. 471.

The conclusion thus reached renders it unnecessary to consider the other questions raised; for example, with respect to defendant's negligence in running faster than the ordinance permitted and to the reasonableness of that ordinance.

Order affirmed.

LEACH et al. v. OREGON SHORT LINE R. CO.

(Supreme Court of Utah, May 3, 1905.)

[80 Pac. Rep. 90.]

Evidence—Res Gestæ.—Declarations or acts sought to be introduced in evidence as part of the *res gestæ* must be connected with or grow out of the main or principal transaction which is the subject matter of the litigation, and must tend to elucidate and explain such transaction.

Same—Exclamations.*—In an action against a railroad for the death

*See *Havens v. Rhode Island Sub. Ry. Co. (R. I.)*, 13 R. R. 549, 36 Am. & Eng. R. Cas., N. S., 549; foot-note appended to Nelson

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of a brakeman, an exclamation of the conductor to another brakeman, made a few seconds after the accident, and while he was giving orders respecting the same: "My God! go back and see if you can find L. The bridge knocked him off"—was admissible as part of the *res gestæ*.

Master and Servant—Assumption of Risks—Statement of Doctrine.†—A servant by his contract of employment assumes only the natural and ordinary risks and dangers incident thereto, and such other unusual or extraordinary risks, due to defects in appliances and equipment, or which he knows, or which are so obvious that he will be presumed to have known of them.

Same.‡—An experienced brakeman who had been working on his run for 8 or 9 months on a freight train was transferred to a mixed train on which he had made two or three night trips, when he met his death while passing along an outside railing of a blind baggage car by coming in contact with the uprights of a bridge. His previous trips on the mixed train had given him no opportunity to appreciate the danger of passing along the railing while the car was passing over bridges, nor was his experience on freight trains such as to inform him of the narrow space between the sides of baggage cars and the uprights of the bridges. Held, that the brakeman had a right to assume that the railroad had so constructed its bridges as to permit him to perform his duties, and, in the absence of advice against passing along the railing while the train was passing over such bridges, did not assume the risk of the injury which he suffered.

Appeal from District Court, Fifth District; T. Marioneaux, Judge.

Action by Grace L. Leach individually, and as guardian ad litem of Lola Leach, a minor, against the Oregon Short Line Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Plaintiff brought this action on her own account, and as guardian ad litem for her minor child, to recover damages against defendant company for the death of John Leach, the husband and father of the plaintiffs, alleged to have been caused by the negligence of the defendant. The complaint charges that said John Leach was a brakeman in the employ of defendant, and that it was negligent in failing to exercise care to furnish him a reasonably safe place to work. The acts of negligence relied

v. Georgia, C. & N. Ry. (S. Car.), 13 R. R. R. 150, 36 Am. & Eng. R. Cas., N. S., 150; foot-note appended to *Dixon v. Northern Pac. Ry. Co. (Wash.)*, 14 R. R. R. 619, 37 Am. & Eng. R. Cas., N. S., 619; foot-notes appended to *Atlanta, etc., Ry. Co. v. Gardner (Ga.)*, 14 R. R. R. 602, 37 Am. & Eng. R. Cas., N. S., 602.

†See foot-notes appended to *Foster v. Chicago, R. I. & P. Ry. Co. (Iowa)*, 14 R. R. R. 538, 37 Am. & Eng. R. Cas., N. S., 538; *Chicago, I. & L. Ry. Co. v. Barnes (Ind.)*, 14 R. R. R. 531, 37 Am. & Eng. R. Cas., N. S., 531; *Murphy v. New York, N. H. & H. R. Co. (Mass.)*, 14 R. R. R. 346, 37 Am. & Eng. R. Cas., N. S., 346; *Foster v. New York, etc., R. Co. (Mass.)*, 14 R. R. R. 343, 37 Am. & Eng. R. Cas., N. S., 343; *Meehan v. Holyoke St. Ry. Co. (Mass.)*, 14 R. R. R. 331, 37 Am. & Eng. R. Cas., N. S., 331; *Shaw v. Manchester St. Ry. (N. H.)*, 14 R. R. R. 275, 37 Am. & Eng. R. Cas., N. S., 275.

‡See foot-notes appended to *Mobile & O. R. Co. v. Vallowe (Ill.)*, 14 R. R. R. 543, 37 Am. & Eng. R. Cas., N. S., 543; foot-notes appended to *Choctaw, etc., R. Co. v. McDade (U. S.)*, 14 R. R. R. 837, 37 Am. & Eng. R. Cas., N. S., 837.

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upon for a recovery are that defendant negligently maintained the uprights of a bridge dangerously near the track, and negligently equipped its car with insufficient appliances or means to enable its employees to pass along the side of the same in the discharge of their duties. The answer of defendant, after admitting the employment, denied generally all the allegations, and affirmatively pleaded contributory negligence, and the assumption of risk on the part of said John Leach. The trial of the case resulted in a verdict for plaintiff in the sum of \$10,000. From the judgment entered on the verdict, this appeal is taken.

The record in this case discloses about the following facts: John Leach was 46 years of age, and an experienced railroad brakeman, having worked at this business for more than 2 years. At the time of his death, April 11, 1902, he had been working as brakeman for about eight or nine months between Juab, Utah, and Frisco, Utah. His run on the south end was between Juab and Frisco, leaving Juab about 11 o'clock at night, and returning, when on time, the second morning thereafter about 6 o'clock. Sometimes the train would be late, and he would not get back until late in the afternoon. Prior to April 1st his run was on a freight train, but beginning on the latter date it had been on a mixed train; that is, a train composed of freight and passenger cars, the latter being attached to the rear of the train. On the night in question the train was returning from Frisco, and consisted of nine cars, including the coaches. Immediately behind the freight cars was the combination or blind-baggage car. This car was divided into two parts that were separate and unconnected. The forward end is used for the United States mail, and is in charge of a United States mail agent. Trainmen are not allowed in this part of the car. The rear portion is the baggage compartment. There are two sliding doors, one on either side of the baggage compartment, and an end door at the rear. On the left-hand side of this car as it was going forward an iron foot rail extended from the side door along the side of the car around the mail end to the forward platform, and a hand railing near the top of the car extended the same way. The foot rail was one inch in width, and stood out two inches from the side of the car, making a space of only three inches from the side of the car to the outside of the railing. These railings were the only means provided for the trainmen to walk around the side of the car in going to and from the forward part of the train or to the coaches. The men in passing around this car would hold onto the top rail with their hands, and, with their feet on the lower rail, walk sidewise back and forth. The hand rail was five feet and seven inches above the foot rail. The bridge on which Leach, the deceased, was killed, is known as the "Howe Truss Bridge," and had upright sides, but no top or overhead work. The extreme height of the uprights of this bridge above the rails of the track was 10 feet. The distance between the sides of the combination car referred to, when passing over the bridge, and the uprights of the bridge, was 2 feet 2½ inches. On the night of

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the accident the conductor, when the train was in the vicinity of the bridge, went to Leach and requested him to go out and see if the ties were all right, and if they had shifted, and to do this before the train reached the bridge. This referred to a car load of ties. Leach went forward into the baggage car, opened the side door of the baggage car, and went out on the side by means of the railings hereinbefore described, and closed the door after him. Hawkins, the conductor, soon after opened the door and looked out; saw Leach, who was within a few feet of the forward end of the car. Hawkins then swung out on the rail on the side of the car and started forward, and when he was about halfway between the baggage car door and the mail car door he heard, so he says, Leach's lantern crash. The conductor then immediately returned inside of the baggage car, sprung the air and gave the signal to stop, and from there he hurried on into the smoking car. And there is evidence in the record which tends to show that when he entered the smoker he made the following statement to one Harris: "My God! Go back and see if you can find Leach. The bridge knocked him off." The record further shows that Hawkins, from the time Leach fell or was knocked off the car, acted with promptness and celerity. Quoting his own language, as it appears in the record, he says: "Well, it was done as quick as I could do it." The train was stopped, and the train crew went back and found Leach on the bridge by the side of the track, and about two-thirds of the way from the south end. His head was crushed and some of his limbs were broken, from which injuries he then and there died.

P. L. Williams and Geo. H. Smith, for appellant.

Snyder & Snyder, O. W. Powers, and L. B. Wight, for respondents.

McCARTY, J., after stating the facts, delivered the opinion of the court.

Plaintiff read to the jury the deposition of one William J. Harris, who, at the time of the accident, was a brakeman on this same train with Leach. The following portions of the deposition were admitted, over defendant's objection: "Mr. Leach and I were sitting in the same seat in the smoking car. He [referring to Hawkins, the conductor] said, 'Leach, I want you to go out overhead and see how those ties are before we pass over the bridge.' Leach said, 'All right, sir,' and went out, passed through the baggage car, opened the baggage car door, and by that time we must have been to the bridge. I still sat in my seat where I was until Mr. Hawkins came to me and said: 'My God! Go back and see if you can find Leach. The bridge knocked him off.'"

Appellant contends that these statements of Hawkins, and, in particular, his declaration wherein it is claimed he said: "My God! Go back and see if you can find Leach. The bridge knocked him off"—were immaterial and incompetent, for the reason that they are hearsay, and that it was error for the court

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to admit them. On the other hand, respondent insists that they were a part of the *res gestæ*, and were therefore admissible on that ground. While there is no fixed and settled rule by which the admissibility of acts done or declarations made in relation to a transaction, under the doctrine of *res gestæ*, shall be determined, yet the great weight of authority holds that the declarations or acts sought to be introduced in evidence as part of the *res gestæ* must be connected with or grow out of the main or principal transaction which is the subject-matter of the litigation, and must tend to elucidate and explain such transaction. Gillett on Ind. & Collat. Ev. 242-247; 2 Jones on Ev. 347. In Louisville, etc., Ry. Co. v. Buck, 116 Ind., on page 576, 19 N. E. page 458, 2 L. R. A. 520, 9 Am. St. Rep. 883, the court tersely, and we think correctly, stated the general rule as follows: "It is not always easy to determine when declarations having relation to an act or transaction should be received as part of the *res gestæ*, and much difficulty has been experienced in the effort to formulate general rules applicable to the subject. This much may, however, be safely said: that declarations which were the natural emanations or outgrowths of the act or occurrence in litigation, although not precisely concurrent in point of time, if they were yet voluntarily and spontaneously made, so nearly contemporaneous as to be in the presence of the transaction which they illustrate and explain, and were made under such circumstances as necessarily to exclude the idea of design or deliberation, must, upon the clearest principles of justice, be admissible as part of the act or transaction itself." And the court further says: "Any other rule would in many instances operate to defeat the accomplishment of justice by excluding evidence of the most trustworthy character." McKelvey in his work on Evidence, p. 278, says: "The ground of reliability upon which such declarations are received is their spontaneity. They are the extempore utterances of the mind under circumstances and at times when there has been no sufficient opportunity to plan false or misleading statements; they exhibit the mind's impressions of immediate events, and are not narrative of past happenings; they are uttered while the mind is under the influence of the activity of the surroundings." In 24 A. & E. Ency. Law, 665, it is said: "The principle upon which the admission of such evidence rests is that the declarations may be made so soon after the happening of the principal fact, and be so intimately interwoven therewith by the surrounding circumstances, as to raise a reasonable presumption that they are the spontaneous utterance of thoughts created by and springing out of the transaction itself, and to exclude the presumption that they are the result of premeditation or design." Note 2, and cases cited. In 1 Whart. on Ev., the author says: "It is in any view clear that the declarations which are the immediate accompaniments of an act are admissible as part of the *res gestæ*, remembering that immediateness is tested by closeness, not of time, but of causal relation, as just explained." Applying the facts in this case to the foregoing principles, we are clearly

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of the opinion that the statements of Hawkins as to how the accident happened, which, the record shows, were made but a few seconds, at most, after the accident occurred, and while he was giving orders in the line of his duty respecting the accident, were admissible in evidence as a part of the *res gestæ*. There is evidence in the record which tends to show that, when Hawkins returned to the car and made the statements attributed to him, his face was covered with blood. And this testimony is not wholly denied, for Hawkins admitted on cross-examination that, at the time he heard Leach's lantern drop, "a little white speck," "a little fleshy substance," which he supposed was a portion of Leach's brain, struck him in the forehead. This circumstance, and the fact that he knew that Leach in all probability had been hurled to his death, together with the character of the expressions or statements attributed to him when he informed Harris of the accident, would indicate that he was laboring under considerable excitement, and that the declarations under consideration, if made at all by him, were the emanations or outgrowth of the occurrence, and the instinctive and natural outburst of expression explaining what had just happened to Leach, which clearly brings them within the rule as declared by the great weight of authority. In the case of the Ohio, etc., R. W. Co. v. Stein, 133 Ind. 243, 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 733, the plaintiff was hurt in a collision of some cars. The engineer immediately after the injury came a car's length to see the plaintiff, and the conversation there had between them was admitted in evidence, and the court held it was not error. The court, in a well-considered opinion, discusses the doctrine of *res gestæ*, and reviews many cases in which the question was involved and discussed, and in the course of the opinion says: "The case at our bar differs from those cited in essential particulars, for here the declarations were made at the time and place where the collision they referred to occurred, and they illustrated the event, and were made while all who participated in it were present. We may therefore well adjudge that there was no error in overruling the appellant's objections, without denying the doctrines asserted in our cases. The latest decision of our court upon the question is that given in the case of Louisville, etc., Ry. Co. v. Buck, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 520, 9 Am. St. Rep. 883. In that case the conductor of the train on which the intestate of the plaintiff was employed as a brakeman was on the 'caboose' when he received notice that the deceased had been injured while coupling cars, and he immediately ran forward and found the deceased under the rear end of the second car from the engine. The conductor, when he took the deceased from under the car, asked, 'How did this happen?' and the deceased fully described the cause of the accident. The court held that this testimony was competent, and cited many cases in support of its conclusion." Hanover Ry. Co. v. Coyle, 55 Pa. 396; McLeod, Receiver, v. Ginther's Adm'r, 80 Ky. 399; Leahy v. Cass Ave. & F. G. Ry. Co., 97 Mo. 165, 10 S. W. 58, 10 Am. St. Rep. 300.

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Appellant requested the court to give to the jury the following instruction, which was refused: "You are further instructed that the servant, upon entering the employment of the master, assumes all the ordinary risks incident to his employment; and if the death of the deceased, John Leach, was occasioned by a risk which was incident to his business as a brakeman, the plaintiffs here cannot recover in this action. And you are further instructed that if you believe from the evidence that the bridge in question was not a reasonably safe place, in view of the equipment of the baggage car and the manner in which brakemen were required to discharge their duties, and that the deceased, prior to the accident, by exercising such care and prudence in informing himself of the situation of his master's premises as would have been exercised under the same circumstances by a man of ordinary prudence, could have learned, or did actually know, that the said place was not reasonably safe, then, in that event, the risk of being injured by coming in contact with the bridge in the manner claimed by plaintiffs here was a risk incident to the business in which the said John Leach was engaged, and for his death, under such circumstances, defendant would not be liable." The refusal of the court to give the foregoing instruction is now assigned as error. The court, however, in stating the issues, instructed the jury as follows: "The plaintiffs claim that the space between the upright portion of the bridge and the foot rail was insufficient to enable the said Leach to go safely along said foot rail, and that by reason of such insufficient space the place where said Leach was engaged in performing his work at the time of the accident was not a reasonably safe place." The court also gave the following instruction: "If you believe from the evidence that the deceased was not thrown from the car because of coming in contact with the upright portion of the bridge, but that he lost his hold and fell, that in such case your verdict must be for the defendant." The court, by giving these instructions to the jury, limited plaintiffs' right to recover to the alleged negligence of defendant in maintaining the upright portions of the bridge too close to the railroad track, and thereby rendering the space between such upright timbers and braces of the bridge and the hand and foot railings on the side of the baggage car insufficient to enable the deceased, Leach, while in the discharge of his duties, to pass and repass along said railings when the train was passing over the bridge. The doctrine of assumed risks arises out of the contractual relations existing between master and servant. The servant in his contract of employment assumes the natural and ordinary risks and dangers that are incident to or arise out of the work which under his contract he is called upon to perform. These risks and hazards, and these only, the parties are presumed to have in mind when they enter into the contract. If, however, there are other risks of unusual or extraordinary character connected with the service or work in which the servant is engaged, that are due to defects in the appliances and equipments used in the operation of the

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business, and are known to the servant, or are so open and obvious that he will be presumed to have knowledge of their existence, and he continues, without objection, to use such defective appliances and equipments, he assumes the extra risks and hazards arising therefrom. In the case of *Texas & Pac. Ry. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188, the court says: "The employer, on the one hand, may rely on the fact that the employee assumes the risks usually incident to the employment. The employee, on the other hand, has the right to rest on the assumption that the appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because by ordinary care he might have known of the methods, and inferred therefrom that danger of unsafe appliances might arise." The Supreme Court of the United States, in the case of *Choctaw, etc., R. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96, again declared this same doctrine as follows: "The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume risks of the employer's negligence in performing such duties. The employee is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing appliances necessary for its operation. This rule is subject to the exception that where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus, in the face of knowledge and without objection, without assuming the hazard incident to such situation." *Davidson v. Cornell et al.*, 132 N. Y. 228, 30 N. E. 573; *Garitz v. B. B. & Co. (Utah)* 76 Pac. 556; *Shearman & Redfield*, Neg. 185; *Bailey, Mast. Liab.* 150-155; *1 Labatt, Mast. & Serv.* 260. Now, the record in this case shows that Leach, at the time he was killed, was making his third or fourth trip as brakeman on this "mixed" train, which passed over the bridge in question and others of a like character on this route, in the nighttime. And there is absolutely no evidence in the record which goes to show, and no fact or circumstance from which it can be inferred, that Leach had, at any time prior to the accident which cost him his life, passed along the outside of the baggage car by means of the railings referred to while the train was passing over this or any other bridge of the same kind and structure. Nor is it shown that he had any knowledge of the close proximity of the railings or the baggage car to the upright portions or sides of the bridges along the route on which he was brakeman. But, on the contrary, the record shows that he had made but a few trips on this "mixed" train, and on each occasion passed over these truss bridges in the nighttime, and at a rate of speed of from 20 to 25 miles per hour, which gave him no opportunity whatever to know or appreciate the danger of passing along the hand and foot

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railings on the baggage car while it was passing over the bridges referred to. Neither is it shown, nor can it be inferred from the evidence in the case, that Leach's experience as a brakeman on freight trains before he went to work on the mixed train was such as to inform him of the narrow space between the sides of the combination baggage car and the upright portions of the bridges. The evidence tends to show that the brakeman on trains made up exclusively of a caboose and freight cars, in going back and forth along the train, would pass through and over the tops of the cars, and not climb around on the sides thereof, as they are compelled to do on the combination or blind-baggage cars. When the defendant transferred Leach from the trains made up exclusively of freight cars and a caboose, and put him to work on the mixed train, he had a right to assume, and to act upon such assumption, that it had so constructed and maintained its roadway and bridges that he could perform his duties with reasonable safety; and if the bridges, or any of them, were too narrow to enable him to pass around the sides of the baggage car with reasonable safety on the railings provided for that purpose while the train was passing over such bridges, it was the duty of defendant to advise him of that fact. In the case of *Texas & Pac. Ry. Co. v. Archibald*, supra (170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188), the court says: "In assuming the risks of the particular service in which he engages, the employee may legally assume that the employer, by whatever rule he elects to conduct his business, will fulfill his legal duty by making reasonable efforts to furnish appliances reasonably safe for the purposes for which they are intended; and whilst this does not justify an employee in using an appliance which he knows to be defective, or relieve him from observing patent defects therein, it obviously does not compel him to know or investigate the employer's modes of business, under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances." *Louisville, etc., Ry. Co. v. Wright*, 115 Ind. 378, 16 N. E. 145, 17 N. E. 584, 7 Am. St. Rep. 432; *Baltimore, etc., Ry. Co. v. Rowan*, 104 Ind. 88, 3 N. E. 627; *St. Louis, etc., Ry. Co. v. Irwin* (Kan. Sup.) 16 Pac. 146, 1 Am. St. Rep. 266; *Bass v. Northern Pac. Ry. Co.* (N. D.) 49 N. W. 655, 33 Am. St. Rep. 756; *Ill. Terr. Ry. Co. v. Thompson* (Ill.) 71 N. E. 328; *Pidcock v. Ry. Co.*, 5 Utah, 612, 19 Pac. 191, 1 L. R. A. 131; 20 A. & E. Encyc. Law (2d Ed.) p. 73; *Chicago & A. R. Co. v. Stevens* (Ill.) 59 N. E. 577; *Choctaw, etc., Ry. Co. v. McDade*, 191 U. S. 64-67, 24 Sup. Ct. 24, 48 L. Ed. 96.

There are two propositions contained in the instruction asked for by appellant. The first is, if the death of Leach was occasioned by a risk which was incident to his business as brakeman, the plaintiff's cannot recover. And the second is, if he knew, or by the exercise of ordinary care and prudence would have known, that the place where he was killed was not reasonably safe, the defendant would not be liable. As to the first proposition, the facts and circumstances show that the risk was not such as Leach

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was legally bound to know or anticipate when he went to work on this "mixed" train. And the second proposition contained in the instruction does not correctly declare the law applicable to the facts in this case. It is not claimed that Leach received any instructions respecting the close proximity of the sides of the bridge to those of the baggage car. And, as we have hereinbefore stated, he had a right to assume that the space between the baggage car and the uprights and the braces of the bridges was sufficient to enable him to pass and repass along the sides of the car in the performance of his duties with reasonable safety. Under the law as declared by the foregoing decisions and as announced by the text-writers, the burden of inspection was not on him to ascertain if there were any defects in the roadway, or in the structure of the bridges, which would tend to make of the service in which he was engaged one of extraordinary danger, as the foregoing instruction asked for by appellant would imply. The court instructed the jury very elaborately upon the question of negligence, and of the degree of care required of both appellant and the deceased, and the instructions, as a whole, were as favorable to the defendant as the facts in the case warranted.

We find no reversible error in the record. The judgment is therefore affirmed; the costs of this appeal to be taxed against appellant.

BARTCH, C. J., and ARMSTRONG, District Judge, concur.

MERRILL et al. v. OREGON SHORT LINE R. CO.

(Supreme Court of Utah, May 15, 1905.)

[81 Pac. Rep. 85.]

Master and Servant—Promulgation of Rules—Enforcement—Delegation of Duty.*—A master is under a primary and nondelegable duty to use ordinary care not only to promulgate, but also to enforce, reasonable rules and regulations for the safety of his servants, when the nature of the work requires it; and this duty is not performed merely by promulgating the rules, and using ordinary care in selecting men to enforce them.

Same—Negligence of Fellow Servant—Concurrence with Master's Negligence.†—The fact that the negligence of a fellow servant concurs with the negligence of the master in causing injury to a servant does not exempt the master from liability for his negligence.

Same—Fellow Servants—Test of Rule.—The test of whether negligence is that of the master or of a fellow servant is whether the negligent act is a breach of positive duty owing by the master to the servant, and does not depend in any way upon the grade of service of the fellow servant.

*See foot-note appended to *Moran v. Rockland, T. & C. St. Ry.* (Me.), 12 R. R. R. 721, 35 Am. & Eng. R. Cas., N. S., 721; foot-note appended to *Hill v. Boston & M. R. R.* (N. H.), 11 R. R. R. 385, 34 Am. & Eng. R. Cas., N. S., 385.

†See foot-note appended to *Illinois So. Ry. Co. v. Marshall* (Ill.),

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Appeal—Consideration of Evidence—Directed Verdicts.—An appellate court, in determining whether the lower court should have directed a verdict for appellant, must consider the evidence in the aspect most favorable to respondent.

Master and Servant—Failure to Enforce Rules—Negligence—Sufficiency of Evidence.—In an action for the death of a car repairer, caused by kicking a string of cars against the cars between which deceased was working, evidence held sufficient to authorize a finding that the railroad had not used ordinary care in establishing and enforcing rules and regulations for the safety of its servants.

Same—Primary Duties—Nonperformance by Master—Notice.†—Where a master delegates the performance of his own primary or positive duty to another, notice to the latter with respect to the non-performance of such duty is, no matter what his rank, notice to the master.

Same—Disregard of Rules—Inference of Master's Knowledge.—Knowledge by the master of the servants' failure to observe rules promulgated for their guidance may be inferred from a common disregard for the period of a year of such rules by the servants.

Same—Contributory Negligence—Questions for Jury.—Whether a car repairer working between cars in the railroad's yards was guilty of negligence in not displaying a flag, or otherwise observing rules promulgated by the railroad to secure his safety, held, in view of evidence of a general disregard of such rules by the servants for the period of a year, a question for the jury.

Same—Assumption of Risk—Statement of Doctrine.§—While the servant assumes the usual and ordinary risks incident to his employment, he has the right to assume that the master has used ordinary care to perform his primary and positive duties, and does not assume the risks occasioned by the negligence of the master in failing to perform such duties, unless he has actual or presumptive knowledge that such duties have not been performed, and of the risks arising from that fact, and, with such knowledge, accepts or continues in his employment without complaint or protest.

Same—Questions for Jury.—Whether a car repairer working between cars standing in the yards assumed the risk arising from the negligence of the master in failing to see that rules promulgated to secure the safety of servants were observed, held, under the evidence, a question for the jury.

Appeal from District Court, Salt Lake County; S. W. Stewart, Judge.

Action by Ellen Merrill, individually and as guardian ad litem of Virgil Merrill and another, against the Oregon Short Line Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

13 R. R. R. 95, 36 Am. & Eng. R. Cas., N. S., 95; foot-note appended to Hicks v. Southern Pac. Co. (Utah), 12 R. R. R. 332, 35 Am. & Eng. R. Cas., N. S., 332.

†See foot-notes appended to Havens v. Rhode Island Sub. Ry. Co. (R. I.), 13 R. R. R. 549, 36 Am. & Eng. R. Cas., N. S., 549.

§See foot-note appended to Foster v. Chicago, R. I. & P. Ry. Co. (Iowa), 14 R. R. R. 538, 37 Am. & Eng. R. Cas., N. S., 538; Chicago, I. & L. Ry. Co. v. Barnes (Ind.), 14 R. R. R. 531, 37 Am. & Eng. R. Cas., N. S., 531; Murphy v. New York, N. H. & H. R. Co. (Mass.), 14 R. R. R. 346, 37 Am. & Eng. R. Cas., N. S., 346; Foster v. New York, etc., R. Co. (Mass.), 14 R. R. R. 343, 37 Am. & Eng. R. Cas., N. S., 343; Meehan v. Holyoke St. Ry. Co. (Mass.), 14 R. R. R. 331, 37 Am. & Eng. R. Cas., N. S., 331; Shaw v. Manchester St. Ry. (N. H.), 14 R. R. R. 275, 37 Am. & Eng. R. Cas., N. S., 275.

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*P. L. Williams and Geo. H. Smith, for appellant.
Rogers & Street and L. W. Lockhart, for respondents.*

STRAUP, J. 1. Respondents had judgment against appellants for negligently causing the death of William A. Merrill, the husband and father of respondents. Among other things, it was alleged in the complaint that the deceased was in the employ of the appellant as a car repairer at its yard in Pocatello, Idaho, and was directed to make repairs on one of its cars in a string or train of cars standing upon one of its tracks in said yard; that the appellant had negligently failed to promulgate and enforce rules and regulations concerning the displaying of flags when car repairers were between or under cars making repairs, and at such time forbidding coupling onto or moving the said cars; that whilst the deceased was between two of said cars the appellant, without notice or warning to the deceased, negligently backed and kicked a string of cars against the cars on which the deceased was making repairs, thereby moving them and so injuring him that he died. The answer contained a general denial as to all of the alleged acts of negligence, and alleged negligence of a fellow servant, contributory negligence of the deceased, and that his death was caused from a usual and ordinary risk of his employment.

2. The evidence on behalf of respondents, so far as material to the assigned errors, tends to show: That there were ten tracks running parallel with each other in the yard, which was about three-quarters of a mile long. The yard was used for holding, breaking, and the making up of trains, and a great deal of switching was done there. All trains, both passenger and freight, were stopped and looked over, and, if any light repairs were necessary, they were made there. The deceased was a member of a crew of car repairers, over which there was a foreman. There was a switch crew switching in the yard, over which there was also a foreman. There was also a yard master and a general foreman of the car shops. The deceased was between two cars of a string of four or five cars standing on track No. 6, repairing a coupler. He was working alone. There was no system of signaling or warning used by appellant to make known that car repairers were under or between cars while making repairs, standing upon the track in the yard. There were no flags or other signals displayed on the cars where the deceased was at work. Appellant had not furnished flags for such purpose. Light repairs would be made while the switchman were rearranging the cars, and between the times the cars would be switched and moved about. The men were not in the habit of using flags to protect themselves when making repairs. When there were two men working together, one would look out while the other made the repairs. When a repairer was alone, he looked out for himself and took his own chances. About a year prior to the accident, appellant and the men were in the habit of using flags, and when a train came into the yard the inspectors

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and repairers were in the habit of putting a flag at each end, and then the inspection would be made. About a year prior to the accident, complaint was made by the yard master to the foreman of the inspection and repair crew that such method held the cars too long, and prevented needed switching and making up of trains in the yard, and the yard master stated to the foreman that the flags would have to be taken off as quick as the inspection was done, and that the work would have to be done afterwards. After that the repairers would work between the cars without a flag. The deceased was in the employ of appellant, engaged at this work in its yard, a little over a month. Whilst he was at work between two of said cars a string of about twenty-four cars in the process of switching were kicked and run down upon the track, and against the cars where the deceased was at work, thereby injuring him so that he died. The cars would not have been kicked down and run against the other cars, had a flag or some other danger signal been displayed about or upon them. The above, of course, is a statement of that portion of the evidence most favorable to the respondents. Appellant introduced evidence showing that it had not only established and promulgated rules and regulations concerning the displaying of flags under said circumstances, but that it had also enforced such rules; that at the time of the accident, and for a long time prior thereto, it had promulgated and enforced a rule (No. 26): "A blue flag by day and a blue light by night displayed at one or both ends of an engine, car or train indicates that workmen are under or about it. When thus protected it must not be coupled to or moved. Workmen will display the blue signals and the same workmen are alone authorized to remove them. Other cars must not be placed on the same track so as to intercept the view of the blue signals without first notifying the workmen." Another rule: "When inspecting and repairing cars which they do not wish moved, they must protect themselves by placing conspicuously a blue signal on both ends of the car, as provided in rule 26, and when necessary to make repairs on a car in a train, they must place blue signals on both ends of the train before commencing work. If an engine is attached to it, they will place a blue signal upon the engine where it can be plainly seen by the engineman and fireman." It introduced evidence showing it had furnished and had on hand an ample supply of flags for such purpose, and that there was no disregard of the use of them, but that they were generally used and displayed by the repair men when inspecting and making repairs, in accordance with, and as it was their duty to do under the said rules.

3. The court charged the jury that respondents' rights to recover in the action were to be determined by the law of the state of Idaho, and charged, under such law, that the foreman of the repair or inspecting crew, the foreman of the switching crew, and all other persons at work in and about the yard were fellow servants with the deceased, and that appellant was not liable for any negligence of either said foremen or said persons. But the

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court further charged that if the appellant was negligent, as alleged in the complaint, in respect to promulgating and enforcing rules and regulations, and the deceased did not know of such negligence, and if the negligence of appellant combined and concurred with the negligence of a fellow servant, and if such negligence of the appellant was a proximate cause of the injury and death of the deceased, it would be liable. The court fully charged the jury as to their determination when and under what circumstances rules were required, and as to the duties of appellant in promulgating and enforcing them, and, if ordinary care in these respects had been used, its duty was discharged, "even though it has failed in its efforts to secure obedience or observation of the rules. If, after performing this duty, the rules are violated or not enforced by the fellow servants," and injury is occasioned as a result thereof, appellant was not liable. The court also fully charged as to contributory negligence, and, among other things, that it was the duty of the deceased to use "ordinary care to acquaint himself with the rules and regulations of his employer, to familiarize himself with the methods employed by the employer in the performance and conduct of his business, and to guard and protect himself against injury that might arise from the way the business was being conducted and managed. The servant must exercise the same degree of care for his own safety and protection as the master is required to observe towards his employees, in providing for their safety and guarding against their injury," and, if the deceased did not do these things, respondents could not recover. The court also charged that the deceased assumed the usual and ordinary risks incident to his employment, the usual and ordinary risks arising from the manner in which the business in which the deceased took part was managed and conducted, the risks or hazards known to him, or which were open and obvious, or which, in the exercise of ordinary care, would have been known to him, and that appellant was not liable for an injury resulting from any such risks.

4. The principal assigned error, and the only one discussed in the brief, relates to the refusal of the court to give appellant's request to direct a verdict for it. This is claimed upon the grounds that there was no negligence shown upon the part of appellant, for that it had promulgated rules and regulations calculated to secure the safety of its employees, had flags on hand, and, if the rules and regulations were not carried out, such failure, if it amounted to negligence, was that of a fellow servant. That is to say, the master has performed his full duty by framing and promulgating rules, and "exercising care to enforce the rules by the selection of reasonably competent persons to perform the work," and that appellant is not liable for a failure to carry out the methods as prescribed. It is also claimed that the deceased was guilty of negligence in not displaying a flag, and that the danger was a usual and ordinary risk incident to the employment, and was therefore assumed by him. Appellant,

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with great care and at some length, discussed the question, and cited numerous authorities to the effect that under the law and the decisions of the state of Idaho the foreman of the car repairers, and switch crews, and all persons in the yard, regardless as to whether they were foreman or yard master, were fellow servants with the deceased. To this contention it is quite sufficient to say that the trial court so held with appellant, and so charged the jury. The important question, therefore, is whether the negligence, if any there was, causing the injury and death of the deceased, arose and grew out of a failure to perform some primary or positive duty which appellant, as master, owed the deceased, or whether it arose out of some mere negligent act of a person or persons about the yard, held to be fellow servants, including the said foremen and yard master, or whether there was any negligence upon the part of the appellant with respect to its primary or positive duties, combining and concurring with the negligence of a fellow servant as a proximate cause of the injury and death.

It must be conceded it is settled law that among the primary and positive duties of the master, owing his servant, is the one of using ordinary care to promulgate and enforce reasonable rules and regulations for the safety of his servants, when the nature of the business or the work requires it, and that this duty is nondelegable. And it also is well-settled law that, where the negligence of the master and that of a fellow servant together produce injury, the master is liable therefor on the ground of concurring negligence; that the mere fact of a concurrence of one who stands in the relation of a fellow servant to the one receiving the injury does not exonerate the master from his original fault. The primary duty here resting upon appellant was not only to use ordinary care to promulgate rules, but also to use ordinary care to enforce them. The doctrine which appellant here invokes—that the master's duty was performed when he promulgated rules, and used ordinary care in selecting men to enforce them—cannot obtain. For the care with respect to enforcing the rules is just as much a primary and nondelegable duty as is the one of promulgating rules or of furnishing a safe place or appliance. "An employer does not discharge his whole duty by merely framing and promulgating proper rules for the conduct of his business and the guidance and control of his servants. He is also under the obligation of enforcing the rules in so far as that result can be attained by exercising a reasonably careful supervision over his business and his servants. In other words, a master's duty does not end with prescribing rules calculated to secure the safety of his employees. It is equally binding on him honestly and faithfully to require their observance." *Labatt, Mast. & Serv.* § 214.

Independent of some statute defining "fellow servant" (there is none in Idaho), the test established by the Supreme Court of the United States and those courts not following the superior servant doctrine, of which Idaho is one, as to when negligence

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is that of the master or of a fellow servant, is whether the negligent act is a breach of positive duty owing by the master to his servant. If it is, then negligence in the act is the negligence of the master. In such case the liability of the master is not made to depend in any manner upon the grade of service of a co-employee, but upon the character of the act itself. If, instead of personally performing his obligations with respect to his primary and positive duties, the master engages another to do them for him, he is liable for the neglect of that other, which in such case is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such. *Cent. R. Co. v. Keegan*, 160 U. S. 264, 16 Sup. Ct. 269, 40 L. Ed. 418; *North Pac. R. Co. v. Peterson*, 162 U. S. 353, 16 Sup. Ct. 843, 40 L. Ed. 994; *B. & O. R. R. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *New Eng. R. Co. v. Conroy*, 175 U. S. 344, 20 Sup. Ct. 85, 44 L. Ed. 181; *Hough v. Ry. Co.*, 100 U. S. 213, 25 L. Ed. 612; *N. P. R. R. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; *Pool v. R. R.*, 20 Utah 210, 58 Pac. 326. We think this doctrine, in substance and effect, is recognized by the Supreme Court of Idaho, the state where the acts complained of occurred. *Harvey v. Min. Co.*, 3 Idaho, 510, 31 Pac. 819.

It is quite true, when the evidence of appellant is considered, it shows that appellant established and promulgated sufficient and proper rules and regulations, used ordinary care to, and did, enforce them, furnished and kept on hand sufficient and necessary flags for such purpose, and that by yielding obedience to such rules the safety of the deceased was reasonably and properly protected and guarded, and that his injury and death were the result either from his failure and neglect to display flags whilst between the cars, or from some omission or commission of the men about the yard in not properly obeying or observing the rules. But in considering whether the court should have directed a verdict for appellant, we must look to that evidence in the record which is most favorable to the respondents; and, when the truth of such testimony is assumed, quite a different state of facts is made to appear. We think the evidence on behalf of respondents was quite sufficient to submit to the jury the question as to whether appellant used ordinary care, not so much, probably, in establishing and promulgating rules and regulations, but particularly in using ordinary care to enforce them, and in furnishing and providing flags. There was some evidence which tended to show that flags had not been furnished and provided by the appellant, and that there was no system of signaling or warning used by appellant to make known when car repairs were under or between cars, making repairs, and that repairs were made between the times when the cars would be switched and moved about, and that it was the practice and custom not to use flags, and such practice continued for a year prior to the accident, and, though rules and regulations had been established

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and promulgated, they were abandoned, or so generally and habitually disregarded, from which it could be presumed compliance therewith was not exacted, but was waived. The truth and the weight of this testimony were for the jury, which, if believed by them, was sufficient to find that ordinary care had not been used by the appellant in either establishing or in enforcing rules and regulations for the safety of its servants. And as this duty was a primary one, and one which could in no way be delegated so as to relieve appellant from responsibility, therefore any negligence in the failure to perform or in the manner of performing it was appellant's negligence, for which it is liable.

The contention made that it was not shown appellant, through any officer or agent standing in the place of the master, had notice or knowledge that the rule was disregarded, and that notice to or knowledge of the foreman or yard master was not its knowledge, cannot prevail, and is fully answered by the following cases and those already cited: *North. P. R. Co. v. Babcock*, 154 U. S. 200, 14 Sup. Ct. 978, 38 L. Ed. 958; *Hough v. Ry. Co.*, 100 U. S. 213, 23 L. Ed. 612. The knowledge of appellant is not charged by virtue of these men being foremen, but from the fact, as shown by the evidence, to them or some of them was delegated the duty to discharge a primary duty of appellant—of enforcing the rules. And when a master, instead of performing his primary or positive duty himself, delegates it to another, then, no matter what the rank of such other is, whether high or low, notice to him and his knowledge with respect to such matters is notice to and knowledge of the master. Besides, if true, as testified to by a witness, that for a year it was common practice to disregard the rule, knowledge on the part of the appellant may be inferred therefrom.

It is further urged that the deceased was guilty of negligence, because of his failure to display a flag before going between the cars to make the repairs. It is true, if appellant had established the said rule with respect to displaying a flag, and that the deceased knew there was such a rule, and that such rule was not generally or habitually disregarded, and not abandoned, but reasonably enforced, and that appellant furnished flags for such purpose, and that the deceased failed to display the flag as required by the rule, and that such failure contributed to his injury, clearly respondents were not entitled to recover. But there is evidence in the record to show that appellant had not furnished or provided flags for such purpose during the time that deceased was employed at and about the yard, and for a year prior thereto, and that car repairers during said time were not in the habit of using flags when making repairs in the yard. And appellant cannot well say—much less can we, as matter of law, say—the deceased was guilty of negligence in not using and displaying a flag, when it was not provided or furnished him. And because there was evidence in the record showing though rules and regulations had been established and promulgated, yet for a year prior to the accident they were generally disregarded,

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under circumstances from which it could be presumed appellant knowingly permitted such disregard, or approved it, without attempting to enforce the rules, we think it was a question for the jury to determine whether the deceased was or was not guilty of negligence in not displaying a flag or not observing the rules. *Pool v. R. Co.*, 20 Utah, 210, 58 Pac. 326; *Boyle v. R. R.*, 25 Utah, 420, 71 Pac. 988; *Wright v. R. R.*, 14 Utah, 383, 46 Pac. 374.

It is further claimed that deceased assumed the risk. It is true, the servant assumes the usual and ordinary risks incident to his employment. But with the exception hereinafter stated, he does not assume the danger and perils occasioned through the negligence of his employer. "It is true that, when the plaintiff entered the employment of the defendant as switchman in the yards at Carlin, he assumed the perils and risks ordinarily incident to such employment, including the hazards which observation would bring to his knowledge; but he did not assume the perils occasioned through the negligence of his employer." *Wright v. R. R.*, 14 Utah, 392, 46 Pac. 374; *Pool v. R. R.*, 20 Utah, 216, 58 Pac. 326. In entering his employment the servant has the right to assume that the master has used ordinary care with respect to the performance of his primary and positive duties, and the servant does not assume the perils and risks occasioned by the negligence of the master in his failure to perform these duties, unless the servant has actual or presumptive knowledge that these duties have not been performed, and the perils and risks arising therefrom, and to which he is exposed, are known to him, or are so obvious that knowledge may be presumed, and, with such knowledge, he accepted or continued in his employment without complaint or protest. "The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duties. The employee is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and in such case cannot recover." *R. Co. v. McDade*, 191 U. S. 68, 24 Sup. Ct. 24, 48 L. Ed. 96. After stating the general rule again, it was said: "But no reason can be found for, and no authority exists supporting, the contention that an employee, either from his knowledge of the employer's methods of business, or from a failure to use ordinary care to ascertain such methods,

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subjects himself to the risks of appliances being furnished which contain defects that might have been discovered by reasonable inspection. The employer, on the one hand, may rely on the fact that his employee assumes the risks usually incident to the employment. The employee, on the other hand, has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because by ordinary care he might have known of the methods, and inferred therefrom that danger of unsafe appliances might arise. The employee is not compelled to pass judgment on the employer's methods of business, or to conclude as to their adequacy. * * * In assuming the risks of the particular service in which he engages, the employee may legally assume that the employer, by whatever rule he elects to conduct his business, will fulfill his legal duty by making reasonable efforts to furnish appliances reasonably safe for the purposes for which they are intended; and, whilst this does not justify an employee in using an appliance which he knows to be defective, or relieve him from observing patent defects therein, it obviously does not compel him to know or investigate the employer's modes of business, under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances." *Ry. v. Archibald*, 170 U. S. 671, 18 Sup. Ct. 777, 42 L. Ed. 1188.

Tested by these principles, we cannot say, as matter of law, that the deceased assumed the risk of the peril and danger to which he was exposed and which caused his injury, but we think it was a question of fact to be submitted to the jury; and the law with respect thereto, we think, was stated more favorably to the appellant than it had a right to ask. Here was evidence to show that the peril to which the deceased was exposed was occasioned through the want of ordinary care by appellant, either in not promulgating a proper rule, or by not using ordinary care in enforcing it, which, of course, was its negligence.

The point now is, did the deceased have knowledge, either actual or presumptive, that the nature of the business was such as to require rules and regulations; whether rules had been promulgated; if promulgated, what was his knowledge with respect to the disregard or waiver or abandonment of the rules; what was his knowledge with respect to the perils occasioned thereby; his knowledge as to the condition of the premises, the things then being done or about to be done, the nature and character of the work then being performed about the yard, all to be considered in connection with what he was doing himself, and from all of which his peril arose; and how manifest and obvious this peril was made to appear or his perilous situation disclosed. His knowledge of these matters does not rest upon any direct evidence in the case, but it is to be gathered and deduced from the length of time he was employed about the yard, the nature and

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character of his work, his conduct with respect thereto, his experience and familiarity therewith, the condition and situation of the premises, the nature and character of the work and the things there done; and from all the facts and circumstances bearing upon the question, and tending to show knowledge of his peril, or the lack of it. It is apparent what knowledge the deceased had, either actual or presumptive, with respect to these matters, was a question of fact. Furthermore, it is the law that a servant has the right to assume that the master has used ordinary care in the discharge of his duties, and that "the employee is not obliged to pass judgment upon the employer's method of transacting his business," and he may rest upon the presumption that the master has done his duty, until, of course, he has knowledge, either actual or presumptive, that such duty has not been performed, and he knows the danger, and the peril to which he is exposed from the want or manner of discharging it, or that the peril therefrom is so obvious that knowledge may be presumed. If appellant here was negligent with respect to its duties, we cannot say, as matter of law, that the deceased was called upon to pass judgment upon the manner and method in which appellant was conducting its business, as is shown by the evidence on behalf of respondents, and that he had knowledge that such method was improper or inadequate, and that he knew the perils arising therefrom, and to which he was exposed, and that he, with such knowledge, accepted or continued in his employment. We think it was a question of fact for the jury. What was said upon this question in the Pool Case equally well applies here. Our conclusion, therefore, is, whether the nature and character of the work and business were such as to require appellant, in the exercise of ordinary care, to promulgate and enforce rules and regulations, and as to whether its duty in these respects was performed with ordinary care; whether the injury and death were the result of such want of care, or of a negligent act of a fellow servant, or of a concurrence and combination of both; whether the deceased himself was guilty of negligence, or whether he assumed the risk—were, under the circumstances of the case, all questions of fact to be submitted to the jury. Upon all these matters the charge of the court was quite full, and on some of them stating the law more strongly for appellant than many of the authorities seem to indicate.

The judgment of the court below is therefore affirmed, with costs.

BARTCH, C. J., and McCARTY, J., concur.

GRAHAM v. MINNEAPOLIS, ST. P. & S. STE. M. RY. CO.

(Supreme Court of Minnesota, May 26, 1905.)

[103 N. W. Rep. 714.]

Injury to Railroad Employee—Contributory Negligence.*—When a yardmaster, in the discharge of his duties, is required to occupy places of danger, he may, in regulating his conduct, rely upon the custom of the railway company in the movement of its trains and engines.

Held, under the circumstances of this case, the plaintiff's intestate was not, as a matter of law guilty of contributory negligence, or assumed the risks of working at the place.

(Syllabus by the Court.)

Appeal from District Court, Hennepin County; Charles M. Pond, Judge.

Action by Grace Mary Graham, administratrix of Robert H. Graham, against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Verdict for plaintiff. From an order denying judgment notwithstanding the verdict, and from an order denying a new trial, defendant appeals. Affirmed.

Alfred H. Bright, for appellant.

Frank D. Larrabee and Mathias Baldwin, for respondent.

LEWIS, J. Defendant company, as lessee, had the right to use certain of the Northern Pacific Railway Company's tracks in Minneapolis. In that portion of the company's yards involved in this case there was a certain switch shanty, a one-story building, 12x36 feet, for the use and benefit of yardmasters and switchmen, located south of the main tracks, and about 500 feet east of the roundhouse, the north side of which was about 5 feet south from the southerly rail of the east-bound main line track. Between the building and the track was a platform about 4 feet wide, upon which, standing against the building, with the exception of the westerly portion, was a bench about 16 inches wide. The building consisted of a west and east room; the former opening upon the platform by a door facing the track, and the latter upon the platform at the east end of the building. The two main line tracks are connected with other tracks by means of switches both to the east and west, and during the time in question, at a distance of about 90 feet west from the west end of the switch shanty, at a point where another track crossed the east-bound main line track, was a switch tended by a switchman. Several hundred feet east of the switch shanty were other tracks leading to the main track in question, and switches connecting therewith. What is known as the "Plymouth Avenue Bridge" was located several hundred feet west, and the coal shed was on the south

*As to the right of an employee to rely on his master's performance of duties owing to him, see foot-notes appended to *McCabe v. Montana Cent. Ry. Co.* (Mont.), 13 R. R. R. 564, 36 Am. & Eng. R. Cas., N. S., 564, where all the preceding authorities in this series are collected.

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side of the main tracks, and the east end of it was in the neighborhood of 700 feet west of the west end of the switch shanty. It was conclusively shown that defendant company had for a long time been in the habit of running its passenger locomotive easterly every evening about 5 o'clock on the east-bound main line track, next to the switch shanty, from the general yard to the Milwaukee station, to take out the east-bound passenger train, and that all trains and locomotives of the Northern Pacific Company coming into the city from the west also came in over the main line on the same track. Plaintiff's intestate, Robert H. Graham, was employed by the Northern Pacific Company as assistant yardmaster, in which capacity he served at the place involved for a number of years. The platform in front of the switch shanty was a perilous place, because the pilot beam on the engines extended over the platform, leaving only about two feet of clearance between it and the wall of the building. About 5 o'clock in the afternoon of February 3, 1904, Mr. Graham, in the discharge of his duties as yardmaster, was in the west room of the switch shanty, giving directions to certain switchmen. He passed out of the door to the platform, and proceeded to walk eastward along the platform in front of the shanty, when defendant's engine rapidly approached from the west, overtaking him either near the east end of the building, or after he had passed it, the pilot beam striking him under the left shoulder. He was picked up at a point about 12 feet east from the east end of the switch shanty, and death resulted either from the blow of the pilot beam or from concussion received from the fall. A verdict having been returned for plaintiff, defendant moved for judgment notwithstanding, and, the same having been denied, appeals from the order, and also from the order denying its motion for a new trial.

There is evidence reasonably tending to support the claim of respondent that it was a custom of long standing for the engine passing easterly through the yards in front of the switch shanty regularly every evening at 5 o'clock to slow down after passing the Plymouth Avenue Bridge in order to receive the signal from the switchman at the switch 90 feet west of the shanty, and it was that switchman's duty to post himself by observations to the east, and ascertain whether the track was clear, and, if so, to give the signal to the engineer of the approaching engine to go ahead. In order to receive this signal, it was the custom of the engineer to slow up the engine as he approached the switchman to a speed not exceeding eight miles an hour, and to pass through the yards beyond the switch shanty with his engine under control, or running not faster than six to eight miles an hour. There is also evidence to the effect that at the time in question the engineer in charge of the approaching engine did not comply with the custom and slow down the engine, but proceeded past the switch shanty without diminishing the speed at all; and several witnesses stated he was running from 18 to 20 miles an hour. There was a conflict in the evidence as to whether the engineer rang the bell

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or gave other signals of warning. Whether or not signals were given was plainly a fact for the jury. It must be conceded that under the circumstances the engineer in charge of defendant's engine was guilty of negligence in so running the engine through the yard contrary to the general custom, and defendant is liable for the consequences, unless it appears, as a matter of law, that respondent was guilty of contributory negligence. The principal ground upon which appellant bases this claim is that the space along the platform between the building and the track was exceedingly dangerous; that Mr. Graham was thoroughly familiar with the situation, his duties as assistant yardmaster requiring him to know the movements of trains and the time of their passing that point; that on this occasion he knew the engine was coming, because he came out of his office on the platform at a time when he saw it approaching at a distance not greater than 200 or 300 feet to the west, and looked in that direction. It is therefore urged that respondent assumed the risk of working there, or, if he knew the engine was coming, he was charged with the duty of getting out of its way, and, if caught on the platform, or near the east end thereof, it was the result of his own carelessness. The position of appellant is, conceding the negligence of appellant's employees in running the engine at 18 or 20 miles an hour when the customary speed was 6 to 8 miles, yet the yardmaster was required to perform his duties in and about the building and assume the responsibility of attending to such business notwithstanding trains and engines might be manipulated contrary to the custom. In our judgment, the application of such a rule would be unnecessary and unwarranted, and would not inure to the best interests of the service. When employees are required, in the performance of their duties, to occupy places of peril, the master should not thus be permitted to shift responsibility if it conducts its business in such manner as to cause the employee to assume that he may safely take such line of conduct into account in controlling his own movements. In this case it clearly appears that there was reason for the rule requiring engines and trains to slow down in order to get the proper signal to go on. The switchman at his post was required to inform himself whether it was proper to give such signal, and the act itself of passing through a yard at a rapid rate of speed, where switches may necessarily have to be manipulated, is fraught with danger. Assuming that Mr. Graham saw the engine approaching some 200 or 300 feet to the west upon coming out of the door to the platform at the west end of the shanty, he had a right to believe that it was in the process of slowing down to the accustomed speed in order to receive the signal, and that the engine would not pass the switch shanty faster than 6 or 8 miles an hour. It cannot be said, as a matter of law, that he was guilty of contributory negligence because he took only the time usually necessary under such circumstances to pass the building and get out of the way. It does not exactly appear where Mr. Graham was when struck by the engine. Some of respondent's witnesses

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said he was on the platform, about eight feet west from the east end of the building. It seems clear that he was picked up at a point about 12 feet from the east end of the building, and some little distance south of the track. It does not conclusively appear that he had passed entirely to the east of the shanty to the platform and was carelessly walking along too near the track. From the location in which he was found, the direction he was walking, the speed of the engine, and the manner in which he was struck, there is nothing improbable in the theory that he may have been upon the platform some little distance west of the east end of the building. It must be assumed that he was engaged in the performance of his duties, using reasonable care.

Under all these circumstances it was a fair question for the jury to determine whether or not he knew the engine was approaching, and assumed it would follow the accustomed practice, and slow down to the usual speed, giving him sufficient time to pass around the building before being overtaken; and whether, while so engaged, he was exercising ordinary care, and did not hear the signals, if any were given. Bearing upon the question of rules and custom in cases of this character, the following authorities may be considered: *Loucks v. C., M. & St. P. Ry. Co.*, 31 Minn. 526, 18 N. W. 651; *Rahman v. M. & N. W. Ry. Co.*, 43 Minn. 42, 44 N. W. 522; *Westaway v. C., St. P., M. & O. Ry. Co.*, 56 Minn. 28, 57 N. W. 222; *Hooper v. G. N. Ry. Co.*, 80 Minn. 400, 83 N. W. 440; *Walker v. St. P. C. Ry. Co.*, 81 Minn. 404, 84 N. W. 222, 51 L. R. A. 632.

Order affirmed.

GULF, C. & S. F. R. CO. v. LARKIN.

(Supreme Court of Texas, Nov. 10, 1904.)

[82 S. W. Rep. 102.]

Master—Injury to Servant—Defective Implement—Failure to Inspect—Negligence.*—A lantern globe is not an implement of such a character as to require inspection by a man of ordinary prudence either before or after use by his employees; and hence a railroad company is not liable for injury to a fireman from a defective globe merely because the company could not prove that it had inspected the particular globe which caused the injury.

Error to Court of Civil Appeals, Third Supreme Judicial District.

Action by A. E. Larkin against the Gulf, Colorado & Santa Fe Railroad Company. Judgment of the Court of Civil Appeals (80 S. W. 94) affirmed a judgment for plaintiff, and defendant brings error. Reversed.

*As to the care required of a railroad company, as an employer, in inspecting appliances, see foot-note appended to *Illinois Cent. R. Co. v. Coughlin* (C. C. A.), 14 R. R. R. 326, 37 Am. & Eng. R. Cas., N. S. 326.

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J. W. Terry and A. H. Culwell, for plaintiff in error.
Stanford & Watkins, for defendant in error.

BROWN, J. Larkin had served as a fireman for about eight months prior to his injury. Upon each locomotive there were two lamps—one white and the other red; the latter being intended for use at night in giving signals. Larkin had been running upon this engine for three days, and had used the same lantern during that time, unless it had been changed the night before his injury while the engine was in the roundhouse at Temple. He had the exclusive possession and control of the lantern, and it was his duty to keep it clean and see that it was in proper condition for use. No other person was authorized to clean it. The lantern was usually left upon the engine when the latter was not in service. There was no evidence that the railroad company caused this lantern to be inspected. While on the engine in the daytime, running from the town of Temple to Cleburne, Larkin undertook to clean the globe of the red lantern; and in doing so the glass broke and cut his left wrist, severing the tendons, from which injury his hand became seriously affected, by drawing down and stiffening of the fingers. Upon a trial in the district court of Bell county, Larkin recovered a judgment against the railroad company, which was affirmed by the Court of Civil Appeals.

The railroad company at the trial asked the court to give to the jury the following charge, which was refused by the court: "The jury is charged that, the plaintiff having failed to show that he was injured by or through any act of negligence on the part of the defendant, you will return a verdict for the defendant."

The only negligence charged against the plaintiff in error is that it failed to have the lantern which was furnished to the plaintiff inspected before furnishing it, or after it had been furnished, and while he was using it. Inspection is only the means by which the master exercises the care required of him for the servant's protection. It is not the duty of the railroad company to inspect every implement or tool that it furnishes to its employees, but that duty arises whenever the machinery or implement is of such character that a man of ordinary prudence would, under the same circumstances, inspect the machinery or implement as a precaution against injury to the servant. If an individual, being an ordinarily prudent man, would not have inspected the lantern before furnishing it to the servant, or after it had been furnished and while it was in use, then the railroad company was not required to do so in this case. A master is not required to inspect the common tools and appliances which are committed to the custody of a servant who has the capacity to understand their character and uses. Am. & Eng. Ency. Law, vol. 20, p. 89; *Miller v. Railroad Co.*, 21 App. Div. 45, 47 N. Y. Supp. 285; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56; *Wachsmuth v. S. Electric Crane Co.*, 118 Mich. 275, 76 N. W.

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497. In *Miller v. Railroad Company* a switchman was engaged in aiding to move some cars by means of a push pole, which broke, by which he was injured. In a suit for damages it was alleged that the railroad company failed to have the pole inspected, and was therefore negligent. The Supreme Court of the New York, Appellate Division, said: "There is no duty resting upon an employer to inspect, during their use, those common tools and appliances with which every one is conversant. If a spade, a hoe, or a push stick either wears out or becomes defective, the employer may ordinarily rely on the presumption that those using the article will first detect its defect." In the case of *Wachsmuth v. Electric Crane Company*, the injured party was using a ladder which was defective, through which defects he was injured. The Supreme Court of Michigan said: "In heavy or complicated machinery, and where the person called upon to use appliances may not possess the skill to detect the unfitness, or have the opportunity to do so, the law may require diligence upon the part of the master; but where the appliance is a common tool, of which the man who uses it is necessarily well qualified to judge, and, who, when he uses it, has an opportunity to know its condition, a distinction may be made, and the master may rely upon the servant to inform him of the defect, or not use the tool if it is unsafe."

The undisputed evidence in this case shows that the railroad company purchased its lanterns from reliable manufacturers, and that they were of good and standard make. It was not proved that this particular globe was inspected, but the evidence, which was undisputed, shows that actual inspection was made of a large per cent. of the globes which were purchased. But we are of opinion that no ordinarily prudent man who is buying a lantern for use upon his own premises, in the ordinary affairs of life, would think of going into a minute examination of it, to detect some latent defect; nor could it be said that such man, after purchasing the lantern and delivering it over to his servant for use about his premises, would consider it necessary for the safety of that servant to inspect the lantern at regular times or at any time thereafter. If a prudent man in the common business of life would not resort to inspection as a precaution in the selection of lanterns to be used by his servants, nor during their use, then the railroad company was not required to make such inspection, either before or after furnishing the appliance to the employee. There is no greater risk in cleaning and using a lantern upon a locomotive engine when drawing a train than there would be to clean and use the same lantern in the performance of services about the barn lot. Therefore there can be no difference in the care required. The conduct of the ordinarily prudent individual is the standard by which we must measure the duty of the corporation. If this requirement were sustained, then every farmer or housekeeper who furnishes an ax to his servant with which to cut wood for use upon the premises, or for other purposes, must use that care which would here be required with regard to the

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lantern by an inspection to discover the condition of the ax before he purchased it, and, during the use of it by the servant, he must keep up a course of inspection in order to insure safety.

The law has established that, in furnishing dangerous machinery for use by its servants, the master must inspect, in order to maintain that machinery in proper condition, because it is a matter of common knowledge that there is danger of injury in its use, and that the persons who use it oftentimes do not have the necessary information to detect its defects, or opportunity to examine it before use. Likewise it is a matter of common knowledge that a lantern globe is one of the simplest appliances that can be furnished to a servant for use, as well as being in common use, and the court knows, as a matter of law, that it does not require special knowledge or skill to understand the lantern; nor is there any reason why the servant who handles it should not be fully acquainted with its condition, especially when, as in this case, it is committed to his exclusive control and care. There may be, and doubtless are, cases in which it is a question of fact that should be submitted to the jury as to whether the machinery or implement, tools and the like, were of such character as to require inspection, as a safeguard against danger, but there was no reason for submitting the question to the jury in this case. Therefore the court erred in not instructing the jury to find for the defendant.

The facts show that upon another trial the defendant in error cannot make a case that would entitle him to recover against the railroad company. It is therefore ordered that the judgments of the district court and of the Court of Civil Appeals be reversed, and that judgment be here rendered that A. E. Larkin take nothing by his suit, and that the railroad company recover of him all costs in all the courts.

ANDERSON *v.* GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota, June 16, 1905.)

[103 N. W. Rep. 102.]

Injury to Employee—Assumption of Risk.*—An employee of a railway company, who, without knowledge or opportunity for learning that the capacity of a hand car was limited to six men, is thrown from that car because of its overcrowded condition, when carrying ten men, does not, as a matter of law, assume the risk.

*For the general principles involved in the doctrine of assumption of risks by railroad employees, see *Foster v. Chicago, etc., Ry. Co.* (Iowa), 14 R. R. R. 538, 37 Am. & Eng. R. Cas., N. S., 538; foot-note appended to *Chicago, etc., Ry. Co. v. Barnes* (Ind.), 14 R. R. R. 531, 37 Am. & Eng. R. Cas., N. S., 531; *Murphy v. New York, etc., R. Co.* (Mass.), 14 R. R. R. 346, 37 Am. & Eng. R. Cas., N. S., 346; *Foster v. New York, etc., R. Co.* (Mass.), 14 R. R. R. 343, 37 Am. & Eng. R. Cas., N. S., 343; *Meehan v. Holyoke St. Ry. Co.* (Mass.), 14 R. R. R. 331, 37 Am. & Eng. R. Cas., N. S., 331; *Shaw v. Manchester St. Ry.* (N. H.), 14 R. R. R. 275, 37 Am. & Eng. R. Cas., N. S., 275.

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Appeal from District Court, Ramsey County; Grier M. Orr, Judge.

Action by Jacob Anderson against the Great Northern Railway Company. From an order overruling a demurrer to the complaint, defendant appeals. Affirmed.

M. L. Countryman and J. A. Murphy, for appellant.

W. E. Dodge, M. H. McMahon, and John R. Heino, for respondent.

JAGGARD, J. The plaintiff and respondent in this case brought an action against the defendant and appellant to recover for personal injuries. The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. From an order overruling the demurrer, the defendant appealed.

The first ground of negligence in the complaint sets forth that the defendant negligently ordered ten of its sectionmen, including this plaintiff, to get upon a hand car with a capacity of carrying not to exceed six men at a time, and that, because of this crowding, the plaintiff was thrown from the car and injured. The defendant contends that this complaint shows that the plaintiff—a full-grown man, working as a sectionman at this time and place for a long time—assumed the risk of the overcrowded condition of the car, in accordance with the familiar rules of law on the assumption of apparent risks. The danger, the contention is, was as obvious to one man of common sense as another; the plaintiff might forget the danger, but that was one of the things, the risk of which he assumed. *Bengston v. Omaha Ry. Co.*, 47 Minn. 486, 50 N. W. 531. More specifically, the appellant relies on the case of *Bradshaw's Adm'r v. Railway Co. (Ky.)* 21 S. W. 346. In that case, after trial by jury, the court said: "But the alleged gravamen of the appellant's negligence consists in the facts that the car was overcrowded with the hands in the employment of the appellee, which caused the intestate to fall overboard when his hand slipped, instead of on the platform of the car, thereby losing his life. Now, it is not alleged that the intestate did not know that the car was overcrowded, nor is there any inference to be drawn to that effect. On the contrary the inference is that, if such was the fact, he could and did see it and knew it. Such being the case, it was his right and duty to refuse to obey the orders of the section boss in that regard, but he elected to obey. He took the risk of the overcrowded condition of the car, and the appellee is not responsible for any injuries caused him thereby. The judgment sustaining the demurrer and dismissing the action is affirmed." In the case at bar, however, it is expressly alleged that the plaintiff had "no knowledge of the capacity of the hand car, and had prior to said time no opportunity for knowing its capacity." It could not reasonably be held upon this demurrer, admitting this fact as to the absence of

knowledge and of opportunity for knowledge to be true, that the plaintiff, as a matter of law, assumed the risk. This conclusion renders it unnecessary to consider the other allegations of negligence set forth in the pleading.

Order appealed from is affirmed.

McTAGGART v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine, May 19, 1905.)

[60 Atl. Rep. 1027.]

Appeal—Review.—When a case is reported to the law court, with a stipulation that it is to be heard as if a verdict had been rendered for the plaintiff and a motion for a new trial had been filed by the defendant, all conclusions and inferences of fact which a jury would have been warranted by the evidence in finding for the plaintiff must be found by the court for the plaintiff.

Care Required of Master—Safe Place to Work.*—It is the duty of a master to exercise reasonable care so as to place its appliances, boilers, and pipes as to make it reasonably safe for the servant to perform any service which the master has any reason to expect that the servant may properly do at that place by virtue of his employment, and omission to exercise such care is negligence.

Same—Same.—It matters not whether the appliance is so placed as to be safe or unsafe as to other servants in the performance of their respective duties.

Same—Same—Structure Near Track—Scope of Employment—Baggage Master Requested by Station Agent to Deliver Telegram.†—The plaintiff's intestate, a baggage master in the employment of the defendant, was requested while in his car in the train, by one of the station agents and telegraph operators along the line, to take a telegraphic message addressed to one of defendant's construction crew, and to throw it off when the train reached the place where the crew was at work. It is claimed that while the baggage master was engaged in throwing off the message, and while standing on one of the steps at the rear end of his car, his head was struck, and he was killed, by a perpendicular iron pipe erected by the defendant, and standing about 6 inches from the outside of the baggage car as it passed. He was seen to throw off the telegram 25 feet before he reached the location of the pipe, but no one saw the accident itself. His dead body was soon after found in a coal bin 27 feet from the pipe on the other side from where the telegram was thrown off. The defendant's station agent acted as telegraphic operator for the commercial business of the telegraph company, remitting all proceeds to the latter company, but being himself paid for his services, both as such agent and operator, by the defendant. By virtue of its contract with the telegraph company, the defendant agreed to deliver such commercial or public messages as were received. The case otherwise discloses no special authority in the station agent, or duty in the baggage master.

The court is of opinion that the case fails to show that the station

*See foot-notes appended to McCabe v. Montana Cent. Ry. Co. (Mont.), 13 R. R. R. 564, 36 Am. & Eng. R. Cas., N. S., 564.

†As to whether a master is liable for injuries received by servants while not in the discharge of duties owing to the master, see foot-note appended to Shadoan v. Cincinnati, etc., R. Co. (Ky.), 14 R. R. R. 280, 37 Am. & Eng. R. Cas., N. S., 280.

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agent was authorized to require the baggage master to undertake the delivery of a telegram by throwing it off a moving train, or that it came within the scope of the baggage master's employment to perform such a service. Nor does the case show any such custom of the station agent and baggage master to forward and deliver messages in this way, from which it might be inferred that the defendant knew and assented to the practice. Therefore it is held that the defendant was not bound to anticipate the performance of any such service by the baggage master as was undertaken in this case, and did not owe him the duty of providing so that he might do it safely.

~~Same—Same—Same—Master Not Chargeable with Notice.~~—It is held further that, even if the foregoing were otherwise, the defendant had no reason to anticipate that a baggage master in a car with two high and wide doors on the side, as here, made on purpose to be used by him, would leave the car, and go down upon the lower steps, as the deceased must have done if he was hit by the pipe, for the purpose of throwing off a message, when he could have done it safely and conveniently from one of the side doors.

Injury to Employee—Cause of Accident—Insufficiency of Evidence.—The court is further of opinion that it is not proved that the deceased was hit by the pipe at all. He may have been. He may not have been. The train passed slowly over the bridge, and then accelerated its speed. If then the deceased lost his balance and fell upon the coal bin, as he might have done, all other known conditions would be met as well as by the theory that he was hit by the pipe. As between these two possible causes, it seems to be purely conjectural which is the true cause. The court cannot, and a jury should not, select as between conjectures, unless there is something more which may lead a reasoning mind to one conclusion rather than to the other. The court is of opinion that there is no such determining factor in this case.

(Official.)

Report from Supreme Judicial Court, Waldo County.

Action by Dilla McTaggart against the Maine Central Railroad Company. After all the evidence had been taken out, it was agreed that the case should be reported with the following stipulations: "The case is to be heard as if a verdict had been rendered for the plaintiff, and a motion had been filed by the defendant for a new trial. If upon the admissible evidence the action is sustainable, judgment is to be rendered for the plaintiff for \$5,000 damages; otherwise judgment for the defendant. The defendant is to carry the case forward." Judgment for defendant.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and POWERS, JJ.

R. F. Dunton and John R. Dunton, for plaintiff.

C. F. Woodard, for defendant.

SAVAGE, J. Case for wrongful injuries causing immediate death of John McTaggart, plaintiff's intestate. This case is now before us on report, with a stipulation that it is to be heard as if a verdict had been rendered for the plaintiff, and a motion had been filed by the defendant for a new trial. All conclusions and inferences of fact, therefore, which a jury would have been warranted by the evidence in finding for the plaintiff, must be found.

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by us for the plaintiff. Substantially all the evidence was put in by the plaintiff, and there is little dispute, so far as it goes.

It appears that, for some time prior to the injury complained of, a construction crew of the defendant had been repairing the abutments of a bridge on the Belfast Branch, between Unity and Burnham Junction. Not far from the northerly end of the bridge, and towards Burnham, a platform had been erected, at about the level of the rails. Upon this platform stood a donkey engine and boiler, the latter being about 4 feet from the rails. Northerly of the engine and boiler was a coal bin. Southerly, towards the bridge, and about 25 feet distant from the engine, was a derrick, which was operated by the donkey engine. At this point the railroad runs upon a narrow and somewhat steep embankment, with water on both sides. On August 21, 1903, a 2-inch iron steam pipe was connected with the top of the boiler, and extended towards the railroad track about 3 feet, then down perpendicularly to within 18 inches of the level of the rails, then turned towards the rail 3 inches, then down to the ground and under the rails to a pump below.

McTaggart, the deceased, was a railroad man of long experience. He had been section foreman, foreman of construction crew, and brakeman, and for 11 years before his death had been baggage master on the Belfast Branch. He made two round trips a day between Belfast and Burnham, and had therefore passed the engine and boiler above spoken of four times daily since they had been placed in position. On several occasions while his train waited at Burnham he had gone from Burnham to the bridge in question as brakeman on a construction train, and when at the bridge had been on the platform where the engine and boiler were; remaining about there from half to three-quarters of an hour. One of these occasions, at least, was after August 21st, when the steam pipe was connected with the boiler.

On the morning of September 4, 1903, one Whitehouse, the station agent and telegraph operator at Unity, handed McTaggart, in the baggage car of the train, a telegram addressed to one of the construction crew at the bridge, and asked him to throw it off as the train passed the bridge. Whitehouse had tied the telegram to a stick about a foot long. He told McTaggart the contents of the message, which was that the wife of the addressee was sick. He also told him that they wanted to get the message to the man, so that he could go home to his wife as soon as possible. As the train approached the bridge it slowed down somewhat, and started up again after it crossed. While the baggage car was crossing the bridge, the engineer of the donkey engine, standing by the engine, saw McTaggart standing on one of the steps at the rear end of the car, waving the message with one hand, and holding onto the car rail with the other. The witness could not tell which step he stood upon. When he got opposite the derrick, about 25 feet southerly from the boiler, he threw out the message. He was then standing "about square on the steps or platform." What happened afterwards was not seen by any human eye.

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As the train passed, the engineer, unconscious that McTaggart had been struck by any object, picked up the message and started to deliver it. But immediately it was discovered that McTaggart was lying dead in the coal bin, 27 feet northerly from the boiler. His face and head were bruised in several places. The most noticeable bruise was a long, straight one just back of the right ear. From these circumstances, the plaintiff contends that a jury would have been warranted in finding that as McTaggart passed the boiler his head hit the steam pipe, causing the long, straight bruise, and he was thereby knocked off the steps of the car. The height of the steam pipe and its distance from the baggage car as it passed is left uncertain, but we think a jury might properly have found that it extended 2 or 3 feet above the floor of the car, and was about 6 inches from the outside surface of the car. The outside of the lowest step was 2 inches inside of the outside of the car. That step was 2 feet and 10 inches lower than the floor of the car. If the plaintiff's theory is right, the position of the bruise referred to shows that after McTaggart threw out the message he leaned forward, bringing his head 6 or 8 inches outside the car, and was looking backward when he was hit by the steam pipe.

Various defenses are strongly used. We shall not have occasion to examine them all. In the first place, assuming that he was hit by the steam pipe, it is contended that at the time of his injury McTaggart was not engaged in the performance of any service which he owed the defendant by virtue of his employment, that it was no part of his duty as baggage master to deliver telegrams along the route, and therefore that it was not the duty of the defendant to anticipate that he would do so, and so to arrange its boiler and steam pipe that he might do so safely. This question must be considered in the light of defendant's duty to the deceased at the time. It was its duty to exercise reasonable care so as to place its boiler and pipe as to make it reasonably safe for him to perform any service which it had any reason to expect that he might properly do at that place by virtue of his employment. Any omission to exercise such care would be negligence as to him. It matters not whether the pipe was so placed as to be safe or unsafe as to other servants in the performance of their respective duties. It was not negligence as to McTaggart unless there was a failure of duty on the part of the defendant with respect to service reasonably to be expected of his in his employment, and service performed in a reasonable and proper manner.

The case shows that the telegraph business along the Belfast Branch, both railroad and commercial, was done on a single wire, under a joint contract between the defendant and the Western Union Telegraph Company. The telegraph company furnished the poles and wire and the general outfit, which the defendant had the right to use for its own business without the payment of tolls. The station agent at Unity, employed and paid by the defendant, was also the telegraph operator there, and handled all telegraphic business, without expense to the telegraph company. As to commercial business he acted under the rules, regulations, and orders

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of the telegraph company, and remitted all proceeds to that company. By the contract referred to, the defendant agreed to deliver such commercial or public messages as were received. We think, however, it is fairly to be inferred from the evidence that in a case like the present, where the addressee was two miles distant from the office, delivery was obligatory only when charges for delivery were guaranteed beforehand. This, however, was immaterial, if the defendant or its servants, by authority of the defendant, which is the same thing, undertook to deliver the message. The only fair inference to be drawn from the testimony of the station agent is that he understood the message was being forwarded as a matter of accommodation, and not as a matter of duty. But even that makes no difference, if the station agent was authorized to require the service, and it came within the scope of McTaggart's employment to perform it, unless it is shown that McTaggart undertook to carry it as a matter of accommodation, and not of duty. The service here was the carrying of a telegraphic message to be delivered by throwing it off a moving train. This case discloses no special authority in the station agent, or duty in the baggage master. The station agent, being inquired of about his duties as station agent and telegraph operator, replied, "About everything around a country station," and, in the same connection, that he had "general direction of the business of the road at that point," which is, of course, the ordinary duty of a station agent. It does not mean that he was an unlimited agent. *Davies v. Steamboat Company*, 94 Me. 379, 47 Atl. 896, 53 L. R. A. 239. The ordinary duties of such agents and of baggage masters are now so well known and so generally uniform that the court may take judicial notice of them. But if more than that is claimed it must be proved. Nor does the case disclose any such custom of the station agent and baggage master to forward and deliver messages in this way, from which it might be inferred that the company knew of, and assented to, the practice. There was evidence, indeed, that McTaggart had been seen to throw off letters or telegrams at this place several times before. The case does not show which. Therefore it cannot be said that he threw off telegrams. And if he threw off letters, the natural inference would be that he did it as an accommodation.

Taking the case as a whole, then, can it be said that McTaggart, in undertaking to deliver the message, was acting within the scope of his employment? That is to say, was he doing something which the railroad company was bound to anticipate that he might do, and which, therefore, it was bound to provide for his doing safely? We think not. The railroad company may have been under obligations to deliver the message. It may not have been improper for the station agent to ask McTaggart to throw off the message, and he may have been willing to do so. But it was not a part of his duty to do it. And what he did, he did voluntarily, as an accommodation. The case of *Davies v. Steamboat Company*, *supra*, is instructive upon this point.

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And it is argued with much force, and we think fairly, that, even if it were otherwise, the railroad company would have no reason to expect a baggage master in a car with two high and wide doors on the side, as here, made on purpose to be used by him, would leave the car, and go down to one of the lower steps, as McTaggart must have done if he was hit by the pipe, for the purpose of throwing off a message, when he could have done it safely and conveniently from one of the side doors of the car. The message was tied to a stick, undoubtedly for the purpose of making it easy to throw it out and away from the car.

But there is another ground, also, which we think is fatal to the plaintiff's case. We do not think it is proved that he was hit at all by the steam pipe. He may have been. He may not have been. Whether he was, is conjectural. When last seen on the car he was not in position to be hit by it. He had thrown the message off, had completed his service, and was standing up "square." He was not seen to bend forward and look back. He was not seen or known to strike the pipe, though a man who had seen him a second or two before was standing within 6 or 8 feet of the pipe. He was found after having passed 27 feet beyond the pipe. The plaintiff argues that he was hit by it, because the pipe was there, where he could be hit by it if he leaned out, and because of a bruise upon the head which could have been caused by it. The plaintiff thus shows a possibility. But that alone is not enough. She must show a probability. She must do more. She must show enough to lead a fair and reasoning mind to conclude that the pipe actually hit McTaggart. *Seavey v. Laughlin*, 98 Me. 517, 57 Atl. 796. She might, in a supposed case, do this by showing some distinctive mark upon the pipe, as hair or blood, or some bruise upon the head that was peculiar to the pipe, or she might, by elimination or exclusion of other causes, lead to a natural conclusion that he was hit by the pipe. There is in this case, however, another theory, which, for anything that we know or is proved, seems equally plausible to account for his injury. The case shows that the train quickened its speed as it left the bridge, and that McTaggart was standing on the steps of the car. If, when the train started up quickly, or if for any other reason, McTaggart lost his balance and fell out, all the remaining circumstances are as well accounted for as upon the plaintiff's theory. There was nothing in the appearance of the bruise back of the ear which might not as well be attributed to his hitting some part of the coal bin as he fell as to his hitting the steam pipe. But it is said this is conjecture. So it is. But is not the other theory conjecture also? Both are conjectures, one seemingly as plausible as the other. And either might be the truth. But conjectures are not proof. A proposition is not proved so long as the evidence furnishes ground for conjecture only, or until the evidence becomes inconsistent with the negative. *Smith v. Lawrence*, 98 Me. 92, 56 Atl. 455. Can we say then that it is proved that the pipe hit the deceased? Might a jury properly say it? Would a jury be

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warranted in selecting upon which of two conjectures they would base a verdict? And the burden of proving being upon the plaintiff, might they select a conjecture favorable to her, and reject the other? Certainly not. *Seavey v. Laughlin*, supra. Nor does this militate against the doctrine that the reasonable inferences drawn by juries from undisputed facts will not be disturbed. That implies judgment and decision. That involves the weighing of the evidence, and the formation of belief from the evidence. It is not a mere process of arbitrary selection. To choose between two impossibilities is guesswork, and not decision, unless there is something more which may lead a reasoning mind to one conclusion rather than to the other. We think there is no such determining factor in this case.

Therefore, for the two reasons stated, we are of opinion that the plaintiff is not entitled to get or hold a verdict.

Judgment for defendant.

CENTRAL OF GEORGIA RY. CO. v. PRICE.

(Supreme Court of Georgia, Jan. 27, 1905.)

[49 S. E. Rep. 683.]

Injury to Employee—Dangerous Premises—Culvert under Embankment in Freight Yard—Knowledge of Employee.*—It is reasonably to be expected of a railway employee, who is engaged in the performance of duties in and around one of the freightyards of his master, that he shall avail himself of his opportunities to familiarize himself with his surroundings, and note the location of a culvert passing under an embankment along which tracks are laid, to the end that he may guard against the obvious danger of falling into the culvert in the event his duties call him in the nighttime to the point where it is situated; and if he be injured by falling into the same he cannot be heard to say that though he knew of its existence, and, notwithstanding he had previously had full opportunity to acquaint himself with its relative location, he did not in point of fact know exactly where it was, and that his master should have warned him of the danger of falling into it before sending him at night to attend to his duties on and around an engine which had been left directly over the culvert.

Instructions.—The charge of the court touching the right of the plaintiff to receiver was not adjusted to the law and facts of the case on trial, and unjustly deprived the defendant company of one of its main defenses; irrelevant and prejudicial evidence was admitted over its objection; and these and other errors committed should have persuaded the trial judge to grant a new trial irrespective of the question whether the evidence sufficiently supported the finding of the jury.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Sam Price against the Central of Georgia Railway

*For the general principles involved in the doctrine of assumption of risks by railroad employees, see foot-note appended to *Illinois Terminal R. Co. v. Thompson* (Ill.), 12 R. R. R. 683, 35 Am. & Eng. R. Cas., N. S., 683.

As to the duty to warn and instruct employees, see foot-note appended to *McMillan v. Grand Trunk Ry. Co.* (C. C. A.), 12 R. R. R. 712, 35 Am. & Eng. R. Cas., N. S., 712.

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Company. Judgment for plaintiff. Defendant brings error. Reversed.

Hall & Wimberly and *J. E. Hall*, for plaintiff in error.

J. H. Hall and *Glawson & Fowler*, for defendant in error.

EVANS, J. This was an action for damages brought by Price against the Central of Georgia Railway Company, he having sustained personal injuries while in its employ as a locomotive fireman. The case made by his petition was, in brief, as follows: About half past 12 one night he was called on by the defendant company to go out on an engine about to leave the city of Macon, and went to the place in the company's yard where his engine had been stationed by other employees whose duty it was to bring the engine from the roundhouse. The steam was on, and the engine was fully prepared to go out on what was known as the "Southwestern Division" of the company's road. He undertook, as it was his duty to do, to make an examination of the engine for the purpose of seeing that certain parts of it were in good order, and while in the discharge of his duty he stepped into an opening or hole on the premises of the company, very near the track on which the engine was standing, and received the injuries complained of. He had no reason whatever to apprehend that this opening or hole existed, and before he fell into the same did not see it, and could not, by the use of ordinary care on his part, have discovered the same. He was at the time in the full discharge of his duty at the place where the company required him to be, and was himself entirely free from fault. He had "no knowledge or notice of the existence of said hole or opening at that place." It was an opening in a culvert or waterway that passed under the tracks of the company at that place, and its presence was absolutely unknown to him up to that time, and he had no means of discovering it before he fell into the same. The hole was on one side of the engine, right at the point where the cow-catcher stood, and in passing around the cow-catcher for the purpose of examining the engine, he stepped into the hole; it being impossible for him, under the conditions existing at the time, to have discovered its presence in time to prevent the injury. He fell a distance of some 15 feet into a culvert or sewer, and as a result of the fall both bones of his left leg, just above the ankle, were broken, and badly splintered.

The plaintiff charged that the employees of the company were negligent in unnecessarily placing the engine so near the opening in the top of the sewer, and in failing to give him notice of the presence of this opening; that the company was negligent in sending him, without warning, to an unsafe place in which to perform his duties, when it had every means of discovering the dangerous locality, and he did not have equal means of discovering the same before he was injured; that the defendant was negligent in permitting or causing the opening to be made on its premises, and in not taking any means to give petitioner or any other employee notice of the existence of this dangerous place

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on its premises, where he was required to go in the performance of his work; and that the company was also negligent in failing to place any sort of guard or railing about said excavation in order to prevent persons going upon the premises of the defendant from falling into the same, and being thereby injured. The railway company filed an answer, wherein it made a denial of the facts upon which the plaintiff relied as showing negligence on its part. On the trial, however, the jury returned a verdict in favor of the plaintiff, and it is to the refusal of the court to grant a new trial that the company excepts.

Before undertaking to deal with the several assignments of error to set forth in the motion for a new trial, it may be well to give a brief summary of the evidence touching the character of the hole or opening into which the plaintiff fell, and its situation relatively to the track on which the engine was placed and other points in the immediate vicinity. This particular track was a "spur," which, together with other tracks, passed along an embankment some 14 feet in height. Through this embankment extended a brick culvert, built some time prior to the year 1875. From 1886 up to the time of the plaintiff's injury on February 17, 1902, this culvert had remained in the same condition, save for necessary repairs, in which it was on that date. The stream running through this culvert passed through the company's yards under about ten freight tracks, under its coal chute, then under two passenger tracks, and then under two tracks leading to its shopyard. At several points, between different sets of tracks, the ravine through which this stream ran was exposed to view, the coal chute being one of these points. The spur track on which the plaintiff found the engine on the night of his injury was the outside track, and was laid so close to the edge of the culvert that there was no passageway between the end of the cross-ties and the edge of the opening; nor was this opening guarded by any railing extending from one side of the embankment to the other. There was, however, a free passageway between this track and the one next to it, the spaces between the rails and those between the several tracks at this point where they crossed the culvert having been filled in with earth and cinders. The exposure on the outer side of the spur track, caused by its proximity to the edge of the culvert, was an open and obvious one. By day the situation could have been taken in at a glance by the casual observer. At night, one passing along the railway embankment might, in the darkness, fail altogether to observe the ravine on one side where it was not spanned by the culvert, especially if one were not familiar with the locality. It was customary for the company's hostlers, in the discharge of their duty, to bring engines from the roundhouse, and to place such of them as were to go out on the Southwestern Division upon this spur track. Engines had sometimes been placed below the culvert, though they were usually left the distance of a block or so above. On the night of the plaintiff's injury three engines were brought from the roundhouse and placed on this track in

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readiness for the engine crews; that on which the plaintiff was expected to go being the last in line, so that the others might start out ahead. It was left over the culvert, and the engineer and the plaintiff were expected to locate it and take it in charge.

1. On the argument before us, counsel for the plaintiff in error very strenuously insisted that the evidence was not such as to support a verdict in favor of Price. The theory upon which he sought to recover was as follows: He was sent for in the middle of the night, and called on by the company to serve as fireman on engine 1001. He was expected to find this engine, and, after locating it, to go around it, and see whether or not it was in good order. Such being his duty, the company was bound to place the engine at a place where he could reach it in safety and perform his duty of inspection. Instead of choosing a safe place, the company's hostler left the engine over the culvert, negligently failing to observe the open ravine at this point, of which he had, or ought to have had, knowledge. Plaintiff received no warning of the dangerous locality in which the engine had been left; did not know of the existence of any culvert in that part of the company's yard; had never before been called on to take an engine so far down on the spur track; and had no reason to apprehend that the engine had not, as always theretofore, been left in a place of safety. After arriving at the company's yards, he went in search of engine 1001, going along the embankment between the spur track and that next to it; and, after locating the engine, he got on it, changed his clothes, attended to minor duties inside the cab, and then took his hammer, wrench, flambeau, and oil can, and started on his tour of inspection, getting off the engine on the same side from which he had boarded it, which was the side next the adjoining track on the left. After examining the left side of the engine, he got in the middle of the track and looked at the headlight, turned it down, and then got on the pilot in order to reach and adjust the "spark slide." From the pilot he stepped to the outer rail, then upon the cross-ties, and started to go around on the right side of the engine, but fell over the culvert into the ravine below, sustaining the injuries of which he complains.

If this represents the real truth of the matter, then it was for the jury to say whether or not the plaintiff, on this occasion, acted with due caution and circumspection. But the contention of the company is that such does not constitute the entire truth surrounding the occurrence, even though the plaintiff gave a truthful account of the manner in which he received his injury. His stout avowal that prior to the night of February 17, 1902, he had no knowledge of the existence of a culvert in that immediate vicinity, and was unfamiliar with that particular locality, is as strongly denied by the defendant company. Moreover, it insists that, even if the plaintiff did not have actual knowledge of the precise location of this culvert and open ravine in its yards, his opportunities for knowing all about the same had previously been

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such that he cannot now be heard to say that the company was under any duty to give him notice thereof, to the end that he might, on the night of February 17th, have watched out for and discovered the culvert, and have observed that engine 1001 had been placed directly over it. The defense thus interposed was such as, if sustained, would defeat any recovery by the plaintiff. *Blackstone v. Railway Co.*, 112 Ga. 762, 38 S. E. 79, and cases cited. And this defense was supported by testimony, which demonstrated that, if Price did not have actual knowledge of the existence and precise location of the culvert, his opportunities for knowing had been such that the law would impute knowledge to him.

On the argument before this court, counsel for the defendant in error conceded Price's general knowledge of the existence of the culvert, and the open ravine running through the company's yard, but contended that, relatively to the place where the locomotive was stationed, he did not know of the precise location of the culvert. The law charges the servant with what he ought to have known, and will not excuse him for not knowing in case he has been negligently unobservant. Price had worked in the yards of the defendant company first as section hand, afterwards as fireman on a switch engine, and at the time of the injury was employed as fireman on a freight train. His employment as fireman on a switch engine extended over a period of about two years. He had previously worked as a section hand about six months. During this time there had been no change in the physical appearance of the culvert. With such opportunities for obtaining knowledge of the location of the culvert, the conclusion is irresistible that an ordinarily prudent man, under similar conditions, would have known of its location.

2. On the trial the plaintiff sought to contrast his diligence on the night of his injury with that of the company's hostler. To this end the plaintiff showed that he walked down the railroad embankment between two tracks, and was therefore not in a good position to discover the culvert, whereas the hostler's post of duty was on the right-hand side of the engine, from which side he had full opportunity to observe the culvert as he approached it with the engine. The court charged the jury that should they believe from the evidence that the place in which the engine was left was not reasonably safe, and the company knew, or ought by the exercise of ordinary care to have known, of the danger, and "that Sam Price did not know of it at the time of the alleged injury, and had not equal means of knowing such danger, and could not, by the exercise of ordinary care and diligence at the time of the alleged injury, have known of such danger," then the plaintiff would be entitled to recover. The court further instructed the jury that "the conduct of the parties to this case, the conduct of Sam Price, the conduct of the railway company as presented by its officers, servants, and employees, is to be tested by ordinary care and diligence at the time of the alleged injury—that care and diligence which every prudent man would

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exercise under the same or similar circumstances and conditions." The complaint made of these instructions is that the court thereby limited the jury to a consideration of the conduct of Price on the night of the injury, and entirely ignored the company's defense that he might previously have known all about this culvert, and ought to have become perfectly familiar with its location, even though he may not have had any actual knowledge concerning it prior to the time he was hurt. The criticism is just. Moreover, we find, upon inspecting the entire charge of the court, that in it no reference whatever was made to this aspect of the company's defense, but that it was wholly deprived of all benefit of the same.

The court further committed error in charging upon the assumption that the capacity of the plaintiff to earn money might have increased, there being no evidence to warrant such a charge.

Over the objection of defendant's counsel, the plaintiff was permitted to elicit from the company's engineer the statement that when, shortly before the plaintiff's fall, the witness had himself boarded the engine, he did not know it was over the culvert. This testimony was not only irrelevant, but prejudicial to the defendant. The engineer may or he may not have been a man who exercised ordinary care and diligence. His conduct on that night was not the subject-matter of investigation, and his failure to note the culvert could not illustrate the issue whether or not the plaintiff might, in the exercise of reasonable care, have discovered that the engine was over the same.

Complaint is made that the plaintiff was also allowed to show that at the end of a culvert near the coal chute the company had erected a guard rail. This evidence was certainly incompetent for the purpose of showing a quasi admission on the part of the company that the erection of guard rails in such places was a necessary precaution against injury to its employees. *Ga. So. & Fla. Ry. Co. v. Cartledge*, 116 Ga. 164, 42 S. E. 405, 59 L. R. A. 118; *Portner Brewing Co. v. Cooper*, 116 Ga. 175, 42 S. E. 408. The defendant had, it is true, brought out the fact that the plaintiff knew of that culvert at the coal chute, with a view to showing that he must have observed that the stream passing under the culvert into which he fell ran all the way across the company's yard, and that he was familiar with its general direction and its location relatively to other points in the yard, including the place where he usually boarded his engine. Had there really been any pretense by the plaintiff that he did not know of the existence of a culvert at the point where he met with his injury, or at a point other than at the coal chute, the testimony objected to might have been competent to show that one seeing the condition of affairs at the coal chute would not be put upon notice that, if there were other culverts, there might be danger in attempting to go around an engine or car standing over one of them, because of the absence of guard rails. But as the plaintiff admitted, he knew of the existence of the culvert across which

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the spur track ran, and that he had previously had full opportunity to observe that there was no guard rail erected along its outer edge, this testimony threw no light on any issue in the case, and ought to have been excluded as wholly irrelevant.

Exception is taken to certain charges of the court on the ground that by inadvertence the judge used language calculated to impress the jury that the imputation of negligence against the company was to be accepted as an established fact. Another charge, touching the measure of damages, is also criticised on the ground of inaccuracy of expression. We shall not, however, undertake to pass more specifically upon these assignments of error, as, if another trial be had, the court will doubtless so frame its charge as not to subject it to like criticisms.

Judgment reversed. All the Justices concur.

CHICAGO, R. I. & P. RY. CO. v. HAMLER.

(Supreme Court of Illinois, June 23, 1905.)

[74 N. E. Rep. 705.]

Sleeping Car Employees—Injuries—Exemption from Liability—Validity—Public Policy.*—A contract between a sleeping car porter and the sleeping car company, releasing the railroad companies over the lines of which the sleeping cars were operated from liability for personal injury to him while traveling over such lines, was not void as against public policy.

Sleeping Cars—Common Carriers—Railroads.—A railroad company is not a common carrier of sleeping cars belonging to another, and is therefore entitled to impose such term as a condition to their operation as it may elect.

Contract between Sleeping Car Company and Employee—Application—Signatures—Exemption of Railroad from Liability.—Where a contract between a sleeping car porter and his employer bore date as of the date he commenced the service, recited on its face that it was entered into in consideration of the employment, which was for no particular time, and provided for daily wages, payable monthly, a provision releasing railroads from liability for injuries to such porter was effective as to any occurrence after the contract was executed, though it was not in fact signed until seven months after plaintiff's employment.

Sleeping Car Employees—Whether Servants of Railroad.†—Where, in an action for injuries to a sleeping car porter, the declaration averred that plaintiff was in the employ of the sleeping car company, and the uncontradicted evidence was that such company owned the car, had charge of its operation, employed and paid the men who ran it, and that the railroad company paid a compensation to the sleeping car company for running the cars over its road, plaintiff could not be regarded as a servant of the railroad company.

Injury to Sleeping Car Porter—Defense—Contract Releasing Railroad from Liability—Gross Negligence.—Where a sleeping car porter

*See foot-notes appended to *Feldschneider v. Chicago, etc., Ry. Co.* (Wis.), 12 R. R. R. 737, 35 Am. & Eng. R. Cas., N. S., 737.

†For the authorities in this series on the question as to who are, and are not, employees, see foot-notes appended to *Atlanta & W. P. R. Co. v. West* (Ga.), 14 R. R. R. 548, 37 Am. & Eng. R. Cas., N. S., 548.

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was injured by the blowing up of the locomotive of the train to which his car was attached, his contract with the sleeping car company, by which he released the railroad company from liability for injuries, was a complete defense, without regard to whether the latter's negligence was gross or slight.

Magruder, J., dissenting.

Appeal from Appellate Court, First District.

Action by Anderson Hamler against the Chicago, Rock Island & Pacific Railway Company. From a judgment for plaintiff, affirmed by the Appellate Court (114 Ill. App. 141), defendant appeals. Reversed.

W. T. Rankin and Benj. S. Cable, for appellant.

George E. Dickson and Castle, Williams & Smith (Ben M. Smith, of counsel), for appellee.

CARTWRIGHT, C. J. On January 18, 1902, Anderson Hamler, the appellee, was a porter in the employ of the Pullman Company in a sleeping car attached to a passenger train of appellant running in a westerly direction in the state of Iowa. As the train passed through a station called Victor the engine exploded. The engineer and fireman were killed, and the Pullman sleeping car in which appellee was at work was thrown on its side, and he was injured. He brought this suit in the circuit court of Cook county to recover damages for his injuries, and alleged in each count of his declaration that he was employed by the Pullman Company as a porter; that his duties were the care of the sleeping car, the making up and taking down of berths therein and providing for the necessities and comforts of passengers; and that he was, with all due care and diligence, performing his duties as such porter when the car was thrown from the track. In the first count he charged negligent, careless, and wrongful management and operation of the boiler which exploded and threw the car from the track; in the second count he alleged that the engine was negligently, carelessly, and wrongfully equipped with a defective boiler; and the third count contained a general charge of the negligent operation of the train, causing the car to be thrown from the track. There was a plea of the general issue, and upon a trial there was a verdict of guilty, and damages were assessed at \$15,000. On a motion for a new trial plaintiff remitted \$7,500, and judgment was entered for \$7,500. Appellant appealed from the judgment to the Appellate Court for the First District, where the cause was assigned to the branch of that court. One of the judges of the branch court presided at the trial in the circuit court, and took no part in the consideration of the appeal, and, the other judges disagreeing, the judgment was affirmed by operation of law. One of the judges was disqualified, and the judgment became final as to controverted questions of fact by operation of law, and not by consideration and judgment of the court.

On the trial the defendant offered in evidence a contract of employment with the Pullman Company, dated January 2, 1902,

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signed by the plaintiff, the execution of which was admitted by him, and which fixed the terms and conditions upon which he accepted the employment and entered into the service of said company. Among other things, the contract recited that plaintiff was aware that the Pullman Company secured the operation of its cars upon lines of railroad by means of contracts wherein said company agreed to indemnify the corporations or persons owning or controlling such lines of railroad against liability on their part to the employees of said Pullman Company, and he thereby released the corporations or persons over whose lines of railroad the cars of said Pullman Company might be operated from all claims for liability on account of any personal injury to him while traveling over such lines in said employment or service. This contract was the basis of the defense to the suit, and the defendant tendered to the court an instruction to be given to the jury that the defendant was not a common carrier of the sleeping cars of the Pullman Company; that it could not be compelled to haul such sleeping cars, but might or might not haul the same, as it desired; that, if it undertook to haul such cars in its trains, it might do so, and in so doing might make such contract or demand such conditions as would protect it from liability for injury to the porter or other employees of the Pullman Company on the said cars through negligence; and that, if the plaintiff voluntarily entered into the agreement releasing the railroad company from all liability for any injury he might receive while acting as a Pullman porter, he could not recover, and the verdict should be that the defendant was not guilty. The court refused to give the instruction.

The principle involved and the rights of the parties under such a contract as this were considered and decided in *Blank v. Illinois Central Railroad Co.*, 182 Ill. 332, 55 N. E. 332, which was an action brought by an employee of the American Express Company for personal injuries received while engaged in the service of that company in an express car. The defense was a contract made by the plaintiff with the express company to obtain employment, by which he released from any liability to him any corporation operating any railroad over which the express cars should run. It was decided that such a contract is valid, and not void as against public policy, and that the direction of the court to find the defendant not guilty was justified by the contract, which was a complete defense. There is no difference whatever, in principle, between the case of a porter on a car of the Pullman Company and a messenger in an express car. It is no part of the contract or obligation of a common carrier of passengers to furnish berths, or the services of a porter to make up beds or perform other services for passengers. The passenger pays the Pullman Company for the services performed by it, and not the railroad company, and if one desires such services as are rendered by the Pullman Company and its porter he must contract with that company for them. In its business as a common carrier of passengers a railroad company is bound to carry all

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who apply, and to treat all alike, and its duties and obligations to them are imposed by law. The obligations of a common carrier arise from the public nature of the employment, and, being imposed by law, it would be against public policy to allow the obligations so imposed to be changed by a contract exempting the carrier from the consequences of negligence in the employment. A railroad company, in its business as a common carrier, undertakes to use the care and diligence required by law in the transportation of passengers, and will not be permitted to absolve itself from its duties by a stipulation in the contract of carriage by which a passenger is to take the risk of its negligence; but if the service is one that is not imposed upon it as a duty, it may undertake it upon such terms as it may see fit. There can be no doubt that the defendant is not bound to haul sleeping cars tendered to it by the Pullman Company, with its conductors, porters, or other employees. The defendant is a common carrier of passengers, and as to them it assumes the duties and liabilities of a common carrier, but the Pullman Company furnishes special facilities and services to passengers, and the defendant is not a common carrier of Pullman cars and employees performing duties therein. The defendant might undertake to receive and haul the cars of the Pullman Company, but in doing so had a right to impose such terms as it might elect. This has been the opinion of the courts in all cases involving such contracts as the one here in question, which have been enforced in cases of express cars, circus trains, and Pullman cars, which the carrier was not bound to receive and haul as a common carrier. *Bates v. Old Colony Railroad Co.*, 147 Mass. 255, 17 N. E. 633; *Hosmer v. Old Colony Railroad Co.*, 156 Mass. 506, 31 N. E. 652; *Louisville, New Albany & Chicago Railroad Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348; *Pittsburg, Cincinnati, Chicago & St. Louis Railway Co. v. Mahoney*, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101, 62 Am. St. Rep. 503; *Robertson v. Old Colony Railroad Co.*, 156 Mass. 526, 31 N. E. 650, 32 Am. St. Rep. 482; *Griswold v. New York & New England Railroad Co.*, 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; *Coup v. Railroad Co.*, 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374; *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791; *Peterson v. Chicago & Northwestern Railway Co. (Wis.)* 96 N. W. 532; *Donovan v. Pennsylvania Co.*, 120 Fed. 315, 57 C. C. A. 362, 61 L. R. A. 140; *New York & Hudson River Railroad Co. v. Difendaffer*, 125 Fed. 893, 62 C. C. A. 1; *McDermon v. Southern Pacific Railway Co. (C. C.)* 122 Fed. 669. In the last two of these cases the validity of the contract with the Pullman Company was involved. In the case of *Blank v. Illinois Central Railroad Co.*, supra, appellant relied upon the decision of Judge Taft in *Voigt v. Baltimore & Ohio Southwestern Railway Co. (C. C.)* 79 Fed. 561, but that decision was reversed by the Supreme Court of the United States in *Baltimore & Ohio Southwestern Railway Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, where it was held that Voigt could not

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avoid his agreement on the ground that it was against public policy. The court, affirming the doctrine that a common carrier of passengers cannot lawfully stipulate for exemption from responsibility for the negligence of himself or his servants, said: "At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare." Upon an extensive review of the authorities it was decided that the contract was not against public policy, but was valid, and constituted a defense to the action.

It is urged, however, that the contract in this case was without consideration, and was therefore void. Upon the cross-examination of the plaintiff he was presented with the contract, and admitted that he signed it. It bore date at the time of his employment by the Pullman Company, but after it was introduced in evidence by the defendant he was called in rebuttal, and testified that it was executed by him about seven months after he was employed by the Pullman Company, and that he did not read it. It is on the ground that the contract was executed after the employment began that counsel urge it was without consideration. There was evidence that the contract was signed before employment was given to the plaintiff; but, whatever the fact may be, the employment was at certain daily wages, payable monthly, and for no particular time. The contract bore date at the commencement of the service, and recited on its face that it was entered into in consideration of the employment. If it was signed as he claimed, and the employment continued, it would be, in any event, effective as to any occurrence after its execution. It does not seem to be claimed that plaintiff was not bound by the contract because he did not choose to read it. He testified that he was able to read and write, and there was no evidence of fraud or misrepresentation, or that he was in any manner prevented from reading the contract. Under such circumstances the fact that he did not read it does not affect its validity.

It is contended that plaintiff was a servant of the defendant, and that the contract was also void as a contract between master and servant. The declaration averred that the plaintiff was in the employ of the Pullman Company, and, as a question of fact, the uncontradicted evidence was that the Pullman Company owned the car and had charge of its operation; that it employed the men who ran its cars, paid the porters; and that the defendant paid a compensation to the Pullman Company for running the Pullman cars over its road. The master of a servant is one to whose order he is subject, and the plaintiff was not subject to the order of the defendant in any particular, and therefore was not its servant. Under this head it is also urged that no contract was proved between the defendant and the Pullman Company. Plaintiff's contract recited that the Pullman Company secured

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the operation of its cars on lines of railroad by means of contracts, and it released from liability any corporation over whose lines the cars should run. In *Russell v. Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co.* (Ind. Sup.) 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. Rep. 214, in which a contract identical with this one was under consideration, the Supreme Court of Indiana held that the contract, referring generally to the transportation companies over whose lines the Pullman Company should run its cars, comprehend the appellee in that case; that the contract was *prima facie* for its benefit, and that it would be presumed to have accepted its provisions, and might claim rights under it as one in whose interest it was executed.

Finally, it is contended that a contract of this character only exempts from liability for ordinary negligence, and is no defense in an action for an injury caused by gross negligence. It is contended that, if the degree of negligence is high, and the negligence great, the agreement is of no effect; and the trial court adopted that view in giving instructions to the jury. In the first instruction the court defined gross negligence as the want of slight diligence and care, and in other instructions told the jury that, if the plaintiff was not guilty of negligence, and the defendant was guilty of gross negligence, they should find for the plaintiff, and that, if the contract in evidence was signed by the plaintiff, and he was not guilty of negligence, and the defendant was guilty of gross negligence causing the injury, the contract was not a good defense, and they should find for the plaintiff. The cause of the explosion was not definitely proved, but there was evidence that tended to show that the water was low in the boiler. The engineer and fireman were both killed, and it can never be known whether they were misled on account of the water gauge or other appliances not working properly. There was no evidence tending in the remotest degree to prove that there was any willful or intentional failure on the part of either of them to perform any duty respecting the boiler or the management of it. Their own safety was involved, and there can be no presumption that they lost their lives through a willful or intentional disregard of duty.

We are of the opinion that no distinction as to the rights of the parties can be founded upon speculation as to different degrees of mere negligence, and that the trial court erred in instructing the jury to find for the plaintiff if they concluded that the defendant was guilty of gross negligence. Formerly, this court, in expounding the doctrine of comparative negligence, classified negligence into three degrees, as slight, ordinary, and gross; but that doctrine was long ago abolished, and, while negligence may since that time have been alluded to in opinions as gross or slight, no weight has been given to the question, and no liability has been based on any distinction in degrees unless the negligence was willful or intentional, where it assumes an entirely different character from that of negligence in its ordinary meaning. In negligence, merely, there is no intention to do a

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wrongful act or omit the performance of a duty. *Chicago, Burlington & Quincy Railroad Co. v. Johnson*, 103 Ill. 512. Even when gross it is but the omission of a duty. *Jacksonville South-eastern Railway Co. v. Southworth*, 135 Ill. 250, 25 N. E. 1093. The many refinements concerning the degrees of such omissions of duty grew out of the application of the rule of comparative negligence, and were divested of all importance by the decision that to justify a recovery the person injured must be in the exercise of ordinary care, and the injury must have resulted from a want of ordinary care on the part of the defendant. *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358, 3 N. E. 456. The rule since that time has been that if a plaintiff has exercised ordinary care, and the defendant has failed to exercise due care—i. e., the care demanded under the circumstances—the rights of the parties are thereby fixed and determined, and there is an end of controversy. If those conditions exist, there is actionable or culpable negligence, which will justify a recovery of damages resulting therefrom; and it makes no difference in the liability or the damages by what name the negligence is designated. Where an injury results from a failure to exercise ordinary care, and not from a willful or intentional failure to perform a duty, the question of degree is of no importance. Speculations on that subject lead to no practical result, as shown by the various cases, among which is *Lake Shore & Michigan Southern Railway Co. v. Hessions*, 150 Ill. 546, 37 N. E. 905, where it was said that slight negligence is not necessarily incompatible with due and ordinary care; and, inasmuch as there is no negligence unless there is a failure to exercise due care, which is the care required by law under the circumstances of a case, the remark was equivalent to holding that slight negligence was not negligence at all.

Where the doctrine of comparative negligence is not applied, the authorities make no distinction in rights, duties, or liabilities based on degrees of negligence. Judge Cooley, in his work on Torts, p. 30, says: "Some writers classify negligence as gross negligence, ordinary negligence, and slight negligence. But this division only indicates this: that under the special circumstances great care and caution were required, or only ordinary care, or only slight care. If the care demanded was not exercised, the case is one of negligence, and a legal liability is made out when the failure is shown." Judge Thompson classifies negligence as of two kinds—negligence, which consists of carelessness and inattention; and willful negligence, consisting of willful and intentional failure or neglect to perform a duty—and he repudiates any further classification. He says (1 Thompson on Negligence, § 18): "Lord Holt, C. J., in a celebrated case divided diligence into three degrees—slight, ordinary, and gross. In this he is supposed to have made an attempt to follow the Roman law; but later investigators have pointed out that culpa levissima, or slight negligence, was unknown to the Roman law, but was one of the refinements of the Middle Ages. I confess myself careless, ignorant, and indifferent upon this whole subject of the

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degrees of negligence. It is plain that such refinements can have no useful place in the practical administration of justice. Negligence cannot be divided into three compartments by mathematical lines. Ordinary jurors, before whom, except in cases in admiralty, actions grounded on negligence are always tried, are quite incapable of understanding such refinements. * * * No effort can extract from the current American decisions the conclusion that there are three degrees of culpable negligence—slight, ordinary, and gross. On the one hand, it has been held that slight negligence may be compatible with ordinary care, and therefore not actionable at all. On the other hand, it has been laid down that there is no distinction between gross negligence and the want of ordinary care. * * * If the care demanded is not exercised, the case is one of negligence, and the legal liability is made out when the failure is shown." The author of the chapter on Negligence in the American and English Encyclopedia of Law (2d Ed. vol. 21, p. 459) says: "While not infrequent references are still found in judicial discussions of the subject to the classification of negligence into degrees, the tendency of modern authority and the weight of the best-considered cases are now opposed to this view, holding that in every case negligence, however described, is merely a failure to bestow the care and skill which the situation demands; and hence it is more accurate to call it simply negligence. Some decisions even go further, and declare that the classification of negligence into degrees is a matter of pure speculation, and of no practical consequence; that it is useless, and tends to confusion; and that in fact it is unsafe to base any legal decisions on distinctions in the degrees of negligence." One of the reasons given by the courts for disregarding supposed distinctions in degrees of negligence is the inability to give the terms "slight," "ordinary," and "gross" any definite meaning, and the impracticability of applying any rule based on the supposed distinction. It is clear that negligence cannot be divided into slight, ordinary, and gross by definite lines, so that a jury may understand the limits of each, and assign each case to its own department. In *Hinton v. Dibbin*, 42 Eng. C. L. 847, Lord Denman said: "Again, when we find 'gross negligence' made the criterion to determine the liability of a carrier who has given the usual notice, it might, perhaps, have been reasonably expected that something like a definite meaning might have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made, and it may well be doubted whether between 'gross negligence' and negligence merely any intelligible distinction exists."

In *Steamboat New World v. King*, 16 How. 469, 14 L. Ed. 1019, it was said: "The theory that there are three degrees of negligence described by the terms 'slight,' 'ordinary,' and 'gross' has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not

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fixed or capable of being so. * * * Recently the judges of several courts have expressed their disapprobation of these attempts to fix the degrees of diligence by legal definitions, and have complained of the impracticability of applying them. * * * It may be added that some of the ablest commentators on the Roman law and the Civil Code of France have wholly repudiated this theory of three degrees of diligence as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties."

In *Perkins v. New York Central Railroad Co.*, 24 N. Y. 196, 82 Am. Dec. 281, the Court of Appeals said: "The difficulty of defining gross negligence, and the intrinsic uncertainty pertaining to the question as one of law, and the utter impracticability of establishing any precise rule on the subject, renders it unsafe to base any legal decision on distinctions of the degrees of negligence. Certainly, before cases are made to turn, by verdicts of juries, upon any such distinction, the judges should be able to define with some precision what they mean by gross negligence, slight negligence, and ordinary negligence. It will be seen, on examining the many cases reported where the question has arisen, that this has been found utterly impracticable by judges when called upon to instruct juries upon the question, and also when called on to declare the law more carefully in bank. * * * What is negligent in a given case may easily be affirmed by a jury, but in what degree the negligence consists in any scale of classification of degrees of negligence is not so easily determined, will ordinarily be a matter of pure speculation, and of no practical consequence."

In *Wilson v. Brett*, 11 Meeson & Welsby, 113, it was held that there is no legal difference between negligence and gross negligence; that it is the same thing, with the addition of a vituperative epithet; and that the question in any case is whether there was culpable negligence.

In *Grill v. General Iron Screw Collier Co.*, 1 Com. P. 600, it was complained that the Lord Chief Justice misdirected the jury because he made no distinction between gross and ordinary negligence. In deciding the case Willes, J., said: "I quite agree with the dictum of Lord Cranworth in *Wilson v. Brett* that gross negligence is ordinary negligence with a vituperative epithet—a view held by the Exchequer Chamber. *Beal v. South Devon Railway Co.* Confusion has arisen from regarding negligence as a positive, instead of a negative, word. It is really the absence of such care as it was the duty of the defendant to use."

In the case of *Beal v. South Devon Railway Co.*, 3 H. & C. 336, above referred to, the failure to exercise reasonable care, skill, and diligence was called gross negligence, although it would be called ordinary negligence under most definitions where there is any division into degrees.

It will be found that the words "slight," "ordinary," and "gross," as applied to negligence, are not used in the decisions with the same meaning, or any definite and well-understood

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meaning. Illustrations are numerous, but a few will suffice for the present purpose. The words "gross negligence" are often used as the antithesis of "slight care," but in many relations the law only requires the exercise of slight care, and the failure to exercise it cannot be different in degree from the failure to exercise a very high degree of care where it is demanded by the law. The absurdity of such a standard for determining supposed degrees of negligence is manifest. It has been noted that slight negligence is not regarded as inconsistent with due care, and, if due care is exercised, there is no actionable negligence, and therefore, in a legal sense, no negligence at all. In *Bloor v. Town of Delafield*, 69 Wis. 273, 34 N. W. 115, it was held that a slight want of ordinary care on the part of the plaintiff, contributing proximately to cause the injury, would defeat his action, while only slight negligence on his part contributing thereto would not. The Supreme Court of Wisconsin also holds that no mere degree of carelessness or inadvertence constitutes gross negligence (*Decker v. McSorley*, 116 Wis. 643, 93 N. W. 808), and that the term "gross negligence" signifies willfulness, involving intent, actual or constructive, to cause injury; and if one is guilty of willful misconduct causing injury to another the former's fault is denominated gross negligence. *Rideout v. Winnebago Traction Co.* (Wis.) 101 N. W. 672. In *K. C. M. & B. R. R. Co. v. Crocker*, 95 Ala. 412, 11 South. 262, the court drew a distinction between negligence charged to be reckless and a willful and wanton injury; and in *Stringer v. Alabama Mineral Railroad Co.*, 99 Ala. 397, 13 South. 75, it was said: "The words 'gross,' 'reckless,' when applied to negligence per se, have no legal significance which imports other than simple negligence or a want of due care." The court recognized but two grades of negligence; one being simple negligence, or the want of due care, and the other such reckless or wanton disregard of probable consequences as to be equivalent to an intentional injury; and expressed doubt whether the latter could be strictly and technically called negligence—certainly a well-founded doubt. In *McAdoo v. Richmond & Danville Railroad Co.*, 105 N. C. 140, 11 S. E. 316, it was held that in torts there is no degree of negligence which can be described by the word "gross" alone. In *Milwaukee & St. Paul Railroad Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374, the court, after citing and quoting from the English decisions holding that there is no intelligible distinction between ordinary and gross negligence, said: "Gross negligence is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence,' but after all it means the absence of care that was necessary under the circumstances." In *Smith v. New York Central Railroad Co.*, 24 N. Y. 222, it was said: "Attempts have been made to fix a liability upon the distinction between gross negligence and negligence merely, but courts have been compelled to abandon the attempt, and to say that negligence does not change its character and become anything but negligence by the application of any epithet to it."

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The United States Circuit Court of Appeals for the Seventh Circuit considered the same question involved in this case in *Kelly v. Malott* (at the October term, 1904) 135 Fed. 74. The suit was for damages on account of the death of a messenger of the Adams Express Company, and the declaration charged that he was killed in a collision that occurred through the gross negligence of the defendant. A contract similar to the one in this case was pleaded, and the question was whether the injection of the word "gross" in the declaration made out a case despite the plea. The court said: "It seems to us that the whole attempt to classify negligence has resulted from a misapprehension. 'Negligence' is merely a word of denial. 'Care' is the positive word. It is familiar and sound doctrine that there are degrees of care. But 'care' cannot properly be divided into abstract and absolute classes. The quantum of care required in a particular case is determined from the relations of the parties and the facts of the situation, and is proportionate to the danger reasonably to be apprehended. Whatever the required degree of care, the failure to measure up to it is the ground of complaint. But failure is failure. The cause of action flows from the failure to exercise the full degree of care that was due. The injuries are what they are. The innocent sufferer is entitled to full compensation on account of the defendant's failure to bestow the fullness of care demanded by the situation. He is to receive no more, no less, than full compensation, because, though the defendant's lack may be a variable, any lack supplies a cause of action; and his injuries, which measure the value of the cause of action, are a constant. The division of negligence into slight, ordinary, and gross may have originated in an endeavor, unconsciously perhaps, to justify exemplary damages where only compensative should be allowed. One who unintentionally fails in his duty, and thereby causes an injury, should make complete compensation. But to warrant punishment there must be an actual or constructive intent to inflict the injury. Negligence and willfulness are as unmixable as oil and water. 'Willful negligence' is as self-contradictory as 'guilty innocence.' The substantive remains the substantive, whatever the adjective. In *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, the Supreme Court said: 'In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands, and hence it is more strictly accurate, perhaps, to call it simply "negligence." And this seems to be the tendency of modern authorities. * * * In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. A failure to exercise such care and diligence is negligence. It needs no epithet properly and legally to describe it.' See, also, *Milwaukee, etc., Railway Co. v. Arms*, 91 U. S. 489, 492 [23 L. Ed. 374]; *Purple v. Union Pacific Railroad Co.*, 114 Fed. 123 [51 C. C. A. 564, 57 L. R. A. 700]."

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Whether the use of the word "willful" negligence is proper and consistent or not, there can be no doubt that it is not equivalent to gross negligence, and the question whether exemplary damages shall be awarded does not justify any classification into degrees, since negligence, however gross, will not authorize such damages. A tort must be aggravated by an evil intent to enable a party to recover exemplary damages. *Milwaukee & St. Paul Railway Co. v. Arms*, supra. The only question in any case is whether there is actionable negligence, and, if there is, the authorities establish the proposition that the rights of the parties are not affected by any question of the degree of such negligence. The instructions that the contract was not a good defense in case the jury found the defendant guilty of gross negligence were incorrect, and should not have been given.

At the close of all the evidence there was a motion on the part of the defendant to direct a verdict of not guilty. The court denied the motion, and refused to give the instruction. Under the authority of *Blank v. Illinois Central Railroad Co.*, supra, that instruction should have been given.

The judgments of the Appellate Court and circuit court are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

MAGRUDER, J., dissenting.

NORFOLK & W. RY. CO. v. BELL.

(Supreme Court of Appeals of Virginia, Feb. 2, 1906.)

[52 S. E. Rep. 700.]

Master and Servant—Duties of Master—Safe Appliances.*—The master, in selecting instrumentalities for his work, should keep reasonably abreast with improved methods, and should be reasonably prudent and careful to select appliances reasonably adequate and proper for their respective uses, but is not bound to furnish the best-known appliances or those used by some other employer in the same line of business.

Same—Negligence of Master—Evidence.†—On the issue of the failure of a master to exercise ordinary care to provide reasonably safe appliances, a witness having sufficient knowledge of the subject may testify to the general practice of masters with reference to similar appliances and the comparative safety of different appliances; but it is not competent to show that the appliances of another master are better than those used by the master whose conduct is being called in question.

Evidence—Hearsay—Recitals in Papers.—A blue print showing a kind of water gauge, which has indorsed thereon a recital as to the use of the gauge by certain companies, and a paper illustrating another

*For the authorities in this series on the question of the care required of a master in furnishing appliances, see foot-note appended to *Smith v. Fordyce* (Mo.), 16 R. R. R. 378, 39 Am. & Eng. R. Cas., N S., 378.

†See extensive note appended to *Tucker v. Boston & M. R. R.* (N. H.), 18 R. R. R. 294, 41 Am. & Eng. R. Cas., N. S., 294.

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gauge and containing a manufacturer's statement detailing the advantages of the gauge, are hearsay on the issue of alleged negligence in failing to use gauges similar to those described.

Master and Servant—Actions—Instructions—Sufficiency of Evidence.‡—In an action against a railroad for injuries to a fireman, there was evidence that defendant had placed a man on the engine to learn how to fire; that, while he was engaged in that work, plaintiff was on the engineer's side of the cab, running the engine in the presence of the engineer; that the engineer was required to instruct the fireman in his duties and to be present when the fireman was running the engine; and that the fireman was required to obey the orders of the engineer. Held, that the evidence authorized a charge that if plaintiff, as one of the inducements to his employment, was permitted to run the engine so as to learn to be an engineer, it was the duty of defendant to use ordinary care to provide and maintain a reasonably safe place in which plaintiff was to perform such work.

Trial—Instructions—Applicability to Evidence.—Instructions should state, not abstract propositions of law, but the law as applicable to the particular facts of the case.

Error to Circuit Court, Campbell County.

Action by George L. Bell against the Norfolk & Western Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

Instruction No. 1, given by the court and referred to in the opinion, is as follows:

"(1) The court instructs the jury that if they believe from the evidence that the plaintiff was, on the 21st day of October, 1902, in the employment of the defendant in the capacity of fireman on one of its engines, as alleged in the declaration, and that, as one of the inducements to said employment as fireman, he was permitted, in the presence of the engineer, to run the engine, and thereby learn to be an engineer, then it was the duty of the defendant to use ordinary care to provide and maintain a reasonably safe place in which he was to perform said work, including reasonably safe machinery, appliances and instrumentalities, taking into consideration the character of the work to be done and the difficulties and dangers attending it; and a failure on the part of the defendant to perform this duty would be negligence.

F. S. Kirkpatrick and W. H. Mann, for plaintiff in error.

Lee & Howard and Whitehead & Whitehead, for defendant in error.

‡For the authorities in this series on the question of the care required of a master in furnishing a safe place to work, see foot-notes appended to *Southern Pac. Co. v. Gloyd* (C. C. A.), 16 R. R. R. 408, 39 Am. & Eng. R. Cas., N. S., 408; foot-notes appended to *Dean v. Oregon R. & Nav. Co.* (Wash.), 16 R. R. R. 237, 39 Am. & Eng. R. Cas., N. S., 237.

For the authorities in this series on the question who are, and are not, employees of a railroad company, see foot-notes appended to *Parrott v. Chicago Great Western Ry. Co.* (Iowa), 16 R. R. R. 253, 39 Am. & Eng. R. Cas., N. S., 253; foot-notes appended to *Atlanta & W. P. R. Co. v. West* (Ga.), 14 R. R. R. 549, 37 Am. & Eng. R. Cas., N. S., 549.

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BUCHANAN, J. This action was brought by George L. Bell, a fireman of the Norfolk & Western Railway Company, to recover damages for injuries resulting from the bursting of a glass water gauge, which it was alleged the railway company had negligently constructed and maintained on its engine, upon which the plaintiff was at work when injured.

The first error assigned is to the action of the trial court in the admission of evidence.

The plaintiff put upon the stand a witness who testified that he was a locomotive engineer and had worked as such on the Seaboard Air Line, Atlantic Coast Line, and Southern Railways, and that he had also worked on the Norfolk & Western Railway as fireman and engine hostler. The witness was permitted to describe the kind of water gauge in use on the Seaboard Air Line Railway, and to identify and put in evidence a blue print or cut showing its character. Upon this blue print, which is made a part of the record, the original of which is before this court, there is indorsed: "This is the style of water gauge used by Pennsylvania R. R., and almost entirely by Richmond Locomotive Works on everything they construct. J. D. M."

Another witness, who testified that he had worked on the Norfolk & Western Railway and on the Southern Railway, was permitted to describe the water gauge in use on the Southern Railway, and the advantages which the gauge used by that company had over that used by the Norfolk & Western Railway. He also identified a cut or picture of the gauge in use on that road on a paper introduced in evidence, which contained the manufacturer's statement of the advantages of that gauge, among which were that it furnished "most effective protection against explosions," and "absolute safety against injuries to workmen."

One of the objections made to the evidence is that the alleged failure of the defendant company to exercise ordinary care to provide and maintain a reasonably safe water gauge on its engine could not be shown by proving that another railway company provided a different and safer gauge on its engines.

In selecting between different instrumentalities for his purposes the master should keep reasonably abreast with improved methods, so as to lessen the danger to those in his service; but he is not bound, in the performance of his duty, to furnish the best-known instrumentalities, but such only as are reasonably safe. The test is, not whether he has omitted to do something he could have done, nor whether a better appliance could have been obtained or a better method adopted, but whether the selection made was reasonably prudent and careful, and the instrumentality selected reasonably adequate and proper for the use to which it was to be applied. *Bertha Zinc Co. v. Martin's Adm'r*, 93 Va. 791, 22 S. E. 869; *Norfolk & Western Railway Co. v. Cromer's Adm'r*, 99 Va. 763, 787, 40 S. E. 54.

It has been repeatedly held by this court that a witness having sufficient knowledge on the subject may testify as to the general

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practice of masters and the comparative safety of different methods of appliances, but it is not competent to show that the different methods or appliances of another master are better than those of the defendant. It is supposed that in such matters even the skillful and experienced will frequently differ in their choice of instrumentalities. A party should not be judged to be negligent for not conforming to some other method, or for not using some other appliance believed by some to be less perilous. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 640, 27 S. E. 509; *Southern Ry. Co. v. Mauzy*, 98 Va. 692, 694, 695, 37 S. E. 285; *Parlett v. Dunn*, 102 Va. 459, 463, 46 S. E. 467.

The blue print showing the kind of water gauge in use on the Seaboard Air Line Railway, and the paper containing the cut or picture of the water gauge used by the Southern Railway, were amenable to the further objection that the indorsement on the blue print as to the use of the gauge by other companies, and the statement in the other paper that the gauge described was most effective against explosions, and was absolutely safe against injuries to workmen, were mere hearsay statements and inadmissible.

The action of the court in refusing to give the instructions asked for by the defendant, and in giving its own instructions, is assigned as error.

The objection made to instruction No. 1, given by the court, is that there was no evidence upon which to base it.

The defendant claimed that the plaintiff was not entitled to recover, because he had no right to be where he was when injured. The evidence tended to show that the defendant had placed a young man on the engine to learn how to fire, and that, while he was engaged in that work, the plaintiff, who was the regular fireman, was on the engineer's side of the cab, running the engine, in the presence of the engineer; that under the rules of the defendant the engineer was required to instruct the fireman in all his duties, and not to permit him to run the engine, except when the engineer himself was present, or upon the order of the superintendent or master mechanic, and the fireman was required to obey the orders of the engineer.

That evidence was sufficient to justify the court in giving the instruction in question.

It is not contended, as we understand the defendant's objections to the other instructions given by the court, that they do not state the law correctly, or that they do not cover all the questions involved in the case; but the contention is that they, especially the third, fourth, and fifth instructions, state it in such a general way, and with so little application to the facts of the case, that their effect was to mislead, rather than to aid, the jury.

There is some foundation for this contention. But as the judgment will have to be reversed because of the admission of illegal evidence, as hereinbefore pointed out, it will be un-

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necessary to consider the objections to the action of the court in giving and refusing instructions, as the evidence will not be the same on the next trial, further than to say that instructions should state, not abstract propositions of law, but the law as applicable to the particular facts which the evidence in the case tends to prove.

The plaintiff insists that there is sufficient evidence in the case, after rejecting that which was objected to, and which we have seen should have been excluded, not only to sustain the verdict of the jury, but to have compelled a verdict in his favor.

In this he is mistaken. The evidence introduced by the defendant to show that it had exercised ordinary care to provide and maintain a reasonably safe glass water gauge on its engine was sufficient to have sustained a verdict in its favor, if the jury had so found.

We are of opinion, therefore, to reverse the judgment complained of, set aside the verdict, and remand the case for a new trial, to be had not in conflict with the views expressed in this opinion.

MAYER v. DETROIT, Y., A. A. & J. RY. CO.

(Supreme Court of Michigan, Dec. 30, 1905.)

[105 N. W. Rep. 888.]

Master and Servant—Injuries to Servant—Actions—Pleading—Variance.—In an action against a street railway for injuries to a motorman, where the declaration charged negligence in that defendant failed to supply its car with automatic "sand boxes and sand," whether defendant failed to provide the car with a "pail of sand and a shovel" to be used by hand was immaterial.

Same—Evidence—Previous Accidents.*—In an action against a street railway for injuries to a motorman, caused by his losing control of his car, which was not supplied with sand, as it was going down hill, evidence that similar runaways had occurred going down the same hill, under like circumstances, and for the same cause, is competent on the issue of notice to defendant of the danger.

Same.—In an action against a street railway for injuries to a motorman, caused by his losing control of his car, because it was not supplied with sand, while it was going down hill, the exclusion of a question asked of one of plaintiff's witnesses as to how many cars he knew of having previously run away down the hill in question was not subject to the objection of excluding testimony of previous similar runaways for similar causes, in the absence of a showing that the witness knew anything about the causes or circumstances of the previous runaways, nor as to the places from which they started.

Same—Negligence—Sufficiency of Evidence.—In an action against a street railway for injuries to a motorman, caused by his losing control of his car while it was running down hill, evidence held sufficient to show that defendant was negligent in not equipping its cars with automatic sand boxes.

Same—Measure of Master's Duty—Ordinary Care.†—A street railway owes its motorman the duty of furnishing those appliances which,

*See note at end of case.

†See preceding case and foot-notes.

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measured by the standard of good railroading as actually conducted, can be said to be reasonably safe, and is not bound to equip its cars with every possible appliance to insure safety.

Same—Actions—Instructions.—Where a motorman was, before being placed in charge of a car, instructed in the usual manner and for the usual time considered necessary to enable motormen to run a car, and was trained to the satisfaction of his instructors, who were not claimed to have been incompetent, in all the moves necessary to start and control a car at all points, it was error for the court, in an action for injuries to the motorman, to charge that he was the only motorman without other training or experience than what was merely sufficient to start and stop the car, and possessed no mechanical training, but was an inexperienced young man from the country.

Same—Assumption of Risk.—A motorman, who had been working for a street railroad for about six months, and fully understood the ordinary operation of his car, and was familiar with sand boxes and sand and the purpose for which the sand was used, and knew the danger of its absence, and failed to use the sand provided him when he saw the slippery condition of the track over which he was running, assumed the risk of his car's running away on a downgrade.

Grant and Carpenter, JJ., dissenting from paragraph 4.

Error to Circuit Court, Washtenaw County; Edward D. Kinne, Judge.

Action by Albert F. Mayer against the Detroit, Ypsilanti, Ann Arbor & Jackson Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

Plaintiff, while in defendant's employ as motorman on January 7, 1902, was very seriously injured. The defendant was found guilty of negligence, and a substantial verdict recovered. Defendant's street railway line in the city of Ann Arbor runs northerly from Catherine street down Detroit street, with its northerly terminus near the Michigan Central depot. There is a gradual incline from Catherine street, down Detroit street, to a point west of the Michigan Central depot, which point is called "Bridge Point" in the record, and is a short distance south of the bridge over the railroad tracks. At that point the road turns abruptly to the right down a steep grade to within a short distance of the depot. Opposite its terminus, and a few feet therefrom, is a stone pillar of the depot. The average grade from Catherine street to Bridge Point is 2.5 per cent. In some places it is nearly level; in others the grade varies from 9 inches to 5.15 inches per 100 feet. The weather previous to January 7th had been cold. On that day it was sufficiently warm to melt snow upon the streets. There was no snow or ice upon the rails. Towards noon the frost came out of the rails, causing slippery, or, as the railroad men called it, "greasy tracks." No difficulty had been experienced in going over this street until the trip before that in which the plaintiff was injured. Plaintiff's run commenced at 8 o'clock a. m. from defendant's car barns, and continued until 4:40 p. m. Each trip took 40 minutes. The accident occurred about 10 minutes past 12. There was nothing in the condition of the tracks in the morning to cause apprehension. Plaintiff testified that it got more frosty and slippery as

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the day went on. A car had gone down and back just before the plaintiff went down and was injured. The cars passed each other on a switch near Catherine street. There are several cross-streets between Catherine and Bridge Point, among which are Division, Kingsley, and Fuller streets, Fuller is about 350 feet from Bridge Point, and Kingsley 1,150 feet. The record fails to show the distance from Division street to the point. Plaintiff testified: "A. I was going down Detroit street slowly. When near Division street my car began to slide. I released my brakes and put on my reverse current, threw my reverse lever, put on the reverse current, and stopped the car somewhere about Division street—somewhere in that vicinity between Fuller and Division—and I shut off the current, but did not change the reverse lever, but left it in proper position to reverse again if necessary; left the car to roll slowly down the hill, gathering up my brakes, but it began to slide again, and I reversed. I began to slide the last time somewhere about Fuller street. I reversed again, but the rail was so slippery that it was impossible to stop the car. * * * Q. Did you stop the car? A. I did not. Q. Go on and state how it happened, and what further occurred. A. It skidded all the way down. The car skidded all the way down to the depot down hill. Q. What do you mean by that? A. It slid all the way down. Q. All the way down where? A. All the way down as far as I knew anything about it. Q. Do you know whether it turned to go down to the depot? A. It did. Q. Did it go down that hill? A. It did. Q. Were you able to stop it when it got to the top of the hill going down to the depot? A. No, sir." He also testified that by means of his reverse current he stopped the car after it had skidded a little ways, and ran it back a short distance before starting again down the incline; that he applied the brakes as soon as the car started the second time, and let it roll slowly down with the brakes on; that after going from two to four rods he became satisfied that the brakes were not going to hold the car, and he then threw off the brakes and again reversed. The car ran off at the end of the track and struck the stone pillar, badly demolishing the car and severely injuring plaintiff. The grounds of negligence alleged in the declaration are: (1) Failure to equip its cars with sand boxes and sand. (2) To keep its tracks free from ice, snow, and frost. (3) Failure to warn and instruct the plaintiff against the dangers attendant upon running cars when the tracks were covered with ice and snow, and in assuring him that there was no danger in running the car down grade when the track was thus covered. (4) The failure to equip the car with proper brakes and other appliances for stopping it.

The first and fourth grounds of negligence were properly eliminated from the consideration of the jury, as there was no evidence to sustain them. The evidence on part of the plaintiff shows that on the day in question the track became suddenly unusually slippery or "greasy." Plaintiff testified that he had no trouble in holding his car at any other time. The motorman

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who made the trip 30 minutes before, and who had been in the employ of the company about ten months, testified: "I never saw them in worse condition. * * * Q. When did you first notice this slippery condition caused by the frost coming out of the rails; that is, what time of the day? A. I noticed that it was especially bad the trip before Mr. Mayer got hurt; that is, 30 minutes before. Q. Had you noticed it before then that day? A. I had not noticed it enough to be alarmed about it. It is a condition that comes on very quickly. The condition was not the same on all the rails on that part of our route. It was only particularly slippery from Kingsley street to the depot. On my trip before Mayer was hurt, I made the trip, by being careful, without any accident. I had never run off the end of the track at the depot." Another motorman, who made the trip immediately preceding that of the plaintiff, testified: "It was the worst track I ever saw, slippery." The case was submitted to the jury upon the second and third grounds of negligence. Upon the second ground of negligence the court instructed the jury as follows: "The negligence of which the plaintiff complains, and which he charges against the defendant as causing this accident, is the failure of the defendant to provide its railway cars with sand boxes or the appliances for the casting of sand upon the rails of said railway track when the rails were slippery, and when there was danger by reason of the wheels sliding and thereby losing control of the car. * * * It is the duty of the defendant, in view of the grade of its roadbed and the liability of its tracks to become slippery in certain conditions of the weather, to use reasonable care and diligence to furnish its cars with such devices and appliances for controlling the speed of its cars as good railroading demands; and if you shall find from the evidence in this case that the defendant failed to do so, then it would be guilty of negligence. It was the duty of the defendant to use reasonable care and diligence to provide for the use of the plaintiff such appliances as were in common use upon other roads as would be adequate to control the speed of its cars at any point on its road in the city of Ann Arbor during any conditions of its track which the defendant knew, or by the exercise of ordinary care and diligence ought to have known, was liable to exist; and if you shall find from the evidence in this case that the defendant failed to do so, then it would be guilty of negligence." Upon the third ground of negligence the court instructed the jury as follows: "In this case, if you should find that from the evidence that the danger and risk which caused this accident was as open and apparent to the plaintiff as it was to the defendant, and that he remained in the employ and service of the defendant with this knowledge of this risk and danger, then he cannot be heard to complain, and must be regarded as having assumed these dangers, and he cannot recover. It appears, however, that he was the only motorman without other training or experience or knowledge than what was merely sufficient to start and run and to stop the car, and he possessed no mechanical or other scien-

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tific knowledge or training, but was an inexperienced young man recently from the country. Under those circumstances I instruct you as follows: If you find from the evidence that he became uneasy and solicitous about his ability as a motorman to properly handle and hold the cars without sand boxes or other like appliances, and that on the morning of the accident he went to the superintendent of the company and communicated his fears, and that the superintendent of the company assured him that there was no danger if due care was exercised; and if you further find from the evidence that he relied upon this information and assurance of the superintendent, and that he did so because he believed he could safely depend upon the opinion and judgment of the superintendent, whom he believed to possess knowledge superior to his own, then it seems to me, and I so instruct you, that the defendant company ought not to be allowed to urge against the plaintiff that he has assumed the risks and dangers which he sought to have avoided, and which he might have escaped but for the assurance of the superior officer of the railroad company to whom he went for counsel and for safety to himself and the public." Any further facts so far as essential will be stated in connection with the discussion and determination of the legal questions.

Argued before MOORE, C. J., and CARPENTER, GRANT, MONTGOMERY, and HOOKER, JJ.

Corliss, Leete & Joslyn (Charles D. Joslyn and Ray B. Morgan, of counsel), for appellant.

A. J. Sawyer & Son, for appellee.

GRANT, J. (after stating the facts). In the briefs and oral arguments it was asserted by plaintiff's counsel—and denied by defendant's counsel—that there was not a pail of sand or a shovel provided on plaintiff's car with which he could throw sand upon the track in case of emergency. Under this record the question is wholly immaterial. No such ground of negligence is alleged in the declaration. The duty of the defendant alleged in the declaration was to "equip and supply its said car with sand boxes and sand." It is apparent that the case was tried solely upon this theory, so far as the use of sand is concerned. Neither the plaintiff nor any other witness testified that his car was not supplied with a pail of sand and a shovel. The other motormen testified that on their cars they had pails of sand. Plaintiff testified that his car was equipped substantially the same as others. The argument of the attorney for plaintiff before the jury, as printed in the record, is evidently based upon the failure to provide sand boxes and sand, which could be used automatically, and not a failure to provide a pail of sand to be used by hand. The inquiry made by the plaintiff of the superintendent in the morning, before he commenced his day's work, whether the cars should not be equipped with sand boxes and sand, was not made with reference to the slippery condition of the track which developed at noon. It was made with a view to equipping the cars with this auto-

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matic arrangement for use on all occasions when necessary. There was evidence that the president of the street railway employees' union had requested Mr. Merrill, the manager of the road, to place sand boxes on the cars, and that Mr. Merrill said he did not think it was necessary; also that the superintendent of the road in Ann Arbor told plaintiff, on the morning in question, that he did not think it was necessary. There is no evidence of but one other runaway, on account of the slippery condition of the track, on this road during the several years of its existence, and that happened several years before the plaintiff's accident. Evidence of this came from one Mullison, a motorman, who had been in the employ of the company for six years as motorman and conductor. Whether this runaway of Mullison's commenced upon Detroit street, or whether it commenced on the steep grade from Detroit street to the depot, the record fails to show. From the fact that the result was not very serious, it might be inferred that Mullison lost control of his car as it commenced to go down the steep grade by the depot. Defendant asserts in its brief that this was so, and that there never had been an accident of any kind on Detroit street. But, as already stated, the record does not show what the fact is, and the onus probandi is upon the plaintiff. If other runaways had occurred going down this hill, under like circumstances and for the same cause, it would not only be competent, but very important, evidence; for this would have been notice to the defendant that it should have made all reasonable efforts to avoid a danger imperiling the lives and limbs of its employees and passengers.

Counsel for plaintiff, however, insist that they were prevented by the ruling of the court from showing other similar occurrences. Counsel's basis for this claim is found in the exclusion of the following question, propounded to the depot master, one of plaintiff's witnesses: "How many cars do you know of having run away and run down that hill before this, since you have been there—getting away and running down that hill, and running into that depot, or something there?" This was objected to as incompetent, and the objection sustained. No attempt was made to show, by Mr. Mullison or any other employee of the road, similar runaways. Mr. Mullison's testimony was admitted without objection. Its competency is too clear to admit of doubt, if that runaway occurred on Detroit street. There was no attempt to show that the depot master knew anything about the cause or circumstance of any other runaways, if there were any, nor whether they occurred in running down the very steep grade from Detroit street to the depot, or whether they started above on the street. This question furnishes no basis for an argument that plaintiff was prevented from showing other similar runaways for similar causes upon the same portion of the road.

Having disposed of these preliminary questions, we now come to the first main question, viz.: Was there evidence that the defendant was negligent in failing to provide its cars with sand boxes and sand, for use so that they could be used automatically

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when occasion required? There is no evidence that, during the several years in which defendant had operated its road in the city of Ann Arbor, any such runaway had occurred down Detroit street, or that there had been any difficulty in controlling the cars thereon. So far, therefore, as this record shows, there had been no difficulty in controlling the cars with the appliances which the defendant had furnished. It was customary, evidently, for them to use sand, when deemed necessary, with a shovel. This was more inconvenient, and undoubtedly involved more labor; but the record fails to show that its use in this manner was insufficient to avoid accident. Whether the president of the union requested the manager to equip the cars with sand boxes to work automatically, because they were more convenient and labor-saving, or whether because it was safer, does not appear. Defendant's cars were small and light. There is no evidence that similar cars on other roads were equipped with sand boxes, except that in the city of Detroit two small cars were thus equipped. These were the only two in use in that city; the others being the large cars. Defendant's counsel assert that the ordinance of the city of Detroit requires all its cars to be supplied with sand boxes and sand. We find no evidence of the ordinance upon the record. This witness (the president of the union) was then asked: "State whether or not, at the time of this accident, good railroading demands that these cars should have sand boxes and sand supplied upon the cars? A. I believe they would have been safer. Q. Would it have been good railroading to have done it? A. I believe it would have been good railroading to have done it; yes." On cross-examination he gave his definition of the meaning of good railroading as follows: "What I mean by good railroading is that everything should be done possible in equipping a car to insure safety." This is not the rule, and renders this witness' opinion valueless, and his testimony should have been stricken out. Ordinary care is the rule applicable to this case. 4 Thompson on Neg. §§ 3768, 3769; *Lamotte v. Boyce*, 105 Mich. 545, 63 N. W. 517. The means furnished must be those which, "measured by the standard of good railroading as actually conducted, can be said to be reasonably safe." *Balhoff v. M. C. Ry. Co.*, 106 Mich. 606, 65 N. W. 592; see, also, *G. R. & I. R. Co. v. Huntley*, 38 Mich. 537, 31 Am. St. Rep. 321. It does not appear by this record that experience had shown that sand boxes were essential for safety in running defendant's cars. Neither is it shown that it is the custom of other roads similarly situated and running similar cars. It follows that there was no negligence shown in the failure to supply its cars with these appliances. A new trial, if one be had, may show a different state of facts. We now determine the question only upon the record before us.

2. I think it was error for the circuit judge to say to the jury that "he [plaintiff] was the only motorman without other training or experience or knowledge than what was merely sufficient to start and run and stop the car, and he possessed no mechanical

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or other scientific knowledge or training, but was an inexperienced young man from the country." I find nothing upon this record to indicate that plaintiff was not instructed in the usual manner and for the usual time considered necessary to enable motormen to run one of these cars alone. It is not a difficult thing to do. It was not necessary, neither was it expected, that he should understand all the mechanism of the car. No scientific knowledge was required. When he had been instructed and had learned how to control such mechanism by the use of the lever and the brakes, he had acquired all that is essential. If anything happened to disable his car, the rules required him to have the next car take it back to the barn for repairs. He is not, as is a railway engineer, required to understand the mechanism of the machine and be able to repair it. That duty was very wisely left to others, educated for that purpose. The plaintiff had been employed as motorman of defendant's road for six months prior to the accident. No complaint is made that competent men did not instruct him, or that they did not instruct him for a sufficient length of time. He understood all the moves necessary to be made in order to start and control the car around curves, descending inclines, and at all other danger points. All of his instructors considered him competent. After a week's instruction he acted as motorman on defendant's cars in Ann Arbor until the 1st of November following. He was then placed under instruction for two weeks upon the main line between Ann Arbor and Detroit, engaged in running heavy cars, after which he returned to run the small and light cars in the city of Ann Arbor. His instruction was both by example and precept. He was familiar with sand boxes and sand. He used them on the main line; had run the cars for nearly six months without them in the city of Ann Arbor. He knew for what purpose the sand was used; he knew its effect as well as any one; he knew the danger of its absence as well as any one; and if he had it upon the car, and failed to use it when he saw the slippery condition of the track, he should be held to have assumed the risk. But for some assurance by the superintendent that the use of sand was unnecessary, plaintiff would clearly have assumed the risk. The assurance upon which he says he relies he states as follows: "I asked him the question whether he did not think there would be, or ought to be, sand and sand boxes upon those cars, and he said, 'No;' that it was not the car, it was the man, who was to blame. He said he could take a car down there at any time, and go down there safely, and so could any other man who would go down there carefully." Every motorman, so far as appears from this record, had taken his car down Detroit street in safety. If this were so, the superintendent was justified in his statement. But the assurance was not that the use of sand in any manner was not necessary. It was only that sand boxes, constructed so as to feed sand automatically, were not necessary.

Judgment must be reversed, and new trial ordered.

CARPENTER, J., concurred with GRANT, J.

Note

MOORE, C. J. I agree with JUSTICE GRANT that the case should be reversed, but think there was evidence tending to show the defendant was negligent in not equipping its cars with automatic sand boxes.

MONTGOMERY and HOOKER, JJ., concurred with MOORE, C. J.

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Evidence of Other Fires Set by Locomotives.—See foot-note appended to *Hendricks v. Southern Ry. Co.* (Ga.), 18 R. R. R. 503, 41 Am. & Eng. R. Cas., N. S., 503; *Shelly v. Philadelphia & R. Ry. Co.* (Pa.), 17 R. R. R. 835, 40 Am. & Eng. R. Cas., N. S., 835; *Gorham Mfg. Co. v. New York, etc., R. Co.* (R. I.), 16 R. R. R. 216, 39 Am. & Eng. R. Cas., N. S., 216.

I. SIMILAR ACTS OF NEGLIGENCE.

A. NOT PROOF OF NEGLIGENCE ALLEGED.

Evidence of similar, but disconnected, acts of negligence is not admissible to prove the existence of the negligence alleged by plaintiff to have caused his injuries.

United States.—*Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. Rep. 569.

Alabama.—*Langworthy v. Goodall*, 76 Ala. 325; *Louisville & N. R. Co. v. Miller*, 109 Ala. 500, 19 So. 989; *Schlaff v. Louisville, etc., R. Co.*, 100 Ala. 377, 14 So. 105.

Arkansas.—*Little Rock, etc., R. Co. v. Harrell*, 58 Ark. 454, 25 S. W. 117; *St. Louis & S. F. Ry. Co. v. Jones*, 59 Ark. 105, 26 S. W. 595.

Colorado.—*Pueblo Bldg. Co. v. Klein*, 5 Colo. App. 348, 38 Pac. 608; *Colorado Mortg., etc., Co. v. Rees*, 21 Colo. 435, 42 Pac. 42.

Georgia.—*Augusta & S. R. Co. v. Randall*, 85 Ga. 297, 11 S. E. 706; *Central R. Co. v. Brunson*, 63 Ga. 504; *Central R., etc., Co. v. Roach*, 64 Ga. 635; *City Council of Augusta v. Lombard*, 93 Ga. 284, 20 S. E. 312.

Illinois.—*Chicago, etc., R. Co. v. Hodge*, 55 Ill. App. 166; *Galesburg v. Hall*, 45 Ill. App. 290; *Illinois Cent. R. Co. v. Borders*, 61 Ill. App. 55; *Kolb v. Chicago Stamping Co.*, 33 Ill. App. 488; *North Chicago St. Ry. Co. v. Hudson*, 44 Ill. App. 60; *Ohio, etc., R. Co. v. Simms*, 43 Ill. App. 260; *Steator v. Hamilton*, 49 Ill. App. 449.

Indiana.—*Cleveland, C., C. & I. Ry. Co. v. Wynant*, 114 Ind. 525, 17 N. E. 118; *Ramsey v. Rushville & M. Gravel Road Co.*, 81 Ind. 394.

Iowa.—*Babcock v. Chicago & N. Ry. Co.*, 62 Iowa 593, 13 N. W. 740, 17 N. W. 909; *Bell v. Chicago, B. & Q. Ry. Co.*, 64 Iowa 321, 20 N. W. 456; *Croddy v. Chicago, R. I. & P. Ry. Co.*, 91 Iowa 598, 60 N. W. 214; *Dalton v. Chicago, Rock Island & Pac. Ry. Co.*, 114 Iowa 257, 86 N. W. 272; *Goodson v. City of Des Moines*, 66 Iowa 253, 23 N. W. 655; *Hoyt v. City of Des Moines*, 76 Iowa 430, 41 N. W. 63; *Hudson v. Chicago & N. Ry. Co.*, 59 Iowa 581, 13 N. W. 735; *Mathews v. City of Cedar Rapids*, 80 Iowa 459, 45 N. W. 894.

Kansas.—*Hoffman v. Union Pac. Ry. Co.* (Kan.), 56 Pac. 331.

Kentucky.—*Eskridge v. Cincinnati, N. O. & T. P. Ry. Co.*, 89 Ky. 367, 12 S. W. 580; *Louisville & N. R. Co. v. Fox*, 74 Ky. 495.

Maine.—*Parker v. Portland Pub. Co.*, 69 Me. 173.

Maryland.—*Baltimore Elevator Co. v. Neal*, 65 Md. 438; *Baltimore & Y. Turnpike Road v. Leonhardt*, 66 Md. 70, 5 Atl. 346; *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242; *Burrows v. Trieber*, 21 Md. 320.

Massachusetts.—*Collins v. Dorchester*, 6 Cush. (Mass.) 396; *Connors v. Morton*, 160 Mass. 333, 35 N. E. 860; *Darling v. Stanwood*, 73 Mass. 92; *Emerson v. Lowell Gas Light Co.*, 88 Mass. 146; *Gagagen v. Boston, etc., R. Co.*, 1 Allen (Mass.) 187; *Hatt v. Nay*, 144 Mass. 186, 10 N. E. 807; *Kennedy v. Spring*, 160 Mass. 203, 35 N. E. 779;

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Maguire v. Middlesex R. Co., 115 Mass. 239; **Menard v. Boston & M. R. Co.**, 150 Mass. 386, 23 N. E. 214; **Neal v. City of Boston**, 160 Mass. 518, 36 N. E. 308; **Robinson v. Fitchburg, etc., R. Co.**, 7 Gray (Mass.) 396; **Standish v. Washburn**, 21 Pick. (Mass.) 237; **Whitney v. Gross**, 140 Mass. 232, 5 N. E. 619.

Michigan.—**Armstrong v. Medbury**, 67 Mich. 250, 34 N. W. 566; **Dundas v. City of Lansing**, 75 Mich. 499, 42 N. W. 1011; **Fox v. Peninsular White Lead & Color Works**, 92 Mich. 243, 52 N. W. 623; **Grand Rapids & I. R. Co. v. Huntley**, 38 Mich. 537; **Langworthy v. Green Tp.**, 68 Mich. 207, 50 N. W. 130; **Michigan Cent. R. Co. v. Gilbert**, 46 Mich. 176, 9 N. W. 243; **Tice v. Bay City**, 78 Mich. 209, 44 N. W. 52.

Minnesota.—**Davidson v. St. Paul, M. & M. Ry. Co.**, 34 Minn. 51, 24 N. W. 324; **Morse v. Minneapolis & St. Louis Ry. Co.**, 30 Minn. 465, 16 N. W. 358.

Mississippi.—**Mississippi Cent. R. Co. v. Miller**, 40 Miss. 45; **Tri-bette v. Illinois Cent. R. Co.**, 71 Miss. 212, 13 So. 899.

Missouri.—**Bowles v. Kansas City**, 51 Mo. App. 416; **Coale v. Hannibal & St. J. R. Co.**, 60 Mo. 227; **Hipsley v. Kansas City, St. J. & C. B. R. Co.**, 88 Mo. 348, 27 Am. & Eng. R. Cas. 287; **Lester v. Kansas City, St. J. & C. B. R. Co.**, 60 Mo. 265; **Patrick v. Steamboat J. Q. Adams**, 19 Mo. 73.

Montana.—**Higley v. Gilmer**, 3 Mont. 90.

New York.—**Burke v. New York Cent. & H. R. R. Co.**, 66 Hun. 627, 20 N. Y. Supp. 808; **Collins v. New York Cent. & H. R. R. Co.**, 109 N. Y. 243, 16 N. E. 50; **Englert v. Kruse**, 14 Daly (N. Y.) 247; **First Nat. Bank v. Ocean Nat. Bank**, 60 N. Y. 279; **Jacobs v. Duke**, 1 E. D. Smith (N. Y.), 271; **Lyons First Nat. Bank v. Ocean Nat. Bank**, 60 N. Y. 279; **Reed v. New York Cent. R. Co.**, 45 N. Y. 574; **Sherman v. Kartright**, 52 Barb. (N. Y.) 267; **Warner v. New York Cent. R. Co.**, 44 N. Y. 465.

North Carolina.—**Grant v. Raleigh & G. R. Co.**, 108 N. Car. 462, 13 S. E. 209.

Ohio.—**Findlay Brewing Co. v. Bauer**, 50 O. St. 560, 35 N. E. 55; **Lake Shore & M. S. Ry. Co. v. Gaffney**, 9 O. C. C. 32, 6 O. C. D. 94; **Village of Ashtabula v. Bartram**, 3 O. C. C. 640.

Oregon.—**Davis v. Oregon & C. R. Co.**, 8 Ore. 172.

Pennsylvania.—**Baker v. Irish**, 172 Pa. St. 528, 33 Atl. 558; **Scott v. National Bank**, 72 Pa. St. 471.

Rhode Island.—**Dyer v. Union R. Co. (R. I.)**, 8 R. R. R. 782, 31 Am. & Eng. R. Cas., N. S., 782, 55 Atl. 688.

Texas.—**Fordyce v. Withers**, 1 Tex. Civ. App. 540, 20 S. W. 766; **Gulf, C. & S. F. Ry. Co. v. Ogg**, 8 Tex. Civ. App. 285, 28 S. W. 347; **Gulf, C. & S. F. Ry. Co. v. Rowland**, 82 Tex. 166, 18 S. W. 196; **Missouri Pac. Ry. Co. v. Donaldson**, 73 Tex. 124, 11 S. W. 96; **Missouri Pac. Ry. Co. v. Mitchell**, 75 Tex. 77, 12 S. W. 810.

Utah.—**Konold v. Rio Grande W. Ry. Co. (Utah)**, 17 Am. & Eng. R. Cas., N. S., 450; **Sullivan v. Salt Lake City**, 13 Utah 122, 44 Pac. 1039.

Vermont.—**Coats v. Town of Canaan**, 51 Vt. 131; **Nones v. North-house**, 46 Vt. 587; **Whiting v. First Nat. Bank of Battleboro**, 55 Vt. 154.

Virginia.—**Moore v. City of Richmond**, 85 Va. 538, 8 S. E. 387.

Washington.—**Christensen v. Union Trunk Line**, 6 Wash. 75, 32 Pac. 1018.

Wisconsin.—**Barrett v. Village of Hammond**, 87 Wis. 654, 58 N. W. 1053; **Mayer v. Milwaukee St. Ry. Co.**, 90 Wis. 522, 63 N. W. 1048; **Richards v. City of Oshkosh**, 81 Wis. 226, 51 N. W. 256.

Canada.—**Edwards v. Ottawa Riv. Nav. Co.**, 39 Up. Can. Q. B. 264.

1. New Hampshire Doctrine.

In **Wentworth v. Smith**, 44 N. H. 419, an action against a post-master for alleged negligence in losing a letter, it was held, that evi-

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dence was not admissible to show his specific acts of negligence in relation to other letters, for the purpose of proving negligence as to the letter in question. This case seems to sustain the majority doctrine, but in *Parkinson v. Nashua & Lowell R. Co.*, 61 N. H. 416, it is said in the opinion: "Although it is quite generally held elsewhere in actions for negligence, that evidence of other specific instances of negligence on the part of either party is not competent, because raising a collateral issue, yet in this state a different rule prevails, and has become established in cases where the evidence is conflicting; and it is here held, to be competent to show that the party charged with negligence had performed or omitted the same act in the same way before, as tending to show that he did or omitted the act at the time in question, on the ground that a person is more likely to do a thing in a particular way, as he is in the habit of doing or not doing it." (Citing *State v. M. & L. R. R.*, 52 N. H. 528, 549, 550; *Hall v. Brown*, 58 N. H. 93, 96, 98; *State v. Boston & Maine R. R.*, 58 N. H. 410, 412; *Nutter v. Boston & Maine R. R.*, 60 N. H. 483.)

Failure to Give Crossing Signals.—And in *State v. Manchester & Lawrence Railroad*, 52 N. H. 528, where a failure to give crossing signals was alleged, it is held, that where a person is charged with negligently doing or omitting an act, and the evidence is conflicting, it may be competent to show that he had performed or omitted the same act in the same way before, as tending to show that he did or omitted the act at the time in question.

Negligence of Deceased in Driving over Railroad Crossings at Other Times and Places.—So in an action for killing a person at a crossing, where the evidence is conflicting on the question whether deceased was guilty of contributory negligence, defendant was properly permitted to introduce evidence tending to show negligence on the part of deceased in driving over railroad crossings at other times and places in the vicinity of locomotives and moving trains. So held in *Parkinson v. Nashua & Lowell R. Co.*, 61 N. H. 416.

2. Other Statements and Illustrations of General Rule.

Negligence of Agent on Other Occasions.—Even when the negligence of an agent on a particular occasion is an issue in the case, evidence that he was negligent on other occasions is not admissible. So held in *Konold v. Rio Grande W. Ry. Co.* (Utah), 17 Am. & Eng. R. Cas., N. S., 450.

Incompetency or Carelessness of Employee on Other Occasions.—In *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176, 9 N. W. 243, 2 Am. & Eng. R. Cas. 230, it is held, that the negligence of a servant in a particular instance can not be shown by testimony of his incompetency or carelessness on other occasions.

Collision between Street Car and Another Vehicle—Speed on Other Occasions.—In an action for negligence in running a street car against another vehicle, evidence to prove that the motorman had run his car at a high rate of speed on other occasions is irrelevant and inadmissible. So held in *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018.

Failure to Ring Same Street Car Bell at Other Street Crossings.—Evidence, in an action by a pedestrian against a street railroad for injuries, that defendant had failed to ring the bell on the car in question at the intersection of other streets, prior to the time of the accident, is inadmissible. So held in *Dyer v. Union R. Co.* (R. I.), 8 R. R. R. 782, 31 Am. & Eng. R. Cas., N. S., 782, 55 Atl. 688.

Killing Stock—Prior Failures of Defendant's Agent to Close Gate.—In an action for killing a cow which came upon the track through a gate, it was error to admit evidence to show that on former occasions the agent of defendant had passed through the gate without shutting it. So held in *Chicago & Alton R. Co. v. Hodge*, 55 Ill. App. 166.

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Injuries to Stock—Negligence in Running Other Trains.—In an action for injuries to stock through alleged negligence in running a train, evidence is not admissible to show that the defendant's trainmen were negligent in this respect at other times and on the other trains. So held in *Mississippi Cent. R. Co. v. Miller*, 40 Miss. 45.

Prior or Subsequent Specific Acts of Negligence in Operating Locomotive.—In an action for injuries sustained through negligence in managing a locomotive, evidence of prior or subsequent specific acts of negligence of the engineer in operating it is inadmissible, as it could have no legal or logical tendency to prove that he was negligent on the occasion in question. So held in *Robinson v. Fitchburg & Worcester R. Co.*, 73 Mass. 92.

Collision between Street Car and Train—Death of Street Car Passenger—Previous Acts of Negligence of Driver of Car.—In an action to recover for the death of a street car passenger, caused by a collision between his car and a railroad train, evidence that the driver of the car had been guilty of other and previous acts of negligence, at times and places, near the time and place of the accident, is inadmissible to prove his negligence on that occasion. So held in *Little Rock & Memphis Ry. Co. v. Harrell*, 58 Ark. 454, 25 S. W. 117.

Other Failures to Give Signals—Conflicting Evidence.—In an action for running a train against a person at a crossing, based upon failure to give the statutory signals, evidence of other failures to give the signals for the crossing is inadmissible, where there was conflicting evidence as to whether they were given on the occasion in question. So held in *Illinois Cent. R. Co. v. Borders*, 61 Ill. App. 55.

Intoxication of Flagman on Prior Occasions—Crossing Accident.—In a crossing accident case, where the issue is the negligence of the flagman on the occasion in question, evidence is not admissible to show that he had been intoxicated on previous occasions. So held in *Warner v. New York Cent. R. Co.*, 44 N. Y. 465.

Similar Acts of Negligence or Unskillfulness in Driving.—In an action for injuries from a person's unskillful driving, evidence of similar acts of negligence on his part at other times is inadmissible, as having no bearing on the question as to the care or skill exercised by him on the occasion in question. So held in *Maguire v. Middlesex R. Co.*, 115 Mass. 239.

Collision between Vehicles—Prior Fast Driving by Defendant.—In an action for personal injuries sustained in a collision between plaintiff's and defendant's vehicles, the testimony of a witness that he saw defendant driving up and down the road, before the accident, at a very fast gait, was irrelevant and inadmissible. So held in *Nones v. Northouse*, 46 Vt. 587.

Sales of Similar Property Made by Plaintiff without Retaining Legal Title.—The fact that the claimant made sales of similar property to other persons without retaining the legal title in himself until the purchase money was paid, is not admissible as bearing on the question whether he retained the legal title in the sale to defendant. So held in *Langworthy v. Goodall, McLester & Co.*, 76 Ala. 325.

Negligence of Bank in Keeping Deposited Bonds—Other Depositors Wronged by Cashier.—In an action against a bank for want of care in keeping bonds as a special deposit, evidence was inadmissible to show that other depositors of bonds in the bank had been misused or wronged by its cashier, as such evidence was incompetent to prove that plaintiff was wronged by him. So held in *Whiting v. First Nat. Bank of Brattleboro*, 55 Vt. 154.

General Character of Pilot—Specific Instances of Recklessness.—In an action for injuries to a steamboat, caused by a collision with another vessel, a witness, testifying as to the general character of a pilot, can not state his knowledge of particular instances of his

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recklessness. So held in *Patrick v. Steamboat J. Q. Adams*, 19 Mo. 73.

Escape of Fire from Steamboat at Wharf—Evidence That Funnel Screens Were Left Open on Other Occasions.—In *Edwards v. Ottawa Riv. Nav. Co.*, 39 Up. Can. Q. B. 264, an action for negligence in the construction and management of a steamboat, by which sparks escaped from the funnel at the wharf, and plaintiff's lumber mill was destroyed, the alleged negligence consisted in leaving the screens of the steamer open; and, evidence was received that, on other occasions and at different times and places, the screens were open and cinders escaped. It was held, on appeal, that such evidence was inadmissible, when it was tendered and received. In this case it was said by Harrison, C. J.: "The declaration charges negligence by the defendants on a particular occasion and at a particular place, whereby, etc., and this the defendants deny. The only issue, therefore, for the determination of the jury was whether there was the negligence charged, on the occasion and at the place alleged, resulting in damage to some amount to plaintiff. If, on the day and at the place in question, the screens were open and sparks escaped, one or more of which sparks set fire to the pile of lumber, there was such negligence and such damage as alleged, and the jury should find for the plaintiff. It could not assist the jury in coming to a determination on that issue to show that, on other days and at other places, the screens were open and sparks escaped. Such evidence would, in my opinion, be more likely to mislead than to assist the jury in arriving at a proper determination."

Collision between Wagons—Similar Acts of Negligence—Overloading and Excessive Speed.—In an action for personal injuries, sustained by plaintiff from being thrown from his wagon by a collision with defendants' wagon, driven by one of the defendants' employees, through his alleged negligence, evidence was inadmissible to show other similar acts of negligence of defendants or their driver at other times, in overloading their vehicle, or in driving at an unreasonable speed, in the same place. So held in *Whitney v. Gross*, 140 Mass. 232, 5 N. E. 619.

Fall of Another Staging Built by Same Person—Incompetency of Builder.—In an action for personal injuries from falling from a staging, plaintiff offered to show that defendant's son, who was building the staging, and to "tend" whom plaintiff was employed at the time by defendant, had previously built another staging which had fallen down. It was held, that such evidence was inadmissible, as specific acts of negligence on the part of the son were not competent for the purpose of proving him an incompetent person to construct the staging. *Kennedy v. Spring*, 160 Mass. 203, 35 N. E. 779.

Prior Specific Acts of Negligence of Foreman While on Same Job.—In an action for injuries to an employee, through the alleged negligence of defendant's foreman, evidence of prior specific acts of negligence of the foreman, while engaged on the same job, was inadmissible, as irrelevant to the issue whether he was ordinarily a careful and competent workman, and as tending to confuse the case by collateral issues. So held in *Hatt v. Nay*, 144 Mass. 186, 10 N. E. 807.

Gas Escaping from Main into Houses on Other Side of Street.—In an action for injury to plaintiff's health from the escape of gas from a main pipe, it was not error to refuse to admit evidence of the escape of gas into other houses at the time alleged, and that defendants were negligent in relation thereto, before it had been shown that gas came into plaintiff's house, as the fact that the gas escaped into the other houses did not, of itself, tend to prove that it also escaped into plaintiff's house, on the opposite side of the street; and the fact that the agent of defendant was negligent with respect to such other houses did not, of itself, tend to prove that he or any one else was negligent in respect to plaintiff's house. So held in *Emerson v. Lowell Gas Light Co.*, 88 Mass. 146.

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Fall Down Elevator Shaft—Prior Specific Acts of Negligence of Engineer.—In *Connors v. Morton*, 160 Mass. 333, 35 N. E. 860, an action for personal injuries to defendant's employee from falling down the shaft of an elevator, operated by an engine in a building in the process of erection by defendant, evidence was not admissible to show prior specific acts of negligence on the part of defendant's engineer, known to defendant's superintendent, for the purpose of proving negligence on the part of defendant in setting plaintiff to work in a place which defendant was chargeable with notice was dangerous by reason of the probability of negligence on the part of such engineer, as, if such evidence were to be received, it might be necessary to investigate the conduct of the engineer in every act of his life and to draw inferences from acts similar and dissimilar showing every degree of care or negligence.

Injury to Employee—Other Acts of Negligence of Captain of Tug in Bringing Vessel to Wharf.—In an action for injury to an employee, through alleged negligence of the captain of a tug, in causing the yards of a vessel to come in contact with a building, and thereby knocking off a parcel of slating, evidence of former acts of carelessness on the part of such captain was inadmissible, to raise an inference that he was negligent on the occasion plaintiff was injured. So held in *Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338.

Failure to Light Hall—Elevator Shaft Left Open—Negligence on Other Occasions—Fortunate Escapes of Others.—In *Parker v. Portland Publishing Co.*, 69 Me. 173, an action for personal injuries from alleged negligence in not sufficiently lighting the hall and passageway to defendants' place of business, and in leaving open the doors to its elevator shaft, evidence, embracing a period of two years, tending to show the collateral facts that at different times the condition of the hall and entranceway as to light, the position of the elevator gates and doors, of what had happened to others at different times, and their fortunate escapes from such peril, was irrelevant and inadmissible.

Unskillful Extraction of Tooth—Other Negligent Operations.—In an action for personal injuries from the alleged unskillful extraction of a tooth, evidence is not admissible to show negligence on the part of defendant in the performance of other operations long prior to the operation complained of, as it was too remote to establish the negligence alleged. So held in *Hoffman v. Union Pac. Ry. Co.* (Kan.), 56 Pac. 331.

Negligence in Starting Elevator on Other Occasions.—In an action for the death of a child from the negligent starting of an elevator by the elevator boy, evidence that the boy on previous occasions had started it in a like sudden and negligent manner was not admissible. So held in *T. H. Pueblo Bld'g Co. v. Klein*, 5 Colo. App. 348, 38 Pac. 608. In this case it is said in the opinion: "The only negligence charged was that of the elevator boy on the occasion of the accident. No other negligence was in issue. If he was negligent then, it would be no defense that he had always before been careful; if he was not negligent then, it was entirely immaterial how habitually or recklessly negligent he might have been prior to that time. The effect of the testimony must have been unfavorable to the defendant. If they believed that its servant was in the habit of starting and moving the elevator without regard to the safety of passengers, it would require less effort than otherwise to convince them of his negligence, upon the occasion in question."

Contributing Negligence—Prior Similar Act.—On the issue of plaintiff's contributory negligence, it is incompetent to show that on prior occasions he was guilty of an act similar to the alleged act of contributory negligence. So held in *Baker v. Irish*, 172 Pa. St. 528, 33 Atl. 558.

Loss of Hotel Guest's Trunk—Plaintiff's Carelessness at Other Times.—In an action for the value of a trunk and its contents, lost

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or stolen while plaintiff was guest at a hotel, evidence of carelessness on the part of plaintiff must be confined to the period during which he was a guest at the hotel, and evidence is inadmissible to show carelessness on his part prior or subsequent to such period. So held in *Burrows v. Trieber*, 21 Md. 320.

Person Killed at Crossing—Isolated Instances of His Being Found Asleep in Vehicle.—In an action for the killing of a person at a railroad crossing, where it was claimed he was asleep in his buggy when he drove on the track, it was error to admit evidence of isolated instances of his being found asleep in his buggy, such evidence not being competent as tending to show that he was asleep when struck by the train; or to show decedent's habits of falling asleep. So held in *Dalton v. Chicago, Rock Island & Pac. Ry. Co.*, 114 Iowa 257, 86 N. W. 272.

Plaintiff's Manner of Crossing Tracks Two Hours before Accident.—In *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 49 Am. & Eng. R. Cas. 323, an action for personal injuries sustained at a railroad crossing, it was held, that evidence for defendant as to the manner in which plaintiff crossed the tracks two hours before he made the attempt in which he was injured was irrelevant.

3. Harmless Error.

Former Acts of Negligence and of Contributory Negligence.—Testimony of former acts of negligence erroneously admitted for the plaintiff are not to be regarded as reversible error, if similar evidence is afterwards admitted for defendant on the question of contributory negligence on the part of plaintiff. So held in *Sullivan v. Salt Lake City*, 13 Utah 122, 44 Pac. 1039.

Similar Defects in Street Suffered to Continue for a Considerable Time.—In an action for injury from a hole in a street, evidence that similar defects had often been suffered to continue for a considerable time without attention was immaterial, and, therefore, its admission was not prejudicial. So held in *City of Grand Rapids v. Wyman*, 45 Mich. 516, 9 N. W. 833.

Cattle Guard Filled with Snow—Horse Killed by Train—Subsequent Failure to Remove Snow from Cattle Guards.—In an action for the value of a horse, which went upon defendant's track over a cattle guard filled with snow, and was killed by a train, it was not prejudicial error, at least, to permit plaintiff to prove that during the same winter, and after the accident, the cattle guards were filled with snow, where it was also shown that defendant made no effort to remove the snow, such facts tending to show a failure to exercise any diligence or degree of care. So held in *Grahlman v. Chicago, St. P. & K. C. Ry. Co.*, 78 Iowa 564, 43 N. W. 529.

B. ORIGIN OF NEGLIGENCE ALLEGED.

But where the question is whether defendant or his employees committed the alleged negligent act, or omitted to perform a certain alleged duty, evidence of similar acts or omissions by him or them is, as a general rule, competent as bearing on such issue.

Alabama.—*Louisville & N. R. Co. v. Woods*, 105 Ala. 561, 17 So. 41, 11 Am. & Eng. R. Cas., N. S., 872.

California.—*Craven v. Central Pac. R. Co.*, 72 Cal. 345, 13 Pac. 878.

Colorado.—*Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848.

Connecticut.—*Fuller v. Naugatuck R. Co.*, 21 Conn. 557; *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475, 37 Atl. 379.

Georgia.—*Savannah, F. & W. Ry. Co. v. Flannagan*, 82 Ga. 579, 9 S. E. 471.

Indiana.—*Fort Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 746.

Iowa.—*Ledgerwood v. City of Webster City*, 93 Iowa 723, 61 N. W. 1089; *Meier v. Shrunk*, 79 Iowa 17, 44 N. W. 209.

Maine.—*Dearborn v. Union Nat. Bank of Brunswick*, 61 Me. 369.

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Massachusetts.—*Stowe v. New York, Boston & Providence R. Co.*, 113 Mass. 521.

New Hampshire.—*Nutter v. Boston & Maine Railroad*, 60 N. H. 483; *Plummer v. Ossipee*, 59 N. H. 55; *State v. Boston & Maine Railroad*, 58 N. H. 410.

New York.—*Bailey v. Rome, W. & O. R. Co.*, 139 N. Y. 302, 34 N. E. 918; *Reed v. New York Cent. R. Co.*, 56 Barb. (N. Y.) 493.

Texas.—*Cunningham v. Austen & N. W. Ry. Co.*, 88 Tex. 534, 31 S. W. 629; *Houston & Texas Cent. Ry. Co. v. Waller*, 56 Tex. 331, 8 Am. & Eng. R. Cas. 431.

Wisconsin.—*Bower v. C. M. & St. P. R. Co.*, 61 Wis. 457, 21 N. W. 326.

1. Other Statements and Illustrations of Rule.

Failure to Signal for Another Crossing.—In *Bower v. C. M. & St. P. R. Co.*, 61 Wis. 457, it appeared that plaintiff was injured at a crossing by a locomotive. The negligence charged against the railway company was the failure of the engineer to blow the whistle as he approached the crossing, and the testimony on this point was conflicting. It was held, that evidence was admissible to show that such engineer had failed to give the signal at another crossing, which he passed a few minutes earlier.

Injury to Person Alighting from Train—Habit of Jumping from Moving Cars.—In an action for personal injuries sustained by plaintiff while alighting from a train, evidence that he had within a year previous to the accident, frequently traveled over the route in question, and had frequently jumped off moving cars, and had been warned against the danger of so doing, was admissible. So held in *Craven v. Central Pac. R. Co.*, 72 Cal. 345, 13 Pac. 878.

Injury to Alighting Passenger—Usual Period for Stopping Cars at Same Place.—In an action for injury to a passenger, claimed to have been caused by negligent failure to stop the car long enough for her to alight, where such allegation was controverted, evidence was admissible to show the usual and customary period of the cars stopping at such place. So held in *Fuller v. Naugatuck R. Co.*, 21 Conn. 557.

Custom of Gripman to Stop Car in Middle of Block—Conflicting Evidence.—In case of doubt as to what a person has done, it may be considered more probable that he has done what he has been in the habit of doing than that he has acted otherwise; hence, the particular habit or custom of an individual may be shown where there is conflicting evidence as to whether he has or has not done some act material to the issue. So held in *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848. In this case the question was whether or not the gripman had stopped his car in the middle of a block.

Defective Car Wheel—Cross-Examination of Inspector—Whether He Inspected Cars on Subsequent Specified Days.—In an action for the death of an employee of defendant, on the issue whether a competent car inspector had been in the employ of the defendant at the time of the train wreck, which resulted from a defective car wheel, where the inspector had been called as a witness for the railroad company, it was competent for plaintiff, on cross-examination, to ask the witness whether he inspected the cars of the company as specified days subsequent to the wreck, such testimony being competent on the question of the attentiveness of the witness as a car inspector, and also to test the memory of the witness. So held in *Cunningham v. Austen & N. W. Ry. Co.*, 88 Tex. 534, 31 S. W. 629.

Other Brakes on Similar Cars Defective—Injury to Brakeman—Failure to Inspect.—In an action for injuries to a brakeman from a defective brake, evidence was admissible to show that other brakes on similar cars on the train were in a defective condition, which rendered them useless, as such evidence tended to show that the cars had not been properly inspected. So held in *Bailey v. Rome, W. & O. R. Co.*, 139 N. Y. 302, 34 N. E. 918.

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Speed at Which Same Engineer Drove Train at Same Place on Other Days.—Where the speed at which an engineer drove his train at a certain time and place is in issue, evidence of the speed at which he drove the same train at the same place on other days may be admitted. So held in *State v. Boston & Maine R. Co.*, 58 N. H. 410.

Failure to Stop Street Cars for Plaintiff to Alight—Plaintiff's Habit to Alight in Front of Place of Business in Middle of Block.—In an action by a passenger for personal injuries, alleged to have been caused by the failure of the motorman to stop the car at a crossing to allow plaintiff to alight, where it appeared that plaintiff's place of business was in the middle of the block, below the crossing where he attempted to get off and sustained the injury, and the evidence further tended to show that it was his habit to ride further down the street in front of his place of business before alighting from the car, and that he had formerly requested the motorman to allow him to get off there; but plaintiff testified that the motorman saw him rise from his seat and go to the door to get off at the crossing, it was not error for the motorman to be asked: "Did the plaintiff ever request you to bring him down the line, and let him off in front of his place of business?" Since the question and answer were admissible to explain the action of the motorman in not stopping for plaintiff to get off at the crossing, even if he had seen him rise from his seat and go to the rear platform. So held in *McDonald v. Montgomery St. Ry.*, 110 Ala. 161, 20 So. 317.

Speed at Certain Point—Running Time of Trains.—Evidence of the running time of the defendant's trains over the whole road, and over any given part of it, is competent on the question of the rate of speed at any point on the road. So held in *Nutter v. Boston & Maine R. Co.*, 60 N. H. 483.

Accident in Street—Speed of Train Just before Reaching Street.—Where the speed of a train at the time it ran over a man upon a public street was material, evidence was admissible to show what its speed was on the company's property, just before reaching the street. So held in *Savannah, F. & W. Ry. Co. v. Flanagan*, 82 Ga. 579, 9 S. E. 471. In this case it is said in the opinion: "The habitual high speed of the same engine, when run previously by the same engineer on the same street, was of doubtful admissibility. The authorities upon the question conflict. * * * Upon so doubtful a question we think the court did not error in admitting the evidence. There are several cases in our reports holding that doubtful evidence is to be admitted rather than excluded."

Prior Rapid Speed of Street Car.—In *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475, 37 Atl. 379, 7 Am. & Eng. R. Cas., N. S., 787, plaintiff claimed that the street car which collided with his wagon was late, and, at the time of the accident, was running fast to make up time. It was held, that evidence that the car was running very rapidly before it reached the scene of accident was admissible in support of that claim.

Speed of Train at Beginning of Long Down Grade.—In an action for personal injuries alleged to have resulted from the excessive speed of a train, which occurred on a heavy down grade, testimony as to the rate of speed the train was moving at a place where the grade began, a mile and a half away from where the injury was inflicted, is admissible in evidence. So held in *Louisville & N. R. Co. v. Woods*, 105 Ala. 561, 17 So. 41, 11 Am. & Eng. R. Cas., N. S., 872.

Bonds Lost—Testimony of Cashier as to Loss of Other Bonds Deposited with Bank.—In a suit to recover the value of certain bonds, alleged to have been left at defendant bank as collateral security, where the issue was whether they had been left with the bank, the testimony of its assistant cashier as to other bonds having been lost or misplaced and afterwards found, was admissible to show the man-

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ner in which the business of the bank was conducted, as bearing on the question of care exercised in carrying on the business. So held in *Dearborn v. Union Nat. Bank of Brunswick*, 61 Me. 369.

Bull Frequently Permitted to Be at Large—Whether at Large with Plaintiff's Permission.—In an action for injuries to plaintiff inflicted by defendant's bull while at large, testimony to the effect that defendant had frequently permitted the animal to be at large was admissible, as tending to show that it was at large with defendant's permission at the time of the accident to plaintiff. So held in *Meier v. Shrunck*, 79 Iowa 17, 44 N. W. 209.

C. NEGLIGENCE IN EMPLOYING OR RETAINING SERVANT.

And on the issue of negligence in employing a servant, or in retaining his services, evidence of prior specific acts of negligence or incompetency on his part may be competent.

United States.—*Baltimore & O. R. Co. v. Camp*, 31 U. S. App. 213, 65 Fed. 952; *Wabash Western Ry. v. Brow*, 31 U. S. App. 192, 65 Fed. 941.

Indiana.—*Delphi v. Lowery*, 74 Ind. 525; *Pittsburg, etc., R. Co. v. Ruby*, 38 Ind. 294; *Wabash R. Co. v. Kelley*, 153 Ind. 119, 52 N. E. 152.

Iowa.—*Couch v. Watson Coal Co.*, 46 Iowa 17.

Kentucky.—*Louisville, etc., R. Co. v. Collins*, 2 Duv. (Ky.) 114.

Maine.—*Branch v. Libbey*, 78 Me. 71, 5 Atl. 71.

Massachusetts.—*Schoomaker v. Inhabitants of Wilbraham*, 110 Mass. 134.

Michigan.—*Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176, 9 N. W. 243, 2 Am. & Eng. R. Cas. 230.

Mississippi.—*Vicksburg, etc., R. Co. v. Patton*, 31 Miss. 156.

New York.—*Baulec v. New York & Harlem R. Co.*, 59 N. Y. 356; *Lyons v. New York Cent. & H. R. Co.*, 39 Hun (N. Y. Supr. Ct.) 385.

Texas.—*Galveston, H. & S. A. Ry. Co. v. Davis*, 4 Tex. Civ. App. 468, 23 S. W. 301, 12 Am. & Eng. R. Cas., N. S., 832.

Wisconsin.—*Atkinson v. Goodrich Transp. Co.*, 69 Wis. 5, 31 N. W. 164.

1. Other Statements and Illustrations of Rule.

Specific Acts of Negligence or Unskillfulness of Employees.—

Specific acts of negligence or unskillfulness of defendant railroad's employees may be proved, for the purpose of showing that due care was not exercised in employing them or retaining them in the service, and for the purpose of proving the railroad had notice of their incompetency. So held in *Pittsburg, etc., R. Co. v. Ruby*, 38 Ind. 294.

Incompetency of Employee—Prior Acts of Negligence.—In an action for injuries to a railroad employee from the incompetency of another employee of the company, evidence of prior acts of negligence on his part is admissible, in connection with evidence charging the general agent of the common master with knowledge of them. So held in *Baulec v. New York & Harlem R. Co.*, 59 N. Y. 356.

Servant's Specific Acts of Negligence.—Evidence of specific acts of negligence on the part of a servant, which have been brought to his master's knowledge, are admissible to prove the master's knowledge of the servant's incompetency. So held in *Galveston, H. & S. A. Ry. Co. v. Davis*, 4 Tex. Civ. App. 468, 23 S. W. 301, 12 Am. & Eng. R. Cas., N. S., 832.

Injury to Engineer—Former Discharges of Telegraph Operator by Defendant and Other Railroads.—In an action for injuries to an engineer from the negligence of a telegraph operator, a boy eighteen years old, it was competent to prove that the latter had been discharged by other railroad companies, and that a few months before the accident he had been discharged by defendant company for

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sleeping on duty, and subsequently re-employed; and such evidence is for submission to the jury upon the issue whether the company had not been negligent in continuing the operator in its employ. So held in *Baltimore & O. R. Co. v. Camp*, 31 U. S. App. 213.

Injury to Car Repairer—Similar Accident, Some Weeks Before, from Drunkenness of Switchman.—In an action by a car repairer for personal injuries resulting from the drunkenness of a switchman, evidence that the latter, as the result of intoxication, had caused a similar accident some weeks before, and that his conduct had been reported to the foreman of the yard, who had power to employ and discharge, was admissible. So held in *Wabash Western Ry. v. Brow*, 31 U. S. App. 192, 65 Fed. 941.

Injury to Miner—Other Specific Acts of Negligence of Engineer.—In an action for injury to a miner, from the alleged incompetency and negligence of the master's engineer, evidence of specific acts of negligence on the part of the engineer is admissible as tending to prove negligence in continuing to employ him, but such evidence should not be admitted unless it be shown that the negligent acts occurred prior to the accident to plaintiff. So held in *Couch v. Watson Coal Co.*, 46 Iowa 17.

Improper Treatment of Another Patient by Defendant's Hospital Surgeon During Same Period.—In an action against a railroad by an employee for damages arising from the malpractice of its hospital surgeon, the testimony of another patient of improper treatment by such surgeon, during the same time plaintiff was treated, was admissible on the question of notice to defendant of the incompetency of the surgeon. So held in *Wabash R. Co. v. Kelley*, 153 Ind. 119, 52 N. E. 152.

Evidence of Specific Act of Incompetence by Employee May Be Admissible for Other Purpose than to Charge Master with Notice of Incompetence.—In *Evansville & T. H. R. Co. v. Guyton*, 115 Ind. 450, 17 N. E. 101, an action for personal injuries alleged to have been caused by the incompetence of an employee of defendant, it was held proper to refuse an instruction that "any evidence tending to show a specific act of incompetence is only admissible for the purpose of showing that the defendant had not exercised due care in the employment of, or retaining in service, such employee, and to bring notice to the defendant of incompetence." In this case it is said in the opinion: "While a specific act or mistake will not necessarily establish incompetence, * * * a single act may be of such a character, and may involve such consequences as, with the surrounding circumstances, to indicate want of qualification on the part of the actor. Such acts are usually resorted to by witnesses as a basis for an opinion as to the qualification of the person whose competency for a particular service is in question. In such cases the acts, with the accompanying evidence, are proper to be considered by the jury."

D. DEFENDANT'S EXERCISE OF CARE AND SKILL ON OTHER OCCASIONS.

The authorities all agree in holding that defendant can not show that he exercised due care and skill on other similar, but disconnected, occasions for the purpose of creating an inference that he is not guilty of the negligence for which he is sued. *Atlanta & W. P. R. Co. v. Holcombe*, 88 Ga. 9, 13 S. E. 75; *Peverly v. City of Boston*, 133 Mass. 366; *Bridger v. Asheville & S. R. Co.*, 27 S. Car. 457, 3 S. E. 860; *Ware v. Shafer* (Tex. Civ. App.), 27 S. W. 764. See also, as embracing authorities bearing on this question, extensive note, 18 R. R. R. 296, 41 Am. & Eng. R. Cas., N. S., 296.

Fire Set by Locomotive—Cutting of Weeds in Other Years.—In an action for the destruction of property by fire communicated from a locomotive, evidence as to the cutting of weeds on the margin of defendant's road in other years was inadmissible, as it could have

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no tendency to prove that defendant's duty in this respect had been performed at the proper time before the fire in question. So held in *Bryant v. Central Vt. R. Co.*, 58 Vt. 710.

Custom to Place Stool to Assist Passengers to Board—Direct Evidence.—Where the employee whose duty it was to place a stool used for the purpose of assisting lady passengers to enter the train was not produced as a witness or accounted for, it was proper to reject evidence that it was the custom and habit of the company to have the stool in its proper place up to the time of the starting of the train, there being positive evidence that it was out of place when plaintiff was injured, and only negative evidence to the contrary. So held in *Atlanta & W. P. R. Co. v. Holcombe*, 88 Ga. 9, 13 S. E. 75.

Injury to Ferryboat Passenger—Evidence That Gate Tender Had Always Been in Position on Prior Occasions—Absence of Prior Accidents.—In an action for injuries to a ferryboat passenger, who, while standing with others in the passageway leading from the cabin to a gate near the end of the boat, while it was approaching the wharf, was, by a crowd, pressed against the gate while it was being lifted by an unauthorized person, no employee of defendant being there to attend the gate, evidence was inadmissible to show that the boat never had approached the wharf before without a deckhand at the bow of the boat, and that no accident ever had happened before by the raising of the gate or by the pressing of passengers against it. So held in *Peverly v. City of Boston*, 136 Mass. 366.

Equipment and Condition of All Defendant's Locomotives on Day of Fire.—But in an action for the destruction of property by fire alleged to have been started by one of defendant's locomotives, where the engine causing the fire is not identified, evidence is admissible to show that all of defendant's engines, on the day of the fire, were provided with the most approved apparatus to prevent the escape of fire, and that it was in good condition. So held in *Haley v. St. Louis, Kansas City & N. Ry. Co.*, 69 Mo. 614.

Negligence in Driving—Specific Instances of Good Driving—Rebuttal.—And where the attempt has been made to show the character of a person for unsafe driving, by evidence of specific acts of negligence in driving, evidence of particular instances of careful and safe driving by him is competent in rebuttal. So held in *Plummer v. Ossipee*, 59 N. H. 55.

E. IRRELEVANCY.

Of course, evidence of other acts of negligence on the part of defendant which could not have caused or contributed to the injuries sued for, and which has no bearing on any issue involved in the action at bar, is incompetent.

Georgia.—*Central R. Co. v. Brunson*, 63 Ga. 504.

Illinois.—*Reed v. Reed*, 32 Ill. App. 17.

Iowa.—*Kuhns v. Wisconsin, I. & N. Ry. Co.*, 70 Iowa 561, 31 N. W. 868.

Kentucky.—*Louisville & N. R. Co. v. Fox*, 74 Ky. 495.

Massachusetts.—*Commonwealth v. Ryan*, 134 Mass. 223.

Nevada.—*Longabaugh v. Virginia City & T. R. Co.*, 9 Nev. 271.

Locomotive Identified—Defects in Other Engines.—Where it appears that the fire which destroyed plaintiff's property could only have been caused by sparks from a locomotive which is known and identified, evidence is inadmissible to prove the existence of defects in other engines of the railroad company. So held in *Henderson v. Philadelphia, etc., R. Co.*, 144 Pa. St. 461, 22 Atl. 851.

Subsequent Accumulation of Combustibles on Right of Way.—Where it appears from uncontradicted testimony that the fire started on plaintiff's land, and not on the railroad right of way, evidence is not admissible to show that in the month following the fire defend-

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ant had allowed combustible matter to accumulate on the right of way. So held in *Missouri, K. & T. Ry. Co. of Texas v. Stafford* (Tex. Civ. App.), 31 S. W. 319.

Derailment—Death of Fireman—Rails Not Properly Spiked at Other Places.—In *Kuhns v. Wisconsin, I. & N. Ry. Co.*, 70 Iowa 561, 31 N. W. 868, an action for the death of a fireman, resulting from the tender's leaving the track at a certain point, evidence that the rails were not properly spiked at other places should have been rejected, as immaterial, where it was not shown that failure to properly spike them at the place of the accident caused or contributed to cause the accident.

Fire in Same Woodyard Prior to Construction of Railroad.—In an action for the destruction of cord wood by a fire alleged to have been started by one of defendant's locomotives, evidence was inadmissible to show the irrelevant fact that a fire occurred in the same woodyard previous to the building of the railroad. So held in *Longabaugh v. Virginia City & T. R. Co.*, 9 Nev. 271.

Derailment—Injury to Passenger—Bad Condition of Other, but Remote, Portions of Track.—In an action for injury to a passenger resulting from the derailment of the train, caused by a broken rail, evidence that other parts of the road was in a bad condition was inadmissible, where such portions of the track were so remote from the scene of the accident that they could not have contributed to the accident in any degree whatever, and the question to be determined being whether the derailment was the result of negligence. So held in *Louisville & N. R. Co. v. Fox*, 74 Ky. 495.

II. SIMILAR ACCIDENTS OR DEFECTS.

A. NOT PROOF OF NEGLIGENCE ALLEGED.

It is a general rule that evidence of similar accidents from the alleged cause of plaintiff's injuries, or a similar one, is not admissible to prove the existence of the particular negligence alleged.

California.—*Martiney v. Planel*, 36 Cal. 578.

Georgia.—*Banking Co. v. Walker*, 87 Ga. 204, 13 S. E. 511; *Central of Georgia Ry. Co. v. Ross* (Ga.), 14 Am. & Eng. R. Cas., N. S., 12.

Iowa.—*Hudson v. C. & N. W. R. Co.*, 59 Iowa 581, 13 N. W. 735; *Croddy v. Chicago, R. I. & P. Ry. Co.*, 91 Iowa 598, 60 N. W. 214.

Maryland.—*Wise v. Ackerman*, 76 Md. 375, 25 Atl. 424.

Massachusetts.—*Aldrich v. Inhabitants of Pelham*, 1 Gray (Mass.) 510; *Collins v. Inhabitants of Dorchester*, 6 Cush. (Mass.) 397; *Finn v. Clark*, 74 Mass. 523; *Hubbard v. Concord*, 35 Mass. 52; *Kidder v. Inhabitants of Dunstable*, 11 Gray (Mass.) 342; *Menard v. Boston & Maine R. Co.*, 150 Mass. 386, 23 N. E. 214; *Neal v. City of Boston*, 160 Mass. 518, 36 N. E. 308; *Standish v. Washburn*, 21 Pick. (Mass.) 237.

Mississippi.—*Tribett v. Illinois Cent. R. Co.*, 71 Miss. 212, 13 So. 899.

Missouri.—*Coale v. Hannibal & St. Jo. R. Co.*, 60 Mo. 227.

Montana.—*Higley v. Gilmer*, 3 Mont. 90.

New Hampshire.—*Hubbard v. Concord*, 35 N. H. 52.

New York.—*Chase v. Jamestown St. Ry. Co.*, 15 N. Y. Supp. 35, 60 Hun 582; *Johnson v. Manhattan R. Co.*, 52 Hun 111, 23 N. Y. S. R. 388; *Mailler v. Express Propeller Line*, 61 N. Y. 312; *Sherman v. Kartright*, 52 Barb. (N. Y.), 267.

Ohio.—*Brewing Co. v. Bauer*, 50 O. St. 560, 35 N. E. 55; *Lake Shore & M. S. Ry. Co. v. Gaffney*, 9 O. C. C. 32, 6 O. C. D. 94.

Oregon.—*Davis v. Oregon & Cal. R. Co.*, 8 Ore. 172.

Pennsylvania.—*Albert v. Northern Cent. R. Co.*, 98 Pa. St. 316; *Pirollet v. Simmers*, 106 Pa. St. 95.

Texas.—*Missouri Pac. Ry. Co. v. Mitchell*, 75 Tex. 77, 12 S. W. 810, 41 Am. & Eng. R. Cas. 224; *Ware v. Shafer* (Tex. Civ. App.), 27 S. W. 764.

Utah.—*Sullivan v. Salt Lake City*, 13 Utah 122, 44 Pac. 1039.

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Virginia.—*Moore v. City of Richmond*, 85 Va. 538, 8 S. E. 387.

Wisconsin.—*Barrett v. Village of Hammond*, 87 Wis. 654, 58 N. W. 1053; *Richards v. City of Oshkosh*, 81 Wis. 226, 51 N. W. 256.

1. Illustrations.

Negligence and Contributory Negligence—Other Persons Injured by Trains at Same Crossing.—In an action for injuries, caused by plaintiff being struck by a train at a highway crossing, evidence was not admissible to prove that other persons had been injured by passing trains at the same crossing, prior to the accident to plaintiff, as such evidence had no bearing on the question of the negligence of defendant or the contributory negligence of plaintiff. So held in *Lake Shore & M. S. Ry. Co. v. Gaffney*, 9 O. C. C. 321, 6 O. C. D. 94.

Other Stock Killed by Defendant's Trains.—In *Central of Georgia Ry. Co. v. Ross* (Ga.), 14 Am. & Eng. R. Cas., N. S., 12, it is said in the opinion: "The plaintiff was not entitled to recover at all unless the killing was occasioned by the negligence of the employees of the company, and that question was not properly illustrated by evidence of the killing of other mules and cows. To sustain the admission of this evidence, we are cited to the case of *Railway Co. v. Flannagan*, 82 Ga. 579, 9 S. E. 471. In that case a witness was allowed to testify to the habitual high rate of speed with which a particular engine was run by the same engineer on the same street. In passing on the admissibility of this evidence, Chief Justice Bleckley said that such evidence was of doubtful admissibility, but that, 'on so doubtful a question, we think the court did not err in admitting the evidence.' But the ruling in that case does not support the admissibility of the testimony which was received in this case. There the testimony was confined to the same engine, run by the same engineer, on the same street; and Chief Justice Bleckley, in the *Flannigan* case, above, cited a large number of cases pro and con on the admissibility of such evidence when it was confined to the identical same locomotive, and operated by the same person. The admissibility of the evidence must have been sustained alone to show the habitual negligence of the particular person who it was charged was guilty of the particular act."

Fire Set by One of Two Engines—Prior Emission of Sparks by Defendant's Locomotives.—Where it appears that the fire in question, if it was caused by one of defendant's locomotives, was attributable entirely to the escape of sparks at a certain time from one of two engines, evidence is not admissible, for the purpose of proving defendant's negligence, to show that sparks of unusual size had been emitted for some time prior to such fire by defendant's locomotives generally. So held in *Albert v. Northern Cent. R. Co.*, 98 Pa. St. 316.

Escape of Fire from Other Locomotives of Similar Pattern.—In an action for damages from sparks from a certain locomotive, testimony was not admissible, for the purpose of proving the insufficiency of such engine or the negligence of its engineer, to show that fire had escaped from other locomotives of defendant of a similar pattern. So held in *Coale v. Hannibal & St. Jo. R. Co.*, 60 Mo. 227.

Failure to Light Passageway—Fall of Another Person.—In an action for personal injuries from a fall, alleged to have been caused by negligence in failing to have a passageway lighted, it was error to permit plaintiff to prove, in chief, that another person had fallen and sustained injuries in the same passageway when it was in the like darkened condition. So held in *Martiney v. Paniel*, 36 Cal. 579.

Prior Accidents to Stage under Same Driver.—In an action for injuries to a passenger from the upsetting of a stage coach, evidence is admissible to show that former accidents to the stage occurred under the same driver, for the purpose of proving the badness of the roads or his want of familiarity with them, but not to prove the negligence of the driver at the time of the accident to plaintiff. So held in *Higley v. Gilmer*, 3 Mont. 90.

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Injury to Employee—Prior Similar Defective Action of Machine—Notice—Negligence at Time of Accident.—In an action for injuries to an employee, sustained in operating a machine, through its alleged defective construction, evidence is admissible to prove that, on a former occasion, while the machine was being operated by another, it worked in a manner similar to that when plaintiff was injured. But such evidence is only competent to prove the defective character of the machine, and the master's knowledge of the fact; and it is not competent to prove negligence on the master's part at the time plaintiff was injured. So held in *Brewing Co. v. Bauer*, 50 O. St. 560, 35 N. E. 55.

Alleged Defective Construction of Elevator—Similar Accidents on Other Occasions.—In an action for personal injuries from an alleged defective construction of an elevator, evidence of similar accidents, on other occasions, is not competent, for the purpose of raising a presumption that the accident to plaintiff happened in a particular manner, or that it occurred without fault on the part of plaintiff, but by the negligence of defendant. So held in *Wise v. Ackerman*, 76 Md. 375, 25 Atl. 424.

Obstruction on Sidewalk—Other Persons Stumbling.—In an action for personal injuries resulting from an obstruction on a sidewalk, evidence that other persons stumbled over the obstruction is not admissible on the issue as to whether the obstruction was of such character as to render defendant liable. So held in *Ware v. Shafer* (Tex. Civ. App.), 27 S. W. 764.

Unsafe Thing as Cause of Accidents—Accidents of Similar Character.—In an action for injury resulting from negligence, evidence that accidents have occurred of a similar character to that which produced the injury in question is competent, not for the purpose of showing independent acts of negligence, but as tending to show the common cause of such accidents is a dangerous and unsafe thing. So held in *Bloomington v. Legg*, 151 Ill. 9, 37 N. E. 696.

Payments for Other Cattle Killed at Same Place.—In an action against a railroad for negligently killing a cow, evidence that the company had at different times paid for other cattle, killed by its trains at the same place, was inadmissible. So held in *Georgia Railroad and Banking Co. v. Walker*, 87 Ga. 204, 13 S. E. 511.

Fire Set by Locomotive—Recognition of Liability—Payments to Other Landowners.—In an action for destruction of property by fire set by defendant's locomotive, evidence that defendant paid other landowners for losses caused by the same fire is inadmissible, to show that defendant recognized its liability to plaintiff. So held in *Louisville, N. A. & C. Ry. Co. v. Roberts*, 13 Ind. App. 692, 42 N. E. 247.

B. DEFENDANT'S KNOWLEDGE OF DANGEROUS CONDITIONS.

But where the issue is defendant's knowledge, actual or implied of dangerous appliances, places or conditions, evidence of similar accidents to others, under the similar circumstances to those under which the injuries sued for were sustained by plaintiff, is generally held admissible.

United States.—*District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. Rep. 840; *Osborne v. Detroit*, 32 Fed. 36.

Alabama.—*Louisville & N. R. Co. v. Hall*, 91 Ala. 112, 8 So. 371, 48 Am. & Eng. R. Cas. 170; *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 15.

Illinois.—*Bloomington v. Legg*, 151 Ill. 9, 37 N. E. 696; *Chicago v. Powers*, 42 Ill. 169; *North Chicago St. Ry. Co. v. Hudson*, 44 Ill. App. 60.

Indiana.—*City of Fort Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 743; *City of Delphi v. Lowery*, 74 Ind. 519; *City of Goshen v. England*, 119 Ind. 368, 21 N. E. 977; *Cleveland, C. C. & I. Ry. Co. v. Newell*,

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104 Ind. 264, 3 N. E. 836, 23 Am. & Eng. R. Cas. 492; *Nave v. Flock*, 90 Ind. 205; *Salem Stone & Lime Co. v. Griffin*, 139 Ind. 141, 38 N. E. 411; *Toledo, St. L. & K. C. R. Co. v. Milligan*, 2 Ind. App. 578, 28 N. E. 1019.

Iowa.—*Croddy v. Chicago, Rock Island & Pac. Ry. Co.*, 91 Iowa 508, 60 N. W. 214; *Cameron v. Bryan*, 89 Iowa 214, 56 N. W. 434; *Lanning v. Chicago, B. & Q. Ry. Co.*, 68 Iowa 502, 27 N. W. 478, 25 Am. & Eng. R. Cas. 493; *Moore v. City of Burlington*, 49 Iowa 136; *Slessen v. B. C. R. & N. R. Co.*, 60 Iowa 215, 14 N. W. 244, 11 Am. & Eng. R. Cas. 67.

Kansas.—*St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408.

Kentucky.—*Murray v. Young*, 75 Ky. 337.

Massachusetts.—*Blair v. Inhabitants of Pelham*, 118 Mass. 420.

Michigan.—*Alberts v. Village of Vernon*, 96 Mich. 549, 55 N. W. 1022; *Hoyt v. Jeffers*, 30 Mich. 181; *Knowles v. Mulder*, 74 Mich. 202, 41 N. W. 896; *Lombar v. Village of East Tawas*, 86 Mich. 14, 48 N. W. 947; *Moore v. City of Kalamazoo*, 109 Mich. 176, 66 N. W. 1089; *Smith v. Sherwood Township*, 62 Mich. 159, 28 N. W. 806; *Thompson v. Village of Quincy*, 83 Mich. 173, 47 N. W. 114; *Wormsdorf v. Detroit City Ry. Co.*, 75 Mich. 472, 42 N. W. 1000, 40 Am. & Eng. R. Cas. 271.

Minnesota.—*Burrows v. Village of Crystal Lake*, 61 Minn. 357, 63 N. W. 745; *Phelps v. Winona & St. Peter R. Co.*, 37 Minn. 485, 35 N. W. 273, 32 Am. & Eng. R. Cas. 56.

Missouri.—*Coale v. Hannibal, etc., Railroad Co.*, 60 Mo. 227 (overruling *Lester v. Railroad Co.*, 60 Mo. 265); *Short v. Bohle*, 2 Mo. Rep'r. 1163, 64 Mo. App. 242.

Montana.—*Higley v. Gilmer*, 3 Mont. 90.

New Hampshire.—*Gordon v. Boston & Maine Railroad*, 58 N. H. 396; *Presby v. Grand Trunk Ry. Co.*, 66 N. H. 615, 22 Atl. 554; *Willey v. Portsmouth*, 35 N. H. 303.

New York.—*Avery v. City of Syracuse*, 29 Hun (N. Y. Supr. Ct.), 337; *Brady v. Manhattan Ry. Co.*, 127 N. Y. 46, 27 N. E. 368; *Chase v. Jamestown St. Ry. Co.*, 15 N. Y. Supp. 35, 60 Hun 582; *Hinds v. Barton*, 25 N. Y. 544; *Johnson v. Manhattan Ry. Co.*, 52 Hun (N. Y. Supr. Ct.), 111, 4 N. Y. Supp. 848; *Keenan v. Gutta Percha & Rubber Mfg. Co.*, 46 Hun 544, 120 N. Y. 627; *Larkin v. O'Neill*, 48 Hun 591, 1 N. Y. Supp. 232; *McCarragher v. Rogers*, 120 N. Y. 526, 24 N. E. 812; *Stebbins v. Village of Oneida*, 52 Hun 613, 5 N. Y. Supp. 483.

Ohio.—*Brewing Co. v. Bauer*, 50 O. St. Rep. 560, 35 N. E. 55; *Lake Side & Marblehead R. Co. v. Kelley* (Civ. Ct.), 3 Ohio Dec. 319.

North Carolina.—*Harrell v. Albemarle & Raleigh R. Co.*, 110 N. Car. 215, 14 S. E. 687.

Pennsylvania.—*Carson v. Godley*, 26 Pa. 111.

Rhode Island.—*Smith v. Old Colony & Newport R. Co.*, 10 R. I. 22.

Tennessee.—*Burke v. Louisville & N. R. Co.*, 50 Tenn. 451.

Texas.—*Fort Worth & Denver City Ry. Co. v. Measles*, 81 Tex. 474, 17 S. W. 124; *G. C. & Santa Fe Ry. Co. v. Evansich*, 63 Tex. 54; *Taylor, B. & H. Ry. Co. v. Taylor*, 79 Tex. 104, 14 S. W. 918; *Texas, etc., R. Co. v. Suggs*, 62 Tex. 323; 21 Am. & Eng. R. Cas. 475; *Tex. & Pac. Ry. Co. v. DeMilley*, 60 Tex. 194; *Ware v. Shafer* (Tex. Civ. App.), 27 S. W. 764.

Virginia.—*Richmond Ry., etc., Co. v. Bowles*, 92 Va. 738, 24 S. E. 388, 3 Am. & Eng. R. Cas., N. S., 654.

Wisconsin.—*Randall v. North Western Tel. Co.*, 54 Wis. 140.

1. Other Statements and Illustrations of Rule.

Negligent Use of Dangerous Agencies—Knowledge of Extent of Danger—Prior Similar Occurrences.—In *Tex. & Pac. Ry. Co. v. DeMilley*, 60 Tex. 194, it is said in the opinion: "When a party is sued for damages flowing from a specific negligent act, it is ordinarily irrelevant to prove other similar, but disconnected, acts. But where a party is charged with the negligent use of a dangerous agency, and where

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the case is against him is that he did not use care proportionate to the danger, then the question becomes material whether he knew, or ought to have known, the extent of the danger. On such an issue as this, it is relevant for the party aggrieved to put in evidence of disconnected acts, of which it was the duty of defendant to have been cognizant, and which, if he were cognizant of them, would have advised him of the extent of the danger, and would have made it his duty to take precautions which would, if faithfully applied, have prevented the injury sued for. Thus, in an action against a railroad company for injuries sustained from a car running off the track, evidence has been received to prove seven or eight runnings off of the track on the same road by the same line of cars in the previous month. Wharton's Law of Evidence, 41; Indianapolis R. R. v. Horst, 93 U. S. 291; Mobile & M. R. v. Ashcraft, 48 Ala. 15; Farcett v. Nichols, 64 N. Y. 384; Grand Trunk R. R. Co. v. Richardson, 91 U. S. 454; Buckley v. Leonard, 4 Denio. 501; Keenan v. Hayden, 39 Wis. 560; Stephen's Digest of Law of Evidence, part 1, ch. 3, arts. 11, 12, and notes."

Injury to Passenger—Seven Other Derailments of Same Train within Preceding Month.—In an action for personal injuries to a passenger occasioned by a run-off, evidence that the train on which the accident occurred, and of which witness was conductor, had run off the track seven or eight times within a month before the accident, is admissible. So held in Mobile & Montgomery R. Co. v. Ashcraft, 48 Ala. 15.

Another Child Injured by Same Turntable on Same Evening.—In an action for injuries to a child, caused by the failure of defendant to properly secure its turntable, evidence is admissible to show that another child had been injured by the same turntable on the same evening, as it tended to show that the railroad employees knew that the turntable was dangerous. So held in G., C. & Santa Fe Ry. Co. v. Evansich, 63 Tex. 54.

Another Child Injured by Same Turntable Eighteen Months before.—In an action for injuries to a child, sustained by him through playing on a turntable left unfastened and unguarded in a public place, the testimony of a boy, to the effect that eighteen months before, he had been injured by the same turntable, and had sued defendant to recover damages for his injuries, was competent. So held in Fort Worth & Denver City Ry. Co. v. Measles, 81 Tex. 474, 17 S. W. 124.

Defendant's Knowledge of Prior Accidents to Children Caused by Same Turntable Not Shown.—But in an action for injuries to a boy, sustained while he was playing on an unlocked turntable, evidence of former accidents to children from same turntable was not admissible, because knowledge of them on the part of defendant was not shown. So held in Bridger v. Asheville & S. R. Co., 27 S. Car. 457, 3 S. E. 860.

Low Bridge—Injury to Brakeman—Notoriety as to Similar Accidents from Same Bridge.—In an action for personal injuries sustained by a brakeman, while in the discharge of his duties on top of a car, by being struck by a low bridge, the notoriety of the fact that similar accidents had been caused by the same bridge is admissible, as tending to show notice to the railroad company of the dangerous condition of the bridge and negligence in failing to elevate it. So held in Louisville & Nashville R. Co. v. Hall, 91 Ala. 112, 8 So. 371; 48 Am. & Eng. R. Cas. 170.

Reasonable Care at Time of the Fire—Prior Fires from Sparks.—In an action for the destruction of plaintiff's property by fire started by a locomotive of defendant, evidence of prior fires originating from sparks from defendant's locomotives is competent, to enable the jury to judge whether defendant, in view of the previous occurrence of such fires, was in the exercise of reasonable care at the time of the fire in question. So held in Smith v. Old Colony & Newport R. Co., 10 R. I. 22.

Distance Sparks Had Been Thrown by Defendant's Locomotives on Former Occasions.—In an action for damages from fire communicated from one of defendant's locomotives, evidence is admissible, for the

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purpose of illustrating the character and degree of the danger to be guarded against by defendant, to show that distance to which sparks had been thrown by its engines on former occasions. So held in *Burke v. Louisville & N. R. Co.*, 50 Tenn. 451.

Train Wreck—Gross Negligence—Condition of Track at Other Places, Immediately before and at Time of Wreck.—In an action for the death of an employee, caused by train wreck, resulting from the alleged defective condition of the track, where gross negligence is alleged, evidence is admissible to prove the condition of the track immediately before and at the time of the wreck, at other places than the place of the wreck, as such evidence tends to show knowledge to defendant of such defects and its indisposition to remedy them promptly. So held in *Taylor, B. & H. Ry. Co. v. Taylor*, 79 Tex. 104, 14 S. W. 918. See also, *Tex. & Pac. Ry. Co. v. DeMilley*, 60 Tex. 194.

Personal Injuries—Prior Breaking of Same Trolley Wire.—In an action for personal injuries resulting from the breaking of a trolley wire, evidence that the same wire had broken frequently a short time before the accident to plaintiff was admissible, for the purpose of showing negligence on the part of the railway company, and that the wire was defective. So held in *Richmond Ry., etc., Co. v. Bowles*, 92 Va. 738, 24 S. E. 388, 3 Am. & Eng. R. Cas., N. S., 654.

Defective Stair Railing in Railroad Station—Similar Accidents.—In an action for injuries from a fall over the railing of a stairs in a railroad station, based on the defective construction of the railing, it was held that evidence of other accidents of a similar character at such station was admissible only for the purpose of showing that defendant had learned by experience that the railing was insufficient. So held in *Johnson v. Manhattan Ry. Co.*, 52 Hun (N. Y. Supr. Ct.), 111, 4 N. Y. Supp. 848.

Injury to Elevated Railway Passenger—Too Much Space between Cars and Station Platform.—In an action for injury to an alighting elevated railway passenger, based on the negligent construction of the road in leaving a space between the station platform and its cars greater than was necessary, it was held that evidence of similar accidents would have been competent if evidence had been first introduced tending to show that the conditions were similar. *Brady v. Manhattan Ry. Co.*, 127 N. Y. 46, 27 N. E. 368.

Crossing Obstructed by Snow Thrown from Track—Difficulties Experienced by Other Travelers in Passing.—In an action for injuries from alleged negligence in obstructing a highway crossing with snow thrown from a railroad track, it was held that difficulties experienced by other travelers in attempting to pass the crossing prior to the accident, and while the highway was in substantially the same condition, was admissible, to prove the unsafe condition of the highway, and that defendant was chargeable with notice of the fact. *Phelps v. Winona & St. Peter R. Co.*, 37 Minn. 485, 35 N. W. 273, 32 Am. & Eng. R. Cas. 56.

Death of Employee—Contributory Negligence—Cars Crushed against Gravel Bank on Prior Occasions.—In an action for the death of an employee of the defendant city, resulting from his being crushed against a gravel bank by a car, evidence to show that deceased knew that cars had been crushed against such bank before, or that it was a common occurrence, was competent on the question of his contributory negligence. So held in *Sullivan v. Salt Lake City*, 13 Utah 122, 44 Pac. 1039.

Horse Caught by Foot on Railroad Crossing—Other Accidents at Same Place.—In an action for the value of a horse, lost through having his foot caught in a crossing of defendant's railway track, evidence of other accidents at the same place, while the crossing was in the same condition, was relevant and admissible. So held in *North Chicago St. Ry. Co. v. Hudson*, 44 Ill. App. 60.

Person Stepping Off Approach to Movable Bridge—Failure to Light—Similar Accidents.—In an action against a city for the death of a

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person who stepped off an approach to a bridge in the night, while the bridge was swinging round to enable a vessel to pass, and was drowned, where it was alleged the accident occurred by reason of the neglect of the city to supply sufficient lights to enable persons to avoid such dangers, evidence was admissible to prove that another person had fallen through the same bridge, under similar circumstances, as tending to show that the city had notice that its agents were inattentive to their duties in respect to lighting the bridge, and that the city failed to provide against such neglect. So held in *Chicago v. Powers*, 42 Ill. 169.

Stairway of Store Obstructed by Display Figures—Prior Accidents.—In an action for injuries from a fall upon the stairway of a store, where it was alleged that the accident was the result of negligence in so obstructing the stair by display figures as to prevent persons passing down it from availing themselves of the security of the balustrade, evidence that previous accidents had occurred upon the stairs was admissible for the purpose of showing that the stairs were unsafe and that defendant had probably been made aware of their insecure condition. So held in *Larkin v. O'Neill*, 48 Hun (N. Y. Supr. Ct.), 591, 1 N. Y. Supp. 232.

Specific Attacks by Defendant's Dogs upon Other Stock.—In an action for injuries to stock, inflicted by defendant's dogs, evidence was admissible to prove that such dogs had made specific attacks upon stock of other persons living in the neighborhood where they were kept, for the purpose of showing that defendant was chargeable with notice of their vicious propensity. So held in *Murray v. Young*, 75 Ky. 337.

Negligence in Allowing Car to Remain in Street—Prior Fright of Another Horse.—In an action for personal injuries, sustained by plaintiff by reason of the horse he was driving becoming frightened at a car allowed to remain on a side track, in a public street, evidence that another horse had become frightened at the same car, on a previous occasion, was competent to show that the car was calculated to frighten horses, and negligence in permitting it to remain at such place. So held in *Harrell v. Albemarle & Raleigh R. Co.*, 110 N. Car. 215, 14 S. E. 687.

Other Horses Frightened by Same Hole in Bridge.—In an action for injuries from a defective bridge, evidence was admissible to show that other horses had taken fright at the same hole in the structure, for the purpose of establishing the prior existence and dangerous character of the hole, and that it was calculated to frighten horses, and to show that defendant was chargeable with notice of its existence and dangerous character. So held in *Smith v. Sherwood Township*, 62 Mich. 159, 28 N. W. 806.

Another Person Injured by Same Defect in Master's Premises.—In an action for an injury to an employee from a dangerous condition existing on his master's premises, evidence that prior to the accident to plaintiff another person was injured at the same place in the same way, was admissible for the purpose of showing notice to the employer of the danger. So held in *Salem Stone & Lime Co. v. Griffin*, 139 Ind. 141, 38 N. E. 411.

Unguarded Defect in Sidewalk—Prior Similar Accidents at Same Place.—In an action for injuries from a fall caused by a defective sidewalk, which was in an unguarded condition, evidence is admissible to show that, while it was in the same condition, other similar accidents had occurred at the same place. So held in *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. Rep. 840.

Other Persons Stumbling over Obstruction on Sidewalk.—In an action for personal injuries resulting from an obstruction on a sidewalk, evidence that other persons stumbled over it was only admissible to show that defendant was chargeable with notice of its existence, and not as tending to show that the obstruction was so dangerous as to render defendant liable. So held in *Ware v. Shafer* (Tex. Civ. App.), 27 S. W. 764.

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Prior Similar Accidents from Same Defect in Sidewalk.—In an action for injuries from a defect in a sidewalk, it was held that evidence of prior similar accidents from the same defect was admissible, for the purpose, at least, of proving that the municipality was chargeable with notice of the existence of the defect. *Burrows v. Village of Crystal Lake*, 61 Minn. 357, 63 N. W. 745.

Falls of Others upon Sidewalk.—In an action for personal injuries from a defective sidewalk, evidence was admissible to show that other persons had fallen upon the walk and been injured while it was out of repair. So held in *Avery v. City of Syracuse*, 29 Hun (N. Y. Supr. Ct.), 537.

Loose Boards in Sidewalk—Others Stumbling on Them.—In an action for personal injuries from an alleged defective sidewalk, a witness, who had testified as to the bad condition of the walk prior to the accident to plaintiff, was asked to state how he had discovered its condition, and answered that the boards were loose, and he stumbled on them, and had seen others stumble on them. It was held that such question and answer were both competent, as the question did not necessarily open the door to collateral issues, and the answer tended to show the existence and character of the defect, and that defendant was chargeable with notice thereof. So held in *Thompson v. Village of Quincy*, 83 Mich. 173, 47 N. W. 114.

Prior Accident to Another from Same Loose Board in Sidewalk.—In an action for injuries from being tripped up by a loose board in a sidewalk, evidence is admissible, for the purpose of showing that the municipality was chargeable with notice of the existence of the defect, to prove that another was tripped up by the same loose board about eight months before the accident to plaintiff. So held in *Alberts v. Village of Vernon*, 96 Mich. 549, 55 N. W. 1022.

Other Persons Stepping into Same Hole in Sidewalk.—In an action for personal injuries from a defective sidewalk, evidence that other persons, prior to the injuries to plaintiff, had stepped into the same hole, is competent as tending to show that defendant city had notice of the dangerous condition of the sidewalk. So held in *City of Goshen v. England*, 119 Ind. 368, 21 N. E. 977.

Other Persons Injured by Same Defect within or Near Limits of Street.—In an action for death from a defect within or near the limits of a street, evidence that other persons had previously been injured there was admissible, for the purpose of showing that the defendant city had notice of its dangerous condition. So held in *City of Delphi v. Lowery*, 74 Ind. 519.

Defective Sidewalk—Other Accident at Same Place, About Two Months Prior.—In an action for injuries from a defective sidewalk, it is proper to permit a witness to testify that, about two months before the accident, he and his wife met with an accident at the same place. So held in *Osborne v. Detroit*, 32 Fed. Rep. 36.

C. CONDITIONS MUST BE SIMILAR.

Of course, to render such evidence admissible, it is essential that it be shown that the circumstances of the other accidents were substantially the same as those of plaintiff's accident.

Alabama.—*City of Birmingham v. Starr*, 112 Ala. 98, 20 So. 424; *Louisville & N. R. Co. v. Miller*, 109 Ala. 500, 19 So. 989; *Schlaff v. Louisville & N. R. Co.*, 100 Ala. 377, 14 So. 105.

Connecticut.—*Taylor v. Town of Munroe*, 43 Conn. 36.

Illinois.—*Aurora v. Brown*, 12 Ill. App. 122; *Bloomington v. Legg*, 151 Ill. 9, 37 N. S. 696.

Iowa.—*Hoyt v. City of Des Moines*, 76 Iowa 430, 41 N. W. 63; *Hunt v. City of Dubuque*, 96 Iowa 314, 65 N. W. 319.

Maine.—*Burbank v. Bethel Steam Mill Co.*, 75 Me. 373.

Maryland.—*Wise v. Ackerman*, 76 Md. 375, 25 Atl. 424.

New Hampshire.—*Boyce v. Cheshire Railroad*, 42 N. H. 97.

New York.—*Brady v. Manhattan Ry. Co.*, 127 N. Y. 46, 27 N. E.

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368; *Collins v. New York Cent. & H. R. Co.*, 109 N. Y. 243, 16 N. E. 50; *Gillrie v. City of Lockport*, 122 N. Y. 403, 25 N. E. 357; *Jarvis v. Brooklyn El. R. Co. (City Ct.)*, 16 N. Y. Supp. 96; *Martin v. Cook*, 60 Hun 577, 14 N. Y. Supp. 329; *Sherman v. Kortright*, 52 Barb. (N. Y.), 267; *Ster v. Tuety*, 45 Hun (N. Y. Supr. Ct.), 49.

Texas.—*Gulf, Colo. & Santa Fe Ry. Co. v. Rowland*, 82 Tex. 166, 18 S. W. 96, 6 Am. & Eng. R. Cas., N. S., 775; *Missouri Pac. Ry. Co. v. Donaldson*, 73 Tex. 124, 11 S. W. 163; *Ware v. Shafer* (Tex. Civ. App.), 27 S. W. 764.

Utah.—*Hurd v. Union Pac. Ry. Co.*, 8 Utah 241, 30 Pac. 982.

Vermont.—*Carpenter v. Corinth*, 58 Vt. 214, 2 Atl. 170.

Wisconsin.—*Menominee River Sash & Door Co. v. Milwaukee & N. R. Co.*, 91 Wis. 447, 65 N. W. 176; *Phillips v. Town of Willow*, 70 Wis. 6, 34 N. W. 731.

1. Other Statements and Illustrations of Rule.

Same Condition of Appliance or Agency Must Be Shown.—To render evidence of similar accidents, resulting from the same cause, admissible, it must appear, or the evidence must reasonably tend to show, that the instrument or agency which caused the injury was in substantially the same condition at the time such other accidents occurred as at the time of the accident complained of. So held in *Bloomington v. Legg*, 151 Ill. 9, 37 N. E. 696.

Prior Fires from Same Engine—Repairs.—Evidence of fires caused several months earlier by the same engine was incompetent, where, after them and before the fire in question, the engine had been thoroughly overhauled and put in proper condition. So held in *Menominee River Sash Door Co. v. Milwaukee & N. R. Co.*, 91 Wis. 447, 65 N. W. 176.

Sparks Emitted from Same Engine Several Months after.—In *Collins v. New York Cent. & H. R. R. Co.*, 109 N. Y. 243, 16 N. E. 50, evidence was admitted to prove that several months after the fire in question, sparks of a very large size were emitted from the engine which was claimed to have caused such fire, no proof having been then given as to the manner of the construction of such locomotive. It appeared afterwards that engines of such construction would not admit of the escape of sparks of the size testified to through the spark arrester unless it was out of repair. It was held that the admission of such evidence was error, as it was not shown that sparks of such size could be emitted through faults of construction, or that the engine was in the same condition of repair as when the fire in question occurred.

Other Fires—Remoteness—Indefinite Evidence.—In an action for damages from fire set by locomotive, evidence as to other fires along the line of defendant's road was inadmissible, when it appeared that such other fires occurred ten or twelve years before, and it did not appear that they occurred at or near the place of the fire in question, nor that they began on defendant's roadway, or were caused by its engines, nor that the engines used by defendant when such fires occurred were like the engine used at the time of the fire complained of. So held in *Louisville & N. R. Co. v. Miller*, 109 Ala. 500, 19 So. 989.

Runaway Accident—Testimony That Witness Had Bridle Bits Broken in Same Way.—In an action for personal injuries sustained in a runaway accident, even though it be important to determine what effect the breaking of the bridle bits had in occasioning the accident, the testimony of a witness was not admissible to prove that bits in a horse's mouth could be broken by pulling on the reins, or that he had had bits broken in a similar way to that plaintiff claimed his were broken, it not having been first shown that the bits were similar in strength and construction. So held in *Carpenter v. Corinth*, 58 Vt. 214, 2 Atl. 170.

Icy Sidewalk—Fall of Witness at Same Place Two Years Prior to Accident.—In an action for injuries from a fall upon an icy sidewalk, testimony that about two years prior to such accident a witness fell

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upon ice at the same place, and that there was then about the same amount of ice as when plaintiff fell, was inadmissible, as it did not appear, as in plaintiff's case, that the prior accumulations of ice was caused by defects in the sidewalk. So held in *Gillrie v. City of Lockport*, 122 N. Y. 403, 25 N. E. 357.

Defect in Sidewalk—Falls of Others at Same Place.—In an action for injuries from an alleged defect in a sidewalk, an offer to prove "that other persons, passing back and forth over this walk, fell on the same spot where the accident occurred to plaintiff, while the walk was in the condition described," was properly disallowed, as no reference was made in the offer to the character or condition of the persons, and the time when and the conditions under which they had fallen. So held in *Ster v. Tuety*, 45 Hun (N. Y. Supr. Ct.), 49.

Negligence in Construction of Water Spouts—Similar Prior Accident to Horse—Changed Conditions.—In *City of Bloomington v. Legg*, 151 Ill. 9, 37 N. E. 696, an action against a city for negligence in the construction and use of spouts to conduct water into a basin, it appeared that a similar accident occurred before, but that the spouts were not the same as when the prior accident happened. The trial court ruled in the presence of the jury that such evidence, if there were changed conditions, could not be considered to the prejudice of defendant. The court instructed the jury that they were not to consider any testimony regarding a trouble with horses occurring at the fountain when the spouts were in a materially different condition from what they were at the time of the injury sued for. It was held, on appeal, that there was no reversible error in the admission of the evidence, guarded as it was by the instruction of the court.

Other Persons Falling on Defective Sidewalk—Absence of Evidence of Similarity of Conditions.—In an action against a city for personal injuries alleged to have been caused by a defective sidewalk, evidence that at different times other people fell at the same place, in the absence of testimony showing similarity of the condition of the defect, or that the accidents happened at about the same time as the one complained of is incompetent and inadmissible. So held in *City of Birmingham v. Starr*, 112 Ala. 98, 20 So. 424.

D. OTHER DEFECTS NEAR PLACE OF ACCIDENT—NOTICE OF PARTICULAR DEFECT.

Evidence that there were other defects near the place of the accident, prior to its occurrence, is competent on the question whether defendant was chargeable with notice of the existence of the particular defect complained of.

United States.—*Osborne v. City of Detroit* (C. C.), 32 Fed. 36.

Illinois.—*City of Shelbyville v. Brandt*, 61 Ill. App. 153.

Iowa.—*Armstrong v. Town of Ackley*, 71 Iowa 76, 32 N. W. 180; *Aryman v. City of Marshalltown*, 90 Iowa 350, 57 N. W. 867; *Hunt v. City of Dubuque*, 96 Iowa 314, 65 N. W. 319; *McConnell v. City of Osage*, 80 Iowa, 293, 45 N. W. 550; *Munger v. City of Waterloo*, 83 Iowa 559, 49 N. W. 1028; *Smith v. City of Des Moines*, 84 Iowa 685, 51 N. W. 77.

Michigan.—*City of Grand Rapids v. Wyman*, 46 Mich. 516, 9 N. W. 833; *Edwards v. Common Council of Village of Three Rivers*, 102 Mich. 153, 60 N. W. 454; *Moore v. City of Kalamazoo*, 109 Mich. 176, 66 N. W. 1089; *O'Neil v. Village of West Branch*, 81 Mich. 544, 45 N. W. 1023; *Tice v. Bay City*, 84 Mich. 461, 47 N. W. 1062; *Will v. Village of Mendon*, 108 Mich. 251, 66 N. W. 58.

Minnesota.—*Gude v. City of Mankato*, 30 Minn. 256, 15 N. W. 175; *Kellogg v. Village of Janesville*, 34 Minn. 132, 24 N. W. 359.

Missouri.—*Smallwood v. City of Tipton*, 1 Mo. App. Rep'r, 764, 63 Mo. App. 234.

New York.—*McGuire v. Ogenburgh & L. C. R. Co.*, 63 Hun 632, 19 N. Y. Supp. 313; *Pettengill v. City of Yonkers*, 116 N. Y. 558, 22 N. E. 1095.

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North Dakota.—Chacey *v.* City of Fargo, 5 N. Dak. 173, 64 N. W. 932.

Pennsylvania.—North Manheim Tp. *v.* Arnold, 119 Pa. 380, 13 Atl. 444.

Tennessee.—Poole *v.* City of Jackson, 93 Tenn. 62, 23 S. W. 57.

Texas.—City of Belton *v.* Turner (Tex. Civ. App.), 27 S. W. 831.

Wisconsin.—Shaw *v.* Village of Sun Prairie, 74 Wis. 105, 42 N. W. 271.

1. Illustrations.

Injury to Passenger from Derailment—Other Defects in Roadbed—Gross Negligence.—In an action for injuries to a passenger, resulting from a derailment, evidence tending to show that there were other defects in the roadbed than those alleged to have caused the accident, and that they had existed for some time, is admissible, where gross negligence is charged against the company. So held in Texas and Pac. Ry. Co. *v.* DeMilley, 60 Tex. 194.

Injuries to Stock—Railroad Fence Defective in Immediate Vicinity.—Evidence was admissible to show that the railroad fence was defective in the immediate vicinity of the point where plaintiff's horses went through, as tending to show constructive notice to defendant of the general condition of the fence. So held in M'Guire *v.* Ogdensburg & L. C. R. Co. (Supr. Ct.), 18 N. Y. Supp. 313.

Condition of Crossing Some Months Prior—Horse Caught in Same Way at Same Place.—In an action for injury to plaintiff, alleged to have resulted from a defective railroad crossing, evidence is admissible to show the defective condition of the crossing, some months prior to the injury complained of, and that one of the horses driven by the witness was caught in the same way and at the same place, on the question of notice of the defect to defendant. So held in Toledo, St. Louis, etc., R. Co. *v.* Milligan, 2 Ind. App. 578, 28 N. E. 1019.

Horse Frightened—Lumber Piled at Same Place on Prior Occasions—Notice to Township.—In an action for injuries sustained by reason of a horse becoming frightened at piles of lumber projecting into a highway, evidence was admissible, as tending to show that the defendant township was chargeable with notice of the existence of such obstruction to prove that in repeated instances lumber had been piled at the same place. So held in North Manheim Tp. *v.* Arnold, 119 Pa. St. 380, 13 Atl. 444.

Allowing Lumber to Be Piled in Street—Similar Negligence on Former Occasions.—In Moore *v.* City of Burlington, 49 Iowa 136, an action for personal injuries resulting from alleged negligence in allowing lumber to be piled in a street, it is held that evidence was admissible to show that, while defendant had no actual knowledge of the acts resulting in plaintiff's injuries, it had been guilty of the same acts on former occasions, creating the danger of injuries like those complained of.

Fall of Mine Roof—Condition of Roof a Year Prior to Accident.—In an action for injuries to a minor from the falling of the roof of a mine, evidence of the condition of the roof for a year before the accident is competent to show notice of the defect on the part of defendant. So held in Island Coal Co. *v.* Neal, 15 Ind. App. 15, 42 N. E. 953.

Injury to Employee—Other Holes in Dock.—In an action for injury to defendant's employee from an alleged defect in their dock, evidence was admissible to show that the dock was defective in many places by reason of holes other than the one which caused the injury to plaintiff, as such evidence tended to show that defendants were chargeable with notice of the particular hole. So held in Propsom *v.* Leatham, 80 Wis. 608, 50 N. W. 586.

Thrown from Vehicle by Telephone Wire—Height of Wire on Preceding Sunday.—In an action for wrongful death, caused by deceased's being thrown from his carriage by a telephone wire stretched across the highway, evidence was admissible to show the height of

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the wire on the Sunday before the accident. So held in *Pennsylvania Tel. Co. v. Varnan* (Pa.), 15 Atl. 624.

General Bad Condition of Sidewalk.—Evidence of other defects in the sidewalk in the immediate vicinity of the defect causing plaintiff's injuries or of the general bad condition of the walk, is admissible, for the purpose of showing that the village was chargeable with notice of the particular defect. So held in *Shaw v. Village of Sun Prairie*, 74 Wis. 105, 42 N. W. 271.

Stepping into Hole in Sidewalk—Condition of Walk between Plaintiff's House and Corner.—In an action for injuries sustained through stepping into a hole in a sidewalk, evidence was admissible, for the purpose of showing that defendant was chargeable with notice of such defect, to prove that the walk between plaintiff's house and the next corner, where the accident occurred, was rickety, and had a number of holes in it. And, in such case, evidence of the condition of the walk two months after the accident could be properly admitted when it was shown that it was in a like bad condition since long prior to the date of the accident to plaintiff. So held in *Munger v. City of Waterloo*, 83 Iowa 559, 49 N. W. 1028.

Personal Injuries—Newly Dug Trench—Absence of Warning Lights on Preceding and Subsequent Night.—In an action for personal injuries caused by a newly dug trench in a street being left exposed and without warning lights, evidence was admissible to show the condition of the street and the absence of lights in the nighttime prior to the accident, and on the same night thereafter, as evidence of its prior condition tended to charge the city with notice, and that of its condition on the same night tended to contradict the testimony of the contractors that a light was there. So held in *Pettengill v. City of Yonkers*, 116 N. Y. 558, 22 N. E. 1095.

Decayed Planks at Other Parts of Bridge.—Evidence that the planks of a bridge were old and decayed at other points than where plaintiff was injured, was admissible to show such a general defective condition as to charge the town with notice of all such defects as the one which caused the accident. So held in *Spearbracker v. Town of Larrabee*, 64 Wis. 573, 25 N. W. 555.

Loose Plank in Sidewalk—Prior Condition of Walk at Same Place.—On the question whether the defendant city was chargeable with notice of the defect causing the accident in question (a loose plank in a sidewalk), it is competent to prove that the walk at that place had been in a dilapidated condition for a long time before such accident. So held in *Chacey v. City of Fargo*, 5 N. Dak. 173, 64 N. W. 932.

Other Holes in Sidewalk between Two Gates Leading into Certain Premises—Witnesses without Knowledge as to Which Hole Was Complained of.—In an action for injuries, caused by plaintiff getting foot into a hole in sidewalk, at a point about midway between two gates leading into certain premises, the evidence as to defects in walk were confined to that point, but the testimony showed there were more than one hole, and some of the witnesses, not knowing the particular hole complained of, were questioned on both sides as to the location of the holes they observed; but the jury were instructed that there could be no recovery unless the city was chargeable with notice of the identical hole into which plaintiff stepped, and the existence of other holes was not permitted to be used to show notice of the hole causing plaintiff's injuries. It was held that there was no error in admitting the testimony concerning the other holes. *Tice v. Bay City*, 84 Mich. 461, 47 N. W. 1062.

Other Defects in Immediate Vicinity of Hole in Sidewalk—Others Stepping into Same Hole.—In an action for injuries caused by stepping into a hole in a sidewalk, evidence is admissible to show the existence of other defects in the walk in the immediate vicinity of such hole, and that others had stepped into the same hole, as tending to show that the city was chargeable with notice of the existence of the hole. So held in *Moore v. City of Kalamazoo*, 109 Mich. 176, 66 N. W. 1089.

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Defects in Sidewalk Not Apparent to Ordinary Observation—Generally Defective Condition of Walk for Four or Five Rods.—In an action for injuries from a defective sidewalk, evidence is admissible to show the generally defective condition of the walk for a distance of four or five rods in either direction from the place of the accident, as tending to charge the municipality with notice of the defect complained of, even though such defect may not have been apparent to ordinary observation. So held in *Will v. Village of Mendon*, 108 Mich. 251, 66 N. W. 58.

Fall upon Defective Sidewalk—General Condition in Front of the Premises.—In an action for personal injuries from a fall on a defective sidewalk, evidence as to the general condition of the walk in front of the premises where the accident occurred is admissible, for the purpose of showing that defendant city was chargeable with notice of the defect causing plaintiff's fall. So held in *Smith v. City of Des Moines*, 84 Iowa 685, 51 N. W. 77.

Loose Board in Sidewalk—Defective Condition for the Entire Block.—In an action for personal injuries caused by a loose board in a sidewalk, evidence was admissible to prove a defective condition of the walk the entire length of the block, as it tended to show that the city was chargeable with notice of the defect complained of. So held in *McConnell v. City of Osage*, 80 Iowa 293, 45 N. W. 550.

Defective Sidewalk—Its Condition a Year Prior to Accident.—In an action for personal injuries from a defective sidewalk, evidence was admissible to show the condition of the walk a year before the accident, as tending to show its actual condition at the time of the accident, and that it had been in a defective and dangerous condition for such a length of time as to charge the city with notice thereof, in connection with evidence that its condition had not been substantially altered in the interval. So held in *Hunt v. City of Dubuque*, 96 Iowa 314, 65 N. W. 319.

Defective Sidewalk—Walk Continuously Unsafe for Sixty Feet.—In an action for personal injuries from a defective sidewalk, evidence is admissible to show that the walk is continuously unsafe for sixty feet, although the accident occurred at one end of such distance, for the purpose of showing that defendant town should have known of the defect causing the injuries complained of. So held in *Armstrong v. Town of Ackley*, 71 Iowa 76, 32 N. W. 180.

Condition of Sidewalk in Immediate Vicinity of Place of Accident.—In an action for personal injuries from a defective sidewalk, it is competent to show the condition of the walk in the immediate vicinity of the spot where the accident occurred, if it be so near the place of the accident that a person examining the walk there would be also likely to notice the defect at the place in question. So held in *Osborne v. Detroit*, 32 Fed. Rep. 36.

2. Held Not Admissible.

Injury to Passenger—Bad Condition of Road Half Mile Distant.—In an action for injury to a passenger, sustained in a derailment caused by the alleged defective condition of the track, it was error to admit evidence of the bad condition of the road at a point half a mile distant from the place of the accident. So held in *Reed v. New York Cent. R. Co.*, 45 N. Y. 574.

Rotten Box Sewer Covered with Earth—Death of Horse—Condition of Sewer Half a Block Distant.—In an action for the value of a horse, killed by breaking through a rotten box sewer, covered with earth, at a street crossing, it was error to admit evidence, for the purpose of proving negligence on the part of defendant, to show that the sewer was rotten before the accident occurred, half a block away from the crossing, as such evidence did not prove that the city was bound to know of the particular defect complained of, the sewer being in some places covered with earth, and in other places exposed so that it could be seen. So held in *Conklin v. City of Marshalltown*, 66 Iowa 122, 23 N. W. 294.

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Defects in Other Parts of Sidewalk.—But in an action for injuries from a defect in a sidewalk, evidence of other defects in other parts of the walk, prior or subsequent to the accident to plaintiff, is inadmissible to charge the defendant city with notice of the defect causing plaintiff's injuries. So held in *Goodson v. City of Des Moines*, 66 Iowa 255, 23 N. W. 655.

Other Defects in Sidewalk beyond Place of Accident.—In an action for injuries from a defective sidewalk, it is error to permit plaintiff to show the bad and defective condition of the walk at other places beyond the defect complained of, such evidence having no tendency to show actual or constructive notice of the defect causing the accident. So held in *Tice v. Bay City*, 78 Mich. 209, 44 N. W. 52. See also, *Dundas v. Lansing*, 75 Mich. 499, 42 N. W. 1011.

Defective Sidewalk—Visible Defects Twenty-Five Feet or More Distant.—In an action for personal injuries from a defective sidewalk, evidence was not admissible, for the purpose of charging defendant with notice of the defect, to show that the walk was visibly out of repair in the "locality near" where plaintiff was injured, at and prior to the time of the injury. So held in *Ruggles v. Town of Nevada*, 63 Iowa 185, 18 N. W. 866. In this case it is said in the opinion: "If no one passing along the walk had knowledge of the loose plank (the cause of the accident), the city should not be charged with such knowledge because there were open and visible defects in the walk twenty-five feet or more distant."

Condition of Sidewalk More than Two Blocks from Place of Accident.—In an action for personal injuries from a defective sidewalk, it is error to permit the introduction of evidence on the part of plaintiff showing the condition of the walk at other places more than two blocks from the place of the accident. *City of Streator v. Hamilton*, 49 Ill. App. 449.

Ice in Depression in Sidewalk—Condition of Depression During Preceding Winter—Argument Not Called to Attention of Trial Court.—In an action for personal injuries from a fall upon ice which had accumulated in a depression in a sidewalk, which depression plaintiff's evidence tended to show had existed continuously from the previous winter to the time of the accident in the spring and was so formed as to retain water. It was held that plaintiff had no ground of exception to the exclusion of evidence offered to show that the habitual condition of the depression during the previous winter was that it was covered with ice; as plaintiff had been allowed to show that the form of the depression was such the ice and snow would accumulate there, and he was not entitled to argue, upon a ground not called to the attention of the trial court, that the evidence excluded was admissible. So held in *Neal v. City of Boston*, 160 Mass. 518, 36 N. E. 308.

E SUBSEQUENT ACCIDENT—NOTICE OF PROBABILITY OF OCCURRENCE OF ACCIDENT.

On issue whether defendant was chargeable with notice of the probability of the occurrence of the accident to plaintiff, evidence of similar, but subsequent, accidents from the same cause is not competent. *Augusta v. Lombard*, 93 Ga. 284, 20 S. E. 312; *McGrail v. City of Kalamazoo*, 94 Mich. 52, 53 N. E. 955; *Sills v. Ft. Worth & D. C. Ry. Co.* (Tex. Civ. App.), 28 S. W. 908.

1. Illustrations.

Death of Employee—Subsequent Accumulation of Sand on Tracks.

—In an action for the death of an employee caused by negligence in allowing sand to accumulate on the tracks, on the issue of defendant's negligence, evidence was inadmissible to show that, after the accident, sand carried by the wind accumulated in large quantities on the tracks at the place of the accident. So held in *Sills v. Ft. Worth & D. C. Ry. Co.* (Tex. Civ. App.), 28 S. W. 908.

Removal of Water Gates from Canal—Flooding Property—Subsequent Freshets.—In an action against a city for injury to property

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resulting from the removal by defendant of water-gates from its canal, by reason of which plaintiff's property was flooded during a freshet, evidence as to subsequent freshets was inadmissible. So held in *Augusta v. Lombard*, 93 Ga. 284, 20 S. E. 312.

Insufficiency of Sewer—Overflow—Subsequent Great Freshet at Same Place.—In an action for injury to property from an overflow, alleged to have been caused by the negligence of a city in constructing a sewer of insufficient size, evidence to show that another great freshet had occurred at the same place after the action was brought is inadmissible. So held in *Los Angeles C. Assn. v. Los Angeles*, 103 Cal. 461, 37 Pac. 375.

Communication of Electricity from Live to Dead Wires—Subsequent Condition of Wires.—In an action for injury to the employee of an electric light company, from the improper stringing of its wires, whereby electricity was communicated from live to dead wires, a witness was allowed to testify to a like condition of the wires some months after the accident. It was held that, while the condition of the wires immediately before, at the time, and soon after the accident was alone material, such testimony was not so prejudicial as to warrant a reversal solely because of its admission. *Kraatz v. Brush Electric Light Co.*, 82 Mich. 457, 46 N. W. 787.

F. ORIGIN OF ACCIDENT.

On the issue of the probability or possibility of the origin of the accident complained of from the cause alleged, it is generally held competent to show that other injuries were caused by a negligent act or omission similar to the one alleged, or by the defect, or a similar one, claimed to have caused the injuries complained of.

United States.—*Chicago & N. W. Ry. Co. v. Netolicky*, 67 Fed. 665, 14 C. C. A. 615, 32 U. S. App. 406; *Chicago, St. P. M. & O. Ry. Co. v. Gilbert*, 52 Fed. 711, 3 C. C. A. 264; *District of Columbia v. Arms*, 107 U. S. 519, 2 Sup. Ct. Rep. 840; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Gulf, C. & S. F. Ry. Co. v. Johnson*, 54 Fed. 474, 4 C. C. A. 447, 10 U. S. App. 629; *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. Rep. 696; *Northern Pac. R. Co. v. Lewis*, 51 Fed. 658, 2 C. C. A. 446, 7 U. S. App. 254, 56 Am. & Eng. R. Cas. 86; *Osborne v. Detroit*, 32 Fed. Rep. 36.

Alabama.—*Birmingham Union Ry. Co. v. Alexander*, 93 Ala. 133, 9 So. 525; *City of Birmingham v. Starr*, 112 Ala. 98, 20 So. 424; *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 15.

Arkansas.—*St. Louis & S. F. R. Co. v. Jones*, 59 Ark. 105, 25 S. W. 595.

California.—*Butcher v. Vaca Valley, etc., R. Co.*, 67 Cal. 518, 8 Pac. 174; *Henry v. Southern Pac. R. Co.*, 50 Cal. 176.

Connecticut.—*Bailey v. Town of Trumbull*, 31 Conn. 581; *House v. Metcalf*, 27 Conn. 630; *Tomlinson v. Town of Derby*, 43 Conn. 562.

Florida.—*Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Trans. & Mfg. Co.*, 27 Fla. 157, 9 So. 661.

Georgia.—*City of Augusta v. Hafers*, 61 Ga. 48; *Gilmer v. City of Atlanta*, 77 Ga. 688.

Illinois.—*Aurora v. Brown*, 12 Ill. App. 122; *City of Bloomington v. Legg*, 151 Ill. 9, 37 N. E. 696; *Chicago & N. W. Ry. Co. v. Hart*, 22 Ill. App. 207; *Illinois Cent. R. Co. v. McClelland*, 42 Ill. 355; *Lake Erie & W. R. Co. v. Helmericks*, 38 Ill. App. 141; *Lake Erie & W. R. Co. v. Kirts*, 29 Ill. App. 175; *Lake Erie & W. R. Co. v. Middlecoff*, 150 Ill. 27, 37 N. E. 660; *Legg v. City of Bloomington*, 40 Ill. App. 185; *Rockford Gas Light & Coke Co. v. Ernst*, 68 Ill. App. 300; *Rowlands v. City of Elgin*, 66 Ill. App. 66.

Indiana.—*Cleveland, C., C. & I. R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836; *Evansville & T. H. R. Co. v. Keith*, 8 Ind. App. 57, 35 N. E. 296; *Louisville, N. A. & C. Ry. Co. v. Lange*, 13 Ind. App. 337, 41 N. E. 609; *Pittsburg, C. & St. L. R. Co. v. Kitley*, 118 Ind. 152, 20 N. E. 727.

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Iowa.—Hunt *v.* City of Dubuque, 96 Iowa 314, 65 N. W. 319; Lan-
ning *v.* Chicago, B. & O. R. Co., 68 Iowa 502, 27 N. W. 478; Slossen
v. Burlington, etc., R. Co., 60 Iowa 214, 14 N. W. 244; Smith *v.* City
of Des Moines, 84 Iowa 685, 51 N. W. 77.

Kansas.—Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354; City of
Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933; Junction City *v.*
Blades, 1 Kan. App. 85, 41 Pac. 677; Missouri Pac. Ry. Co. *v.* Neis-
wanger, 41 Kan. 621, 21 Pac. 582; Murray *v.* Young, 75 Kan. 337;
Union Pac. Ry. Co. *v.* Hand, 7 Kan. 380.

Kentucky.—Georgetown & D. R. Turnpike Road Co. *v.* Cannon,
13 Ky. Law Rep. 257; Kentucky Cent. R. Co. *v.* Barrow, 5 Ky. Law
Rep. 518.

Maine.—Crocker *v.* McGregor, 76 Me. 282; Thatcher *v.* Maine Cent.
R. Co., 85 Me. 502, 27 Atl. 519.

Maryland.—Annapolis & Elkridge R. Co. *v.* Gantt, 39 Md. 115.

Massachusetts.—Bemis *v.* Temple, 162 Mass. 342, 38 N. E. 970;
Hunt *v.* Lowell Gas Light Co., 90 Mass. 169; Loring *v.* Worcester &
N. R. Co., 131 Mass. 469; Myers *v.* Hudson Iron Co., 150 Mass. 125,
22 N. E. 631; Ross *v.* Boston & W. R. Co., 88 Mass. 87; Shea *v.*
Glendale Elastic Fabrics Co., 162 Mass. 463, 38 N. E. 1123.

Michigan.—Alberts *v.* Village of Vernon, 96 Mich. 549, 55 N. W.
1022; Cheney *v.* Russell, 44 Mich. 620, 7 N. W. 234; Ireland *v.* Cin-
cinnati, W. & M. R. Co., 79 Mich. 163, 44 N. W. 426; Kraatz *v.* Brush
Electric Light Co., 82 Mich. 457, 46 N. W. 787; Lombar *v.* Village
of East Tawas, 86 Mich. 14, 48 N. W. 947; Thompson *v.* Village of
Quincy, 83 Mich. 173, 47 N. W. 114; Woodbury *v.* City of Owosso,
64 Mich. 239, 31 N. W. 130.

Minnesota.—Clapp *v.* Minneapolis & St. L. Ry. Co., 36 Minn. 6, 29
N. W. 340; Kelly *v.* Southern Minn. Ry. Co., 28 Minn. 98, 9 N. W.
588; Morse *v.* Minneapolis & St. L. Ry. Co., 30 Minn. 465, 16 N. W.
358; Phelps *v.* Winona & St. Peter R. Co., 37 Minn. 485, 35 N. W. 273.

Missouri.—Campbell *v.* Missouri Pac. Ry. Co., 121 Mo. 340, 25 S.
W. 936; Coale *v.* Hannibal & St. J. R. Co., 60 Mo. 227; Golden *v.*
City of Clinton, 54 Mo. App. 100; Patton *v.* St. Louis & S. F. Ry. Co.,
87 Mo. 117.

Montana.—Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 13 Pac.
367.

Nevada.—Longabaugh *v.* Virginia City & T. R. Co., 9 Nev. 271.

New Hampshire.—Boyce *v.* Railroad, 43 N. H. 627; Bullard *v.*
Boston & M. R. R., 64 N. H. 27, 5 Atl. 838, 27 Am. & Eng. R. Cas. 117;
Chamblin *v.* Enfield, 43 N. H. 356; Darling *v.* Town of Westmoreland,
52 N. H. 401; Gordon *v.* Boston & M. R. R., 58 N. H. 396; Haseltine
v. Concord R. R., 64 N. H. 545, 15 Atl. 143, 35 Am. & Eng. R. Cas.
236; Smith *v.* Boston & M. R. R., 63 N. H. 25; Whittier *v.* Town of
Franklin, 46 N. H. 23; Willey *v.* Portsmouth, 35 N. H. 303.

New York.—Auery *v.* City of Syracuse, 29 Hun (N. Y. Supr. Ct.)
537; Burke *v.* New York Cent., etc., R. Co., 20 N. Y. Supp. 808,
66 Hun (N. Y.) 627; Burns *v.* City of Schenectady, 24 Hun (N. Y.
Supr. Ct.) 10; Chase *v.* Jamestown St. Ry. Co., 60 Hun 582, 15 N.
Y. Supp. 35; Crist *v.* Erie Ry. Co., 58 N. Y. 638; Eggleston *v.* Columbia
Turnpike Road, 18 Hun 146; Evans *v.* Keystone Gas Co., 148 N. Y.
112, 42 N. E. 513; Field *v.* New York Cent. R. Co., 32 N. Y. 339;
Flinn *v.* New York Cent. & H. R. R. Co., 67 Hun 631, 22 N. Y. Supp.
473; Hinds *v.* Barton, 25 N. Y. 544; Home Ins. Co. *v.* Pennsylvania
R. Co., 11 Hun 182; Hoyt *v.* New York Lake Erie & W. R. Co., 118
N. Y. 399, 33 N. E. 565; McCarragher *v.* Rogers, 8 N. Y. St. Rep.
847; Magee *v.* City of Troy, 48 Hun 383, 1 N. Y. Supp. 24, 119 N.
Y. 640, 23 N. E. 1148; Masters *v.* City of Troy, 50 Hun (N. Y.) 485,
3 N. Y. Supp. 450, 123 N. Y. 628, 25 N. E. 952; Quinlan *v.* City of
Utica, 11 Hun 217; Rogers *v.* Rogers, 4 N. Y. St. Rep. 373; Sheldon
v. Hudson River R. Co., 14 N. Y. 218; Sherman *v.* Village of
Oneonta, 66 Hun 629, 21 N. Y. Supp. 137, 142 N. Y. 637, 37 N. E. 566;
Webb *v.* Rome, W. & O. R. Co., 49 N. Y. 420; Westfall *v.* Erie Ry.

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Co., 58 N. Y. 638; *Wilson v. Town of Spafford*, 57 Hun (N. Y.) 589, 10 N. Y. Supp. 648; *Wooley v. Grand Street & N. R. Co.*, 83 N. Y. 121, 3 Am. & Eng. R. Cas. 398.

North Carolina.—*Grant v. Raleigh & G. R. Co.*, 108 N. Car. 462, 13 S. E. 209; *Harrall v. Albemarle & R. R. Co.*, 110 N. Car. 215, 14 S. E. 687.

Ohio.—*McClung v. North Bend Coal & Coke Co.* (Ohio Comm. Pl.) 31 W. L. Bull. 9; *Findlay Brewing Co. v. Bauer*, 50 O. St. 560, 35 N. E. 55; *Lake Side & M. R. R. Co. v. Kelly*, 10 Ohio Civ. Ct. Rep. 322, 6 O. C. D. 555.

Oregon.—*Koontz v. Oregon Ry. & Nav. Co.*, 20 Ore. 3, 23 Pac. 820.

Pennsylvania.—*Glaser v. Lewis* (Pa.), 42 Leg. Int. 141; *Albert v. Northern Cent. Ry. Co.*, 98 Pa. 316; *Henderson v. Philadelphia, etc., R. Co.*, 144 Pa. St. 461, 22 Atl. 851; *Pennsylvania R. Co. v. Stranahan*, 79 Pa. 405.

Rhode Island.—*Butcher v. Providence Gas Co.*, 12 R. I. 149; *Smith v. Old Colony & N. R. Co.*, 10 R. I. 22.

South Dakota.—*Smith v. Chicago, M. & St. Ry. Co.*, 4 S. Dak. 71, 55 N. W. 717.

Tennessee.—*Burke v. Louisville & N. R. Co.*, 54 Tenn. 451.

Texas.—*Galveston, etc., R. Co. v. Hertzog*, 3 Tex. Civ. App. 296, 22 S. W. 1013; *Missouri Pac. Ry. Co. v. Donaldson*, 73 Tex. 124, 11 S. W. 163.

Vermont.—*Hoskinson v. Central Vermont R. Co.*, 66 Vt. 618, 30 Atl. 24; *Kent v. Town of Lincoln*, 32 Vt. 591.

Virginia.—*Brighthouse Ry. Co. v. Rogers*, 76 Va. 443.

Washington.—*Robinson v. Marino*, 3 Wash. St. 434, 28 Pac. 752.

Wisconsin.—*Barrett v. Village of Hammond*, 87 Wis. 654, 58 N. W. 1053; *Brusberg v. Milwaukee, L. S. & W. Ry. Co.*, 55 Wis. 106, 12 N. W. 416; *Richards v. City of Oshkosh*, 81 Wis. 226, 51 N. W. 256; *Allard v. Chicago & N. W. Ry. Co.*, 73 Wis. 165, 40 N. W. 685; *Gibbons v. Wisconsin Val. R. Co.*, 58 Wis. 335, 17 N. W. 132.

1. Other Statements and Illustrations of Rule.

Contributory Negligence an Issue—Admissible to Illustrate Physical Fact.—In *Aurora v. Brown*, 12 Ill. App. 122, it is said in the opinion: "It is the policy of the law to exclude evidence of similar accidents, when the prudence of every person who had met with a like accident would be involved; but when evidence of similar accidents is given to illustrate a physical fact, before or after the occurrence being investigated, and the conditions are the same, such evidence is admissible."

Similar Accidents from Defective Track at Same Time and Place.—Where the question is whether defendant's track, at the time and place of the accident to plaintiff, was in a safe and proper condition for the passage of vehicles, it is permissible for plaintiff to prove similar accidents to the same time and place. So held in *Birmingham Union Ry. Co. v. Alexander*, 93 Ala. 133, 9 So. 525.

Failure to Light Station Platform—Other Persons Falling Off under Similar Circumstances.—In an action for injuries to an intending passenger from a fall in stepping from a station platform, caused by the defendant's alleged negligence in failing to sufficiently light the locus in quo, evidence was admissible to show that other persons had fallen from the same part of the platform, under similar circumstances, as it tended to prove that the place was dangerous. So held in *Missouri Pac. Ry. Co. v. Neiswanger*, 41 Kan. 621, 21 Pac. 581.

Injury to Passenger—Dress Caught in Covering of Car-Wheel—Prior Accidents.—In an action for injuries to an alighting passenger caused by her dress catching in a defect in the sheet-iron covering of the car-wheel projecting above the floor, evidence of prior accidents from the same cause was admissible to show the nature of the defect. So held in *Chase v. Jamestown St. Ry. Co.*, 15 N. Y. Supp. 35, 60 Hun 582.

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Derailment—Injury to Passenger—Rail Substituted for Rail Found Broken on Same Morning.—In an action for injury to a passenger in a derailment, resulting from a broken rail, an instruction that if the jury find from the evidence, that such rail had been put down in place of another which had broken the same morning at the same place, they might consider this fact in determining whether the rail which caused the accident was a good one, and whether it was properly and carefully put down, is proper; and the fact that another rail was found broken, only a few hours before, at the same place, gave room for an inference that there may have been some defect in the roadway at that point. So held in *Cleveland, C., C. & I. R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836.

Derailment—Injury to Passenger—One or More Similar Accidents, Near Same Place from Condition of Road, about a Month Prior.—In *Union Pac. Ry. Co. v. Hand*, 7 Kan. 380, an action for injuries to a passenger caused by a derailment, it was held that evidence was admissible to show that the road was in a bad condition about a month previous to the accident, and that one or more similar accidents happened to trains at or near the same place, at that time, as tending to show the condition of the road at the time of the accident to plaintiff, it being supported by other evidence tending to show that it remained in the same condition up to or near the time of such accident.

Hole in Railroad Crossing—Thrown from Wagon—Defect in Wagon Alleged—Subsequent Accident to the Wagon.—In an action for injuries from being thrown from a wagon, based on alleged negligence in permitting a hole to be in a railroad crossing, where defendant claimed that a defect in the wagon caused, or contributed to, the accident, evidence was admissible to show that, in consequence of such alleged defect, the wagon, upon the day after the accident, came near upsetting as it was being turned. So held in *Hoyt v. New York, Lake Erie & W. R. Co.*, 118 N. Y. 399, 33 N. E. 565.

Wagon Striking against Switch in Street—Other Accidents at Same Switch.—In an action for personal injuries caused by plaintiff's wagon striking against a switch laid down by the railroad company in a street, evidence was admissible to show that there had been other accidents at the same switch. So held in *Woolley v. Grand Street & N. R. Co.*, 83 N. Y. 121, 3 Am. & Eng. R. Cas. 398.

Condition of Street—Witness Thrown from Vehicle While Driving at Same Place.—In an action for personal injuries from an alleged defect in a street, it was not error to permit a witness, after he had described the condition of the roadbed at the time of the accident, to testify that he had been thrown from his seat in driving along there at a moderate gait, as such evidence tended to show the condition of the street. So held in *Sherman v. Village of Oneonta*, 21 N. Y. Supp. 137, 66 Hun 629.

Fall on Icy Sidewalk—Falls of Others at Same Place.—In an action from a fall on an icy sidewalk, it was proper to allow a witness to testify that subsequent to the accident, and on the same afternoon, she slipped on the ice at the same place, and to allow another witness to testify that three or four days prior to the accident to plaintiff he also fell upon the same sidewalk, as such evidence tended to show the condition of the walk. So held in *Masters v. City of Troy*, 50 Hun (N. Y. Supr. Ct.), 485, 3 N. Y. Supp. 450, 123 N. Y. 628, 25 N. E. 952.

Water-Gate Projecting from Sidewalk—Falls of Others.—In an action for personal injuries from a fall over a water-gate projecting from a sidewalk, it was error to exclude the question, "did you ever know of anybody falling over there before?" So held in *Burns v. City of Schenectady*, 24 Hun (N. Y. Supr. Ct.) 10.

Other Accidents from Same Defect in Street.—Other accidents from alleged defect in street may be shown for the purpose of proving

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the dangerous character of the place. So held in *Golden v. City of Clinton*, 54 Mo. App. 100.

Others Stepping into Same Hole in Sidewalk.—In an action for injuries from a fall caused by stepping into a hole in a sidewalk, evidence is admissible, as tending to prove the existence and character of the defect, to show that others had stepped into the same hole prior to the accident to plaintiff. So held in *Lombar v. Village of East Tawas*, 86 Mich. 14, 48 N. W. 947.

Narrow Escapes of Others at Same Crossing.—In an action for the death of a person, struck by a train at a grade crossing, it is competent to show by witnesses, who are familiar with the locality, the narrow escapes they have had at the same crossing, in connection with descriptions of the locality, for the purpose of showing the nature of the crossing and the difficulties of travelers in passing over it. So held in *Chicago & N. W. Ry. Co. v. Netolicky*, 67 Fed. Rep. 665, 14 C. C. A. 615, 32 U. S. App. 406.

Trains Frequently Passing without Setting Fire to Cotton.—Evidence that defendant's trains frequently passed cotton in open cars near the track without setting it on fire was admissible as bearing on the question whether or not plaintiff was negligent in placing his cotton near the railroad track. So held in *Bennett & Lovell v. Missouri, K. & T. Ry. Co. of Texas*, 11 Tex. Civ. App. 423, 32 S. W. 834.

Sufficiency or Safety of Instrumentality—Cause of Accident—Similar Accidents from Same Cause.—In *Morse v. Minneapolis & St. Louis Ry. Co.*, 30 Minn. 465, 16 N. W. 358, it is held that where the sufficiency or safety of the instrument which is claimed to have caused the accident complained of is in issue, evidence of similar accidents from the same cause is admissible, to show the condition of the instrument, and that the common cause of the accident was a dangerous thing. See also, *Clapp v. Minneapolis & St. Louis Ry. Co.*, 36 Minn. 6, 29 N. W. 340.

Cellar Door on Sidewalk—Previous Accidents to Other Children from Such Openings.—In an action against a city for injuries resulting from falling into a cellar door on one of its sidewalks, where the question is whether the system adopted by the city in regard to allowing cellars on its sidewalks was reasonably calculated to insure the safety of pedestrians, evidence that children upon different occasions had previously fallen into such opening was admissible. So held in *Augusta v. Hafers*, 61 Ga. 48.

Defect in Highway—Effect of Alleged Defect on Other Vehicles.—In an action against a municipality for injuries resulting from a defect in a highway, evidence is admissible to show the effect of the alleged defect on carriages driven by other persons than plaintiff as having a tendency to show negligence or the absence of negligence on the part of defendant. And such evidence is competent whether such vehicles are like that driven by plaintiff, or not, and notwithstanding no evidence be given as to the rate of speed or degree of care with which they were driven. So held in *Kent v. Town of Lincoln*, 32 Vt. 591.

Similar Accidents at Street Crossing.—In an action for personal injuries from a fall caused by an alleged defect in a street crossing, evidence of similar accidents at such crossing was admissible as tending to show its dangerous condition. So held in *Junction City v. Blades*, 1 Kan. App. 85, 41 Pac. 677.

Escape of Electricity—Blisters on Railings of All the Cars.—It is proper on cross-examination to ask a witness, who had testified in chief, that electricity could not be transmitted to a car in quantity sufficient to cause injury, whether all the cars on the line did not have on the metal railings around the ends thereof blisters caused by the leakage and escape of electricity. So held in *Denver Tramway Co. v. Reid*, 4 Colo. App. 53.

Fall upon Sidewalk—Other Accidents Not at Precise Spot.—In an action for injuries from a fall upon a defective sidewalk, where

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it appears that the walk adjacent to a lot is built of unsuitable material and defectively constructed, evidence is admissible to show that other accidents have happened on the part of the walk so constructed, although they did not occur at the precise spot where plaintiff fell, as such evidence would tend to prove the existence of a defect in the precise spot where the fall occurred. So held in *City of Topeka v. Sherwood*, 39 Kan. 690, 18 Pac. 933.

Persons Seen to Stumble at Same Part of Sidewalk.—In an action for personal injuries from a defective sidewalk, evidence was admissible to show that persons were seen to stumble at the defective part of the walk, and that one person was seen to stop and push the broken board down with his cane, before the accident to plaintiff, as tending to show the condition of the walk at the time of such accident, in connection with other evidence showing that there has been no substantial change in the walk in the meantime. So held in *Hunt v. City of Dubuque*, 96 Iowa 314, 65 N. W. 319.

Defective Sidewalk—Fall of Another Person at About Same Time and Place.—In an action against a city for personal injuries alleged to have been caused by a defective sidewalk, testimony of a witness that he fell about the same time and place is admissible, as being relevant to the question whether the sidewalk was in safe and proper condition at the time and place of the accident to plaintiff. So held in *City of Birmingham v. Starr*, 112 Ala. 98, 20 So. 424.

Building Material in Street—Person Thrown from Vehicle on Preceding Night.—In an action for personal injuries resulting from plaintiff's vehicle running into building material piled and left unguarded in a street, at night, evidence was admissible to show that the night before the accident to plaintiff the witness drove a wagon over the pile of materials and one of his passengers was thrown out. So held in *Magee v. City of Troy*, 48 Hun (N. Y. Supr. Ct.) 383, 1 N. Y. Supp. 24.

Existence of Obstruction—Similar Object at Another Place.—Evidence of the existence of an obstruction in a highway at one point is evidence that a similar object may constitute an obstruction at another point. So held in *Plummer v. Ossipee*, 59 N. H. 55.

Injury to Operator of Machine—Prior Accident to Another Operator.—In an action for personal injuries to the operator of a machine alleged to have been caused by its defective condition, evidence was admissible to show that another operator of the machine, about three months before the accident to plaintiff, had sustained an injury from the same cause, as such evidence tended to show the condition of the machine at the time of plaintiff's accident, and defendant's knowledge of it, it appearing that defendant had been informed of the prior accident. So held in *McCarragher v. Rogers*, 120 N. Y. 526, 24 N. E. 812.

Destruction of Other Trees by Gas from Same Pipe.—Where it is an issue whether gas permeating the soil would have the effect to kill the roots of trees, evidence is admissible to show that other trees than the ones in question were destroyed or damaged by gas escaping from the pipe complained of. So held in *Rockford Gas Light & Coke Co. v. Ernst*, 68 Ill. App. 300.

Escape of Gas from Main—Subsequent Illness of Other Inmates of House.—In an action for injury to plaintiff's health from the escape of gas from a pipe main, evidence is admissible to show that all the other persons living in the same house, who had been in good health before the alleged injury to plaintiff, afterwards became ill, as tending to show the effect of the gas upon others who inhaled it at the same time with plaintiff, and consequently the cause of plaintiff's bad health. So held in *Hunt v. Lowell Gas Light Co.*, 90 Mass. 169.

Destruction of Trees—Escape of Gas—Other Trees Similarly Affected.—In an action against a gas company for the destruction of shade trees, evidence tending to show that trees in the immediate vicinity upon the same street, although at a point beyond plaintiff's

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premises, were similarly and at the same time affected, was admissible upon the issue whether escaping gas would account for the injury to plaintiff's trees. So held in *Evans v. Keystone Gas Co.*, 148 N. Y. 112, 42 N. E. 513.

Lead Poisoning from Material in Mill—Prior and Subsequent Illness of Other Employees.—On the issue whether the illness of plaintiff was caused by lead poisoning from inhaling dust containing white lead, coming from the rubber thread on which he worked in defendant's mill, evidence is admissible to show that other persons, some of whom worked at the same time in the same room with plaintiff under similar conditions, and some of whom had worked there under similar conditions a few months before and a few months after him, were ill from lead poisoning; that a former employee, after working at the mill for about four months, a short time before plaintiff was there, was ill and had the same symptoms; and that a physician, at a time which he could not fix exactly, had a number of like cases in patients coming from the same room of the mill, as such evidence tended to show that there was a negligent exposure in defendants' mill which caused plaintiff's illness. So held in *Shea v. Glendale Elastic Fabrics Co.*, 162 Mass. 463, 38 N. E. 1123.

Injury to Plants—Gas from Same Sewers in Other Greenhouses.—In an action for damage to plants in plaintiff's greenhouse, caused by gas escaping from the mains of a gas company, evidence of the presence of gas in other greenhouses connected with the same sewers was admissible. So held in *Butcher v. Providence Gas Co.*, 12 R. I. 148.

Stock Crossing Similar Cattle Guard.—In an action for damages inflicted by running a train against horses, which, it was claimed, got upon the track over an insufficient cattle guard, evidence that cattle and colts had been seen to cross another cattle guard on defendant's road; in the vicinity of the one complained of, was properly admitted, evidence having been introduced to prove the guards were alike, and one of defendant's witnesses having testified that the guard complained of was the best known, and was in general use, but that if cattle and colts could freely cross it, it was insufficient. So held in *Lake Erie & W. R. Co. v. Helmericks*, 38 Ill. App. 141.

And in *Chicago & N. W. Ry. Co. v. Hart*, 22 Ill. App. 207, an action for the value of a colt killed by defendants' train, it was held that evidence of the previous conduct of domestic animals in regard to a certain cattle guard, which tended to show a defective construction of the wire fence on one side of it, was properly admitted. In this case the court, in reference to this evidence, said: "A fact that illustrates, by experiment, the condition of the subject matter of the issue in controversy is not collateral to that issue, but is direct evidence bearing upon it."

Other Horses Frightened by Escaping Steam.—Evidence that other horses were frightened by the noise made by steam escaping from a locomotive was competent on the question whether such noise was likely to frighten horses. So held in *Gordon v. Boston & Maine Railroad*, 58 N. H. 396.

Other Horses Frightened at Flag Across Street—Public Nuisance.—In an action for injuries to plaintiff and his team caused by his horse becoming frightened at a flag suspended across a street, it was competent to show that ordinary safe and gentle horses had been frightened at the flag on other occasions, for the purpose of showing that the flag was an object likely to frighten horses, and, therefore, a public nuisance; the principle, that the mere fact that a collateral issue may be raised, is not of itself sufficient to warrant the exclusion of evidence which bears upon the issue on trial, being applicable. So held in *Bemis v. Temple*, 162 Mass. 342, 38 N. E. 970.

Other Horses Frightened at Same Obstruction in Highway.—In an action for personal injuries resulting from plaintiff's horse becoming frightened through the alleged negligence of the defendant in obstruct-

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ing a highway with a pile of stones, evidence that other horses had been frightened by the same stones at about the time of the accident to plaintiff was competent, as bearing on the question whether or not the stones were calculated to frighten horses. So held in *Wilson v. Town of Spafford*, 10 N. Y. Supp. 649, 57 Hun 589.

Other Horses Frightened by Same Pile of Stones.—On the issue whether a pile of stones was calculated to frighten horses, evidence was admissible to show that other horses than plaintiff's, of ordinary gentleness, were frightened by it. So held in *Eggleston v. Columbia Turnpike Road*, 18 Hun (N. Y. Supr. Ct.) 146.

Other Horses Frightened in Passing Mill.—In *House v. Metcalf*, 27 Conn. 630, it is held that evidence was admissible of other instances in which horses were frightened in passing a mill, for the purpose of showing that its wheel was such an object as would naturally frighten horses, and therefore a nuisance.

Horse Frightened by Steam Escaping from Mill—Other Horses Frightened—Distinguished from Accidents from Defects in Highways.—In an action for personal injuries, alleged to have been caused by plaintiff's horse taking fright at steam escaping from defendant's mill, evidence was admissible to prove that other horses, ordinarily safe, were driven by the mill on other occasions, a short time before and after the accident to plaintiff, when the construction and operation of the mill was the same as when plaintiff was injured, were frightened by it, the issue being whether the mill as constructed and used, with the steam escaping into the highway, was a nuisance to the public. So held in *Crocker v. McGregor*, 76 Me. 282. In this case it is said in the opinion: "Its effect on horses was not dependent upon the acts of men, which may be the result of incapacity or negligence, but was caused by action of the inanimate thing upon an animal acting from instinct. It was not to show that other parties were injured at the same place by the same cause, and is, therefore, distinguished from cases against towns for injuries from defects in a highway, which this court has held that evidence of accidents to others at the same place is inadmissible, because it raised too many collateral issues. Here the only issue is the effect of the sight and sound of the steam upon ordinary horses, as tending to show that travel over the way was thereby rendered dangerous. *Hill v. P. & R. Railroad Co.*, 55 Maine 439; *Burbank v. Bethel Steam Mill Co.*, 75 Maine 373. We think the competency of the evidence rests upon the same principle as evidence, in actions against railroad corporations for damages by fire, alleged to have been set by coals or sparks from a passing locomotive, that the same locomotive, or others similarly constructed and used, have emitted sparks and coals, and set fire at other places and other occasions. It tends to show the capacity of the inanimate thing to do the mischief complained of. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454.

Horse Frightened by Cars Standing on Highway—Similar Accidents on Other Occasions.—But in an action for injury to plaintiff's horse, frightened at cars negligently permitted to stand upon a highway, evidence of similar occurrences on other occasions is not admissible, to raise a presumption that the accident in question happened, or that the place was defective or dangerous, or that the situation was of such character that the accident resulting in the injury for which damages are claimed, might have taken place. So held in *Cleveland, C. C. & I. Ry. Co. v. Wynant*, 114 Ind. 525, 17 N. E. 118.

Impurities Thrown from Mill—Injuries to Other Buildings in Vicinity.—In *Cooper v. Randall*, 59 Ill. 317, an action for injury to a house by the erection of a mill, by which dust, dirt and other impurities were thrown in and upon the house, it was error to exclude evidence that such impurities were thrown in and upon other buildings in the vicinity of plaintiff's house, as it would tend to show that the mill was capable of inflicting the injury complained of, and justify the inference that if other buildings similarly situated were thus affected, the same would be true as to plaintiff's premises.

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Roots Projecting Above Sidewalk—Another Person Tripped Up Some Days Before.—In an action against a city for personal injuries sustained by plaintiff by reason of tree roots having been negligently left projecting above a sidewalk, in which roots her foot was caught, evidence was admissible to show that another person was tripped up, some days before, by the same roots. So held in *Gilmer v. Atlanta*, 77 Ga. 688.

Injury to Alighting Passenger—Frequent Failures to Stop Trains Long Enough at Same Depot—Rebuttal.—In an action for personal injuries sustained by a passenger from alleged negligence in not stopping his car at the depot for a sufficient time to allow him to alight in safety, where the defense had proved that on the occasion of the injury the train was stopped as long or longer than usual, it was not irrelevant or erroneous to allow the plaintiff to prove that at about the time of the accident to him the trains of defendant frequently passed that depot without stopping a sufficient length of time to enable passengers to leave the train. So held in *Gulf, Colo. & Santa Fe Ry. Co. v. Rowland*, 82 Tex. 166, 18 S. W. 96.

Competency of Car Inspector—Subsequent Failure to Inspect—Rebuttal.—In *Cunningham v. Railway Co.*, 88 Tex. 534, 31 S. W. 629, the question was as to the competency of one Rownie as an inspector of car wheels, and as to his failure to inspect a wheel. He testified that he knew that he had inspected the wheel on the day in question, because it was his habit to inspect that car every day that it was in Llano. Evidence was offered to show that on several days shortly after the accident he had failed to make an inspection. It was held that such evidence was admissible. In this case it is said in the opinion: "If Rownie was an inattentive or thoughtless person, such mental quality was a relevant point upon the issue as to whether he probably inspected the cars on the particular morning of the accident; and this is particularly true, since his testimony disclosed that one of his reasons for knowing that he inspected the wheel was the fact that he invariably performed that duty before the car left Llano. Thus, it seems that frequent failures to perform this duty at different times would be competent evidence, tending to prove his mental condition, and we see no reason why such omissions subsequent to the time of the accident would be less competent than similar omissions prior to the time of the accident."

Stage Turned over on Other Occasions by Same Driver—Cross-Examination.—In *Higley v. Gilmer*, 3 Mont. 90, an action for injury to a stage passenger from the upsetting of the vehicle, it is said in the opinion: "The bringing out on cross-examination the fact that this driver had had coaches he was driving before turned over by him, and all of the circumstances connected with such accidents was proper, as the witness had testified in chief that this driver was a good and skillful one. Anything that would show that he was not was proper on cross-examination. The turning over of coaches even in this mountainous country, where the roads are poor and dangerous, is not frequent when the driver is good and competent and appreciates the responsibilities of his position and has a just pride in his useful and often dangerous and most arduous avocation."

Other Accidents from Unguarded Embankment on Highway—View by Jury—Judicial Discretion.—In an action for injuries from running off an unguarded embankment on a highway, evidence of similar accidents from the same cause both before and after the accident to plaintiff, was admissible, as bearing on the questions of plaintiff's negligence and the dangerous condition of the highway, although the jury had a view of the locus in quo, and it was conceded that its condition throughout the entire period covered by the evidence had been the same as it was at the time of such view. But the exclusion of such evidence, as a matter of judicial discretion, presented no error. So held in *Cook v. New Durham*, 64 N. H. 419, 13 Atl. 650.

Similar Freight Usually Arriving in Damaged Condition at Same

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Port.—In an action against the carrier for injuries to goods shipped by sea, the fact that similar goods, shipped by sea to the port of delivery, usually arrived in a damaged condition, is admissible as tending to show that the injuries complained of were not the result of negligence. So held in *Steele v. Townsend*, 37 Ala. 247.

2. Limitations of and Exceptions to Rule.

Other Boys Injured by Similar Machines in Same Shop.—In an action for injury to an employee through an alleged defect in a machine which he was operating, evidence that other boys had been injured by similar machines in the same shop should not be considered, the questions of contributory negligence and assumption of risk being involved. So held in *Kolb v. Chicago Stamping Co.*, 33 Ill. App. 488.

Injury to Employee—Other Engines Started without Human Agency—Absence of Defects.—In an action for injury to a railroad employee, where the negligence alleged was the defective condition of a locomotive, which caused it to move when left standing with the throttle closed and the brake set, and thereby caused the injury complained of, it was inadmissible to show in defence that other engines, when steamed up, had moved without human agency, independently of any discoverable defect. So held in *Hurd v. Union Pac. Ry. Co.*, 8 Utah 241, 30 Pac. 892.

Defect in Icy Sidewalk—Similar Accidents at Same Place.—In an action for personal injuries from an alleged defect in a sidewalk, on account of the slippery condition of the walk from ice, evidence of similar accidents at the same place, is inadmissible for the purpose of showing that there was a defect in the sidewalk. So held in *Hubbard v. City of Concord*, 35 N. H. 52.

Whether Stone a Defect in Traveled Part of Highway—Other Vehicles Driven against It.—On the issue whether a stone which caused the overturning of plaintiff's cutter was in the traveled part of a highway and constituted a defect therein, evidence that similar accidents had happened at about the same time to other persons who drove against the stone, is not admissible. So held in *Phillips v. Town of Willow*, 70 Wis. 6, 34 N. W. 731.

Similar Accident from Defect in Highway—Existence of Defect.—In an action for personal injuries from an alleged defect in a highway, evidence of a similar accident, at or near the same place, and from the same alleged defect, is not admissible for the purpose of proving the existence of such defect. So held in *Collins v. Inhabitants of Dorchester*, 60 Mass. 369. See also, *Marinda v. Inhabitants of Bradford*, 110 Mass. 505.

Plank at End of Bridge—Whether Way Rendered Unsafe.—On the issue as to the position of a plank at the end of a bridge, and whether it rendered the way unsafe for travelers, evidence that other persons with their vehicles had received injuries at the place of the alleged defect is not admissible. So held in *Bremmer v. Inhabitants of Newcastle*, 83 Me. 415, 22 Atl. 382.

Defect in Highway—Similar Accident to Another without Contributory Negligence.—In an action for injuries from an alleged defect in a highway, evidence is not admissible, for the purpose of showing its existence, to prove that another person, prior to the injury complained of, met with a similar accident at or near the same place, and from the same defect, without any contributory negligence on his part. So held in *Collins v. Inhabitants of Dorchester*, 60 Mass. 369.

Other Persons Passing by Defect in Sidewalk in Safety, on Same Day.—In an action against a city for personal injuries caused by a defect in a sidewalk, evidence that other persons safely passed by the defect, on the same day the injury complained of was inflicted, is not admissible as a fact tending to show that plaintiff knew of the presence of the defect, or failed to exercise ordinary care to avoid injury; the facts thus sought to be proved being entirely collateral

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to the issue before the jury. So held in *City of Birmingham v. Tayloe*, 105 Ala. 170, 18 So. 576.

Others Passing Obstruction on Sidewalk without Harm.—In *Calkins v. City of Hartford*, 33 Conn. 57, an action for personal injuries from an obstruction upon a sidewalk, it is held that if the obstacle was of such nature that the attention of all who passed that way would naturally be drawn to it, and their experience of its effect in obstructing travel was substantially the same, evidence that others passed it without harm, when it was in the same condition as at the time when plaintiff was injured, would be admissible to show that it was not dangerous to one using ordinary care.

Numerous Persons Passing over Walk in Safety on Same Night.—In *Town of Fairburg v. Rogers*, 2 Ill. App. 96, it is held that the fact that numerous persons passed over the walk the night of the accident, at the point where plaintiff was injured, without perceiving any difficulty in the passage, or danger of mishap, would be a proper circumstance for the jury to consider in determining whether plaintiff used ordinary care for his own safety. In this case it is said in the opinion: "If, as was said in the case of *C. B. & Q. R. R. Co. v. Gregory*, 58 Ill. 272, the fact that other persons previous to the one for which suit was brought, were injured by the mail catcher 'had the force of direct testimony to produce conviction that it was placed in dangerous proximity to the railroad,' the converse of that proposition must also be a correct rule to be guided by."

Numerous Persons Passing over Alleged Defective Sidewalk without Difficulty of Danger.—In an action for personal injuries from an alleged defect in a sidewalk, it is held that if numerous persons passed over the walk the night of the accident, without perceiving any difficulty in the passage or danger of accident, such fact would be a proper circumstance for the jury to consider in determining whether plaintiff used ordinary care to avoid being injured. So held in *Town of Fairburg v. Rogers*, 2 Ill. App. 96.

G. OTHER FIRES SET BY LOCOMOTIVES.

We have incidentally collected a few authorities on this question, but for a more exhaustive note on this branch of the subject, see 3 R. R. R. 337, 26 Am. & Eng. R. Cas., N. S., 337.

1. Statements and Illustrations of Prevailing Doctrine.

As said in *Atchison, etc., R. Co. v. Stanford*, 12 Kan. 354: "The engines are all alike to him (the plaintiff). He does not know them apart, nor does he know when any particular engine is used, or who manages it, and, when it passes at the rate of fifteen or twenty miles an hour, he could not see enough of it to afterwards identify it. What the engine is, and how it is managed is peculiarly within the knowledge of the company."

Thomson on Negligence.—In Thomson on Negligence, p. 159, the author says: "The business of running railroad trains suggests a unity of management and a general similarity in the construction of the engines. For this reason, and on account of the difficulty of proving negligence in these cases, as before pointed out, the admission of evidence of other and alleged distinct fires from the one alleged to have caused the injury is permitted. This rule is adopted in England, and prevails in all the states, with one or possibly two exceptions. More particularly, it may be stated as follows: That in actions for damages caused by the negligent escape of fire from locomotive engines, it is competent for the plaintiff to show that, about the time the fire in question happened, the trains the company were running past the location of the fire were so managed in respect to their furnaces as to be likely to set on fire objects in the position of the property burned, or to show the emission of sparks or ignited matter from other engines of the defendant passing the spot upon other occasions, either before or after the damage occurred,

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without showing that they were under the charge of the same driver or were of the construction as the one occasioning the damages. Evidence of this character is admitted for two purposes: First, to show the cause of the injury, second, to show negligence in the construction or working of the particular engine which caused the damage."

Sparks and Coals Frequently Dropped by Locomotives—Shearman & Redfield on Negligence.—In *Shearman & Redfield on Negligence*, 491, it is said: "Evidence that sparks and burning coals were frequently dropped by engines, passing on the same road upon previous occasions, is relevant and competent to show habitual negligence, and make it probable that the plaintiff's injury proceeded from the same quarter."

Probable Cause of the Fire—Other Fires Set by Defendant's Locomotives.—Evidence that certain fires were set by defendant's locomotives is admissible as tending to show that another fire could have been and probably was started by one of defendant's engines. So held in *Smith v. Boston & Maine Railroad*, 63 N. H. 25.

Prior and Subsequent Fires Set by Locomotives in Immediate Vicinity.—In an action for the destruction of hay and grass by fire communicated from defendant's locomotives, it is competent to show that, both before and after the injury complained of, defendant's engines had set fire to grass and other combustible matter in the immediate vicinity of plaintiff's premises, and similarly situated. So held in *Gulf, C. & S. F. Ry. Co. v. Johnson*, 54 Fed. Rep. 474.

Prior and Subsequent Fires at Other Points.—In an action for the destruction of wood piled along defendant's railroad, by fire claimed to have been communicated by a locomotive, evidence of other fires at other points on the road, and at other time, both before and after the destruction of the wood, though set by other locomotives, was admissible as tending to show the possibility, and consequent probability, that a locomotive caused the fire, and to show a negligent habit of the officers and agents of the railroad company. So held in *Northern Pac. R. Co. v. Lewis* (C. C. A.), 51 Fed. Rep. 658.

Locomotive Not Identified—Other Fires Set by Locomotives About Same Time and in Same Vicinity.—In an action for the destruction of property by fire alleged to have been set by one of defendant's locomotives, where it does not appear from the record that plaintiff had been able to identify the locomotive from which the fire was communicated, it must be held on appeal that it was proper to permit him to introduce evidence to prove that fires were set by defendant's locomotives at different times about the same time and vicinity that plaintiff's property was burnt. So held in *Thatcher v. Maine Cent. R. Co.*, 85 Me. 502, 27 Atl. 519.

Fire Scattered by Engine or Engines of Defendant About Same Time.—In an action for injury to property from fire alleged to have been started by one of defendant's locomotives, evidence is admissible to show that about the time when the fire complained of took place fire was scattered by an engine or engines of defendant, without predicated such engine to be the one which occasioned the injury to plaintiff, as such evidence would tend to show the origin of such fire, and negligence with respect to the construction or operation of the locomotive causing it. So held in *Diamond v. Northern Pac. R. Co.*, 6 Mont. 580, 13 Pac. 367.

Destruction of Freight in Possession of Carrier—Sparks Thrown by Other Engines at Same Point—Other Fires About Same Time.—In *Evansville & Terre Haute R. Co. v. Keith*, 8 Ind. App. 57, 35 N. E. 296, an action against a common carrier for the destruction of freight in its possession by fire, evidence is admissible to show that other engines of defendant, passing the point where the freight was destroyed, threw sparks, and that other fires occurred along or near the right of way, about the same time the loss complained of occurred, as tending to show the negligent habit of the officers and agents of defendant.

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Fire Scattered by Defendant's Locomotives, at Various Times, During Same Summer, at Same Place.—In an action for destruction of property by fire communicated by a locomotive, plaintiff offered evidence to show that, at various times during the same summer before the fire in question occurred, defendant's locomotives scattered fire when going past the property, without showing that either of those which set the fire in question was among the number, or was similar to them in make, state of repair, or management. It was held that the evidence was admissible, as tending to prove the possibility, and a consequent probability, that the same locomotive caused the fire, and to show a negligent habit of the officers and agents of the corporation. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454.

Negligence with Respect to Spark Arresters—Other Fires Immediately Before or After.—In an action for the destruction of property by fire set by a locomotive, evidence tending to show that other fires were caused by sparks escaping from defendant's engines, immediately before or immediately after the time of the fire complained of, is admissible as tending to show negligence in the construction or maintenance of the spark arresters on defendant's locomotives. So held in *St. Joseph & Denver City R. Co. v. Chase*, 11 Kan. 47.

Prior and Subsequent Fires.—But in *Longabaugh v. Virginia City & Truckee R. R. Co.*, 9 Nev. 271, it is held that evidence of prior and subsequent fires, set by defendant's locomotives, near the time of the destruction of plaintiff's property is admissible for the purpose of showing that plaintiff's loss was due to defendant's negligence.

Negligence as Cause of the Fire—Numerous Fires Set by Locomotives, at About Same Time, and in Same Locality.—Where it can not be satisfactorily proved that a certain engine caused the fire which destroyed plaintiff's property, evidence is admissible, for the purpose of proving that such fire was the result of defendant's negligence, to show that defendant's locomotives generally, or many of them, at or about the time of such fire, emitted sparks of unusual size and thereby caused numerous fires on that part of its road. So held in *Henderson v. Philadelphia, etc., R. Co.*, 144 Pa. St. 461, 22 Atl. 851.

Fire from Coals Dropped by Another Locomotive.—In an action for the destruction of cord-wood by fire alleged to have been started by one of defendant's locomotives, testimony to show that a few weeks after such fire another fire was caused on the same road by coals dropped from another engine of the same company was admissible, for the reason that if one or more of defendant's engines drop coals or emits sparks just prior to or soon after property on the lines of its track has been destroyed by fire without any known cause or circumstance of suspicion besides such engines, it becomes incumbent upon the railroad company to show that it was not started by one of its engines. So held in *Longabaugh v. Virginia City & Truckee R. Co.*, 9 Nev. 271.

Other Fires from Defendant's Locomotives within Preceding Week.—In an action for the destruction of wood and timber by fire, alleged to have originated from one of defendant's locomotives through negligence in its management, evidence is admissible, for the purpose of proving the origin of the fire, and negligence in the construction and management of its engines, that, within a week before the fire complained of, the locomotives of defendant in passing had scattered large sparks, capable of setting fire to combustible articles along the road, and that frequent fires, occasioned by such sparks, had been put out within that time. So held in *Annapolis & Elkridge R. Co. v. Gantt*, 39 Md. 115.

Other Fires, from Three to Six Months Prior, Three Hundred Yards from Mill.—In *Hoover v. Missouri Pac. Ry. Co. (Mo.)*, 16 S. W. 480, it appeared that, a few moments after a freight train passed, a mill 52 feet from the track was found to be on fire on the

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outside of the roof nearest the railroad. It was held that testimony was admissible to show that on several occasions, from three to six months before, the witness, living some half a mile from the mill, had put out fires caused by defendant's locomotives on his land, and some 300 yards from the mill, as such evidence tended to show negligent management of defendant's locomotives. *Coal v. Railroad Co.*, 60 Mo. 227 (*Lester v. Railroad Co.*, 60 Mo. 265, overruled).

Fires Nineteen Miles Distant—Common Occurrence.—In an action for the destruction of plaintiff's barn by a fire alleged to have been started by one of defendant's locomotives, the testimony of a witness living nineteen miles from the barn, that it was a common occurrence for locomotives about where he lived to set fires for rods from the track, was admissible, as tending to show the origin of the fire complained of. So held in *Pennsylvania R. Co. v. Stranahan*, 79 Pa. St. 405.

Subsequent Fires from Defendant's Locomotives—Possibility of Fires Being Started by Sparks.—In an action for the destruction of plaintiff's property by fire alleged to have been communicated from one of defendant's locomotives, evidence of subsequent fires originating from the engines of defendant is inadmissible, unless the possibility of communicating fire by sparks from a locomotive is disputed by defendant, in which case it is competent only for the purpose of proving such possibility. *Smith v. Old Colony & Newport R. Co.*, 10 R. I. 22.

Live Cinders Thrown over Plaintiff's Building on Prior Occasions.—Where there is no direct evidence that the fire in question was communicated from a locomotive, it may be shown, as tending to show that fires might be communicated from locomotives, at that distance from the railroad track, that upon a previous occasion live cinders had been thrown over the building destroyed and set fire upon the farther side. So held in *Hoskinson v. Central Vt. R. Co.*, 66 Vt. 618, 30 Atl. 24.

Distance from Track—Sparks Had Started Fires.—On the issue of the probability that plaintiff's building was set on fire by a steam engine, evidence is admissible to show the distance at which sparks from the engine had kindled fires. So held in *Hinds v. Barton*, 25 N. Y. 544.

Sparks and Coals Emitted Farther on Other Occasions.—After evidence has been given tending to exclude the probability that the fire was communicated from one of defendant's locomotives, evidence is admissible to show that defendant's engines, when passing on other occasions, emitted sparks and coals, which fell farther from the track than the building destroyed. So held in *Crist v. Erie Ry. Co.*, 58 N. Y. 638.

Sparks Emitted by Defendant's Engines Farther than Burnt Building.—After plaintiff has introduced evidence tending to exclude the probability that the fire in question was communicated by any other means than sparks from one of its locomotives, evidence is admissible to show that engines of defendant, passing near the place on other occasions, emitted sparks and coals which fell farther from the track than the burnt building, as tending to show the origin by the fire in question. So held in *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218.

Sparks Thrown One Hundred Feet from Track on Other Occasions.—In an action for the destruction of property by fire, alleged to have been communicated by one of defendant's locomotives, evidence is admissible to show that sparks have been thrown from some of defendant's engines into a meadow one hundred feet from the track, to show the character of the engines in use on the road at a particular time. So held in *Illinois Cent. R. Co. v. McClelland*, 42 Ill. 355.

Finding Cinders at Different Places on Farm after Destruction of Property.—In an action for the destruction of property by fire, it was not error to admit evidence of the finding of cinders at different places on the farm after the destruction of the property; for through

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such proof was rather remote, it tended to establish the charge that the engines of defendant, which were all equipped alike, save those which had the smaller mesh, were all apt to throw sparks, thereby supporting the general allegation that this fire was so occasioned, and supporting the position that too much fire was thrown for them to be well equipped engines. So held in *Lake Erie & W. R. Co. v. Kirts*, 29 Ill. App. 175.

Other Fires Set by Certain Locomotive.—Evidence is admissible to prove that the locomotive alleged to have set fire to plaintiff's property has caused other and distinct fires, because of the difficulty of identifying a passing locomotive, so as to make direct proof of negligence, and for the reason that the business of railroading supposes a unity of management and a similarity in construction of the engines. So held in *Koontz v. Oregon Ry. & Nav. Co.*, 20 Ore. 3, 23 Pac. 820, 43 Am. & Eng. R. Cas. 11.

Occurrence of Other Fires in Same Neighborhood, About Same Time, and Immediately after Passage of Certain Locomotive.—In an action for damages from fire alleged to have been started by sparks from one of defendant's locomotives, it is competent to show that about that time and immediately after the passage of the locomotive, other fires occurred in the neighborhood of the fire complained of. So held in *Lake Side & Marblehead R. Co. v. Kelly* (Cir. Ct.), 6 O. C. D. 555.

Two or More Fires Caused by Same Engine on Same Day—Fires Not Caused by Other Engines, under Like Weather Conditions.—And in an action for the destruction of property by fire set by one of defendant's locomotives, evidence is admissible to show that the same engine caused two or more fires on the same day, and that other engines of the same company passed over the same road at the same place all that fall, prior to the day of the fire complained of, under like conditions of wind, weather, etc., without causing any fire at or near that point, as such evidence tended to show negligence either as to the condition or management of the locomotive. So held in *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354.

Several Successive Fires Set by Same Engine on Same Day and Trip.—So in an action for the destruction of property by fire set by one of defendant's locomotives, evidence that the same engine had set out several successive fires on the same day, and on the same trip was admissible a tending to show negligence with respect to the condition or operation of the locomotive. So held in *Slossen v. B. C. R. & N. R. Co.*, 60 Iowa 215, 14 N. W. 244. See also, *Lanning v. Chicago, B. & Q. Ry. Co.*, 68 Iowa 502, 27 N. W. 478.

Fire Set by Particular Locomotive—Former Fires Set by Same Engine.—Where the fire in question is shown to have been set by a particular locomotive, evidence of former fires set out of the same engine is admissible, as tending to prove its defective construction or condition, or improper management. So held in *Jacksonville T. & K. W. Ry. Co. v. Peninsular L., etc., Mfg. Co.*, 27 Fla. 157, 9 So. 661.

Tending to Prove Negligence—Two Other Fires Set by Same Engine, About Same Time—Question of Law.—In *Smith v. Chicago, M. & St. P. Ry. Co.*, 4 S. Dak. 71, 55 N. W. 717, it is held that whether or not evidence tending to prove the setting of two other fires about the same time plaintiff's property was burned, by the same engine, is admissible, as tending to prove negligence on the part of the defendant, is a question of law for the court.

Other Fires Set by Same Locomotive at About Same Time.—Where it is claimed that the fire complained of was set by a certain locomotive, evidence is admissible for the purpose of showing that other fires were set by the same engine about the same time. So held in *Haseltine v. Concord Railroad*, 64 N. H. 545, 15 Atl. 143; *Boyce v. Railroad*, 43 N. H. 627.

Subsequent Fire Set by Same Locomotive.—In an action for injuries to property, alleged to have resulted from a fire set by a certain

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Locomotive of defendant, a witness testified that about two weeks after the fire complained of, at a place from a quarter to half a mile distant from the point where it started, he saw a fire in a field near defendant's road, just after a train passed, which was drawn by the same engine from which it was claimed the sparks escaped causing the damage to plaintiff. It was held that such evidence was admissible. *Butcher v. Vaca Valley, etc., R. Co.*, 67 Cal. 518, 8 Pac. 174.

Evidence of fires caused by the same engine two or three months after the fire in question was incompetent. So held in *Menominee River Sash & Door Co. v. Milwaukee & N. R. Co.*, 91 Wis. 447, 65 N. W. 176.

Company's Recklessness—Sparks Emitted by All Its Locomotives.—Where the particular locomotive that is alleged to have set the fire in question is not traceable, evidence is admissible for the purpose of proving the railroad company's recklessness, to show that every one of the company's locomotives emit sparks capable of starting fires along the railroad. So held in *Lake Side & Marblehead R. Co. v. Kelly* (Cir. Ct.), 6 O. C. D. 555.

Rebutting Evidence That no Sparks Could Reach So Far.—In an action for the destruction of property by fire, alleged to have been communicated by a certain locomotive, where defendant claims that no sparks could reach far enough to set fire to the property, evidence is admissible to show that the same engine, using similar fuel, has emitted sparks to as great a distance. So held in *Ross v. Boston & W. R. Co.*, 88 Mass. 87.

Condition of Spark Arrester of Same Locomotive on Return Trip—Rebuttal—Another Fire.—In an action for the destruction of property by fire, alleged to have been set by a certain locomotive on its outward trip, defendant introduced evidence that such engine was furnished with a cone and netting for arresting sparks, which netting was found, at the end of the route on the return trip the next day, to be in good condition, and that the engine on the return trip was in the same condition, and used the same kind of fuel as on the outward trip. It was held that evidence was admissible in rebuttal to show that the engine on the return trip emitted sparks which set fire to property in the same neighborhood as the fire complained of. *Loring v. Worcester & Nashua R. Co.*, 131 Mass. 469.

Use of Best Spark Arresters and Skill of Trainmen Relied upon as a Defense—Other Fires from Same Cause—Rebuttal.—In an action for damage by fire communicated from a locomotive, where the use of the most approved appliances to prevent fires and the employment of skillful trainmen is relied on as a defense, evidence is admissible in rebuttal to show that fires kindled in the same manner from the same cause were about the same time occurring along the line of the road, such evidence, though weak, not being irrelevant. So held in *Missouri Pac. Ry. Co. v. Donaldson*, 73 Tex. 124, 11 S. W. 163.

Other Fires Set by Same Locomotive on Same Day within Few Miles of Plaintiff's Property—Rebuttal.—In *Lake Erie & W. R. Co. v. Middlecoff*, 150 Ill. 27, 37 N. E. 660, an action for injuries to property from fire set by a locomotive, defendant introduced evidence to show that the engine was properly constructed and in good order. It was held that evidence was admissible in rebuttal to show that on the same day that plaintiff's property was burned, several other fires were started from sparks emitted by the same engine, within a few miles from where the fire in question was started.

Escape of Fire from Same Engine on Same Day at Other Places—Equipment of Locomotive—Rebutting Testimony.—In *Slossen v. Burlington, Cedar Rapids & N. R. Co.* (Iowa), 10 N. W. 860, plaintiff was permitted to show by rebutting evidence that fire had been seen to escape from the engine setting out the fire complained of, on the same day and at other places. It was held that such evidence was competent to rebut testimony to the effect that the locomotive was equipped with all the usual appliances from arresting fire, and was in good repair.

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Sparks Emitted from Same Locomotive Just before Fire in Question—Rebuttal.—In an action for injuries to property by fire alleged to have been started by one of defendant's locomotives, evidence is admissible, as tending to contradict a showing by defendant that its locomotives were in good order, well equipped and carefully managed, to show that just before the fire complained of, he had seen one of such engines emitting sparks which set fire to grass fifty feet from the track. So held in *Tribette v. Illinois Cent. R. Co.*, 71 Miss. 212, 13 So. 899.

2. Limitations of and Exceptions to General Rule.

Other Fires Set by Same and Other Locomotives.—In an action for the destruction of property by fire set by a locomotive, where the particular engine is identified, evidence is not admissible to show generally that defendant's locomotives have caused fires at other times and places; but it may be shown that such particular engine has caused other fires, in order to show to its defective construction. So held in *Ireland v. Cincinnati, Wabash & M. R. Co.*, 79 Mich. 163, 44 N. W. 426.

Other Fires Set by Locomotives—Fire Set by One of Two Engines.—Where, in an action for damages done by a fire alleged to have been set by a locomotive, there is no evidence that the fire was caused by any other than one of two engines, evidence as to other fires along the same line of road, caused by locomotives other than those two, is inadmissible. So held in *Gibbons v. Wisconsin Valley R. Co.*, 58 Wis. 335, 17 N. W. 132.

Other Prior Fires in Vicinity Shortly after Locomotives Passed.—In an action for the destruction of property by fire, alleged to have originated from one of defendant's engines, it was error to permit plaintiff to show that other fires occurred along the railroad right of way in that vicinity, shortly after locomotives passed over the road at such points, and before the fire complained of, as it concerned collateral facts, which defendant was not bound to be prepared to meet. So held in *Bell v. Chicago, B. & Q. Ry. Co.*, 64 Iowa 321, 20 N. W. 566.

Other Fires—Evidence of Negligent Operation of Engines—Limitation as to Time.—Evidence that defendant's locomotives generally, or many of them, emitted sparks of unusual size, and thereby caused numerous fires on that part of the road, should be confined to the negligent operation of the engines at or about the time of the fire which destroyed plaintiff's property, with such reasonable latitude, before and after such fire, as is sufficient to make such proof practicable. So held in *Henderson v. Philadelphia, etc., R. Co.*, 144 Pa. St. 461, 22 Atl. 851.

Fires Five Years Prior.—Evidence is not admissible to show that fires occurred along the same railroad five or six years prior to the fire complained of. So held in *Dillingham v. Whitaker* (Tex. Civ. App.), 25 S. W. 723.

Repeated Emission of Sparks by Locomotives during Preceding Six Months.—In an action for the destruction of plaintiff's property by a fire alleged to have been started by one of defendant's locomotives, although the particular engine cannot be identified by plaintiff, it is error to admit evidence of repeated emission of sparks of unusual size by defendant's engines, during a period of six months preceding the destruction of plaintiff's property, and also of similar occurrences not limited as to time, such evidence being too remote. So held in *Henderson v. Philadelphia, etc., R. Co.*, 144 Pa. St. 461, 22 Atl. 851.

Whether Fire Was Set by Certain Engine—Sparks from Other Engines of Same Construction.—Where the issue is whether fire was communicated to a building by sparks or coals from a particular locomotive, evidence that sparks and coals were emitted from other engines, running upon the road on other occasions, is inadmissible, unless it be conceded that those other engines were of the same

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construction, used in the same manner, and were in the same state of repair. So held in *Boyce v. Cheshire Railroad*, 42 N. H. 97.

Fires from Other Engines—Equipment and Management of Particular Engine the Only Issue—Rebuttal.—In an action for the destruction of property by fire alleged to have been started by a locomotive, it is error, after the introduction of evidence of a proper equipment and careful management of the engine causing the fire, to admit evidence, in rebuttal, of other fires from sparks escaping from defendant's locomotives, in the same neighborhood, and about the time of the fire complained of, the sufficiency of the equipment and management of the engine causing such fire being the only matter then in issue. So held in *Lester v. Kansas City, St. Jo., etc., R. Co.*, 60 Mo. 265 (overruled in *Coale v. Railroad Co.*, 60 Mo. 227).

Same Kind of Screens on Other Engines—Rebuttal—Fires Set by Other Locomotives.—Testimony of defendant's inspector that the screen on the locomotive which set fire to plaintiff's property was of the same kind as those on defendant's other engines did not entitle plaintiff to show in rebuttal that other fires had been set by such other locomotives. So held in *Allard v. Chicago & N. W. R. Co.*, 73 Wis. 165, 40 N. W. 685.

Other Fires Along Road from Same Engine—Origin—Rebutting Proof of Due Care.—In an action for injuries to property from a fire alleged to have been communicated from defendant's locomotive through negligence, it was held that evidence for plaintiff was inadmissible for the purpose of proving that before the occurrence of the fire upon his property, given in evidence, fire had been communicated by defendant's engine to the property of other persons on the road, either to prove that defendant's engine created the fire complained of, or to rebut defendant's proof of the exercise of due care, though the proof of the latter may have been so loose and indefinite as to be legal. *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242.

Wood-Piles Along Railroad Frequently Catching on Fire—Cause Not Shown.—In *Davidson v. St. Paul, M. & M. Ry. Co.*, 34 Minn. 51, 24 N. W. 324, an action for the destruction of property by fire alleged to have been communicated from one of defendant's locomotives, testimony offered to show frequent fires in wood-piles along defendant's road was entirely irrelevant, in the absence of any evidence adduced or offered to show that such fires were set by defendant's locomotives.

Other Fires Along Railroad.—On the question of the origin of a fire, evidence that other fires had occurred on the line of the railroad, in the immediate vicinity and about the same time, is not admissible, without proof that such fires were caused by the engines of the railroad. So held in *St. Louis & San Francisco Ry. Co. v. Jones*, 59 Ark. 105, 26 S. W. 595.

H. SUBSEQUENT CONDITION OF PLACE OF ACCIDENT.

On the question of the condition of the place of the accident at the time plaintiff was injured, evidence of its subsequent condition is admissible, where there is evidence that it is unchanged.

Illinois.—*Jacksonville & S. E. Ry. Co. v. Southworth*, 135 Ill. 250, 23 N. E. 1093; *Wabash R. Co. v. Kime*, 42 Ill. App. 272.

Indiana.—*City of Indianapolis v. Scott*, 72 Ind. 196.

Iowa.—*Brooke v. Chicago, R. I. & P. Ry. Co.*, 81 Iowa, 504, 47 N. W. 74.

Kansas.—*City of Abilene v. Hendricks*, 36 Kan. 196, 13 Pac. 121.

Massachusetts.—*George v. City of Haverhill*, 110 Mass. 506.

Michigan.—*Langworthy v. Green Tp.*, 88 Mich. 207, 50 N. W. 130; *Fuller v. City of Jackson*, 92 Mich. 197, 52 N. W. 1075; *Shippy v. Village of Au Sable*, 85 Mich. 280, 48 N. W. 584.

Minnesota.—*Miller v. Northern Pac. R. Co.*, 36 Minn. 296, 30 N. W. 892.

New York.—*Ahern v. Steele*, 48 Hun 517, 1 N. Y. Supp. 259; *Clapper v. Town of Waterford*, 62 Hun 170, 16 N. Y. Supp. 640; *Forde v.*

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Nichols (Comm. Pl.), 12 N. Y. Supp. 922; *Stodder v. New York, L. E. & W. R. Co.*, 50 Hun 221, 2 N. Y. Supp. 780, 121 N. Y. 655, 24 N. E. 1092, 26 N. Y. Supp. 760, 145 N. Y. 619, 40 N. E. 163.

Pennsylvania.—*Lohr v. Borough of Philipsburg*, 165 Pa. 109, 30 Atl. 822.

Texas.—*Houston & T. C. Ry. Co. v. Waller*, 56 Tex. 331, 8 Am. & Eng. R. Cas. 431.

Wisconsin.—*Larson v. City of Eau Claire*, 92 Wis. 86, 65 N. W. 731; *Milwaukee & C. R. Co. v. Hunter*, 11 Wis. 160; *Schuenke v. Town of Pine River*, 84 Wis. 669, 54 N. W. 1007.

1. Illustrations.

Crossing Accident—Arrangement of Lights on Subsequent Night.

In an action for the death of a man, struck by an engine at a crossing at night, evidence was admissible to show the arrangement of the lights at the crossing on a subsequent occasion, but on the same sort of a night, where it was shown that such arrangement had not been materially changed. So held in *Houston & Texas Cent. Ry. Co. v. Waller*, 56 Tex. 331, 8 Am. & Eng. R. Cas. 431.

Defective Sidewalk—Condition Subsequent to Accident.—But in an action for personal injuries from a defective sidewalk, it was error to admit evidence as to the condition of the walk at a time subsequent to the accident to plaintiff, where there was no evidence tending to show that its condition was the same as when plaintiff was injured. So held in *Hoyt v. City of Des Moines*, 76 Iowa, 430, 41 N. W. 63.

I. PRIOR AND SUBSEQUENT CONDITION OF PLACE OF ACCIDENT—CONDITION AT THE TIME OF ACCIDENT.

In order to show the condition of the place of the accident in question at the time of its occurrence, it is sometimes competent to introduce evidence as to its prior and subsequent condition.

Alabama.—*Birmingham Ry. & Electric Co. v. Baylor*, 101 Ala. 488, 13 So. 793.

Illinois.—*Jacksonville S. E. Ry. Co. v. Southworth*, 32 Ill. App. 307, 135 Ill. 250, 25 N. E. 1093.

Kansas.—*Union Pac. Ry. Co. v. Hand*, 7 Kan. 380.

Massachusetts.—*Upham v. City of Salem*, 162 Mass. 483, 39 N. E. 178.

Michigan.—*Van Dusen v. Letellier*, 78 Mich. 492, 44 N. W. 572.

Missouri.—*Swadley v. Missouri Pac. Ry. Co.*, 118 Mo. 268, 24 S. W. 140.

New York.—*Woolsey v. Trustees of Village of Ellenville*, 84 Hun 236, 32 N. Y. Supp. 543.

Pennsylvania.—*Pennsylvania Tel. Co. v. Varnan (Pa.)*, 15 Atl. 624.

Texas.—*Belton v. Turner (Tex. Civ. App.)*, 27 S. W. 831; *Ft. Worth & D. C. Ry. Co. v. Wilson*, 3 Tex. Civ. App. 583, 24 S. W. 686.

Vermont.—*Cook v. Town of Barton*, 66 Vt. 65, 28 Atl. 631.

J. DEFECTS IN OTHER PARTS OF STRUCTURE—GENERAL DEFECTIVE CONSTRUCTION.

Evidence of defects in parts of a structure other than the place of the accident complained of is, as a rule, competent on the issue of its general defective construction.

1. Illustrations.

Poles and Wires Down at Other Places—Negligence in Maintaining Telegraph Line.—In *Randall v. Northern Telegraph Co.*, 54 Wis. 140, an action for negligence in permitting telegraph wires to be down and lying across a highway at a certain point, evidence that defendant's poles and wires were down at other places, within a few miles of the place of the accident, and at other times, within a few months of the time of the accident to plaintiff, would seem to be admissible to show negligence in maintaining the line in a safe condition.

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Defective Construction of Bridge—Horse Falling Through a Few Days Before.—In an action for injuries from the improper construction of a bridge, evidence was admissible to show the condition of the bridge a few days before the accident, and that by reason of loose planks a horse fell through the structure, it being shown that he had not been repaired in the interval. So held in *Woodbury v. City of Owasso*, 64 Mich. 239, 31 N. W. 130.

Defective Sewer—Breaks in It Hundred Feet Distant.—In an action for injuries from a defective sewer, evidence of a break in it, about 100 feet distant from the point where the break occurred which caused the injury for which recovery was sought, was admissible for the purpose of charging the defendant city with knowledge, as well as for the purpose of showing the defective character of the work and materials employed in its construction, and that by reason of time and use the sewer got out of repair. So held in *City of Fort Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 743.

Derailment from Expansion of Rails—Bad Condition of Road in Immediate Vicinity.—In an action for injuries to a passenger in a derailment, caused by the expansion of the rails, from heat, or the shoving forward of the rails and throwing them out of place by running all the trains upon the track in one direction, evidence of the bad condition of the road, in the immediate vicinity of the place of the accident, is admissible for the purpose of showing negligence on the part of the railroad. So held in *Reed v. New York Cent. R. Co.*, 56 Barb. (N. Y.), 493.

Negligence at Place of Accident—Condition of Road and Switches at Other Points.—But in an action for injuries to a mail agent, sustained in a derailment, alleged to have been caused by defects in defendant's road and a certain switch, evidence as to the condition of the road and its switches at other places than where the accident happened was not admissible to prove negligence at the latter place. So held in *Grant v. Raleigh & Gaston R. Co.*, 108 N. Car. 462, 13 S. E. 209.

Other Defects in Railroad Track at Other Places.—And in an action for injuries from alleged defects in defendant's railroad track, where the alleged defects were a broken rail and an imperfect switch, it was error to admit evidence of other defects in the road at other places, where there was no evidence tending to show that they had any relation to the accident complained of, or the negligence alleged. So held in *Morse v. Minneapolis & St. Louis Ry. Co.*, 30 Minn. 465, 16 N. W. 358.

Injury to Passenger—Derailment—Other Defects in Track.—So in an action for injuries to a passenger by derailment, evidence of the existence of defects in the track at other times and places is not admissible as bearing on the issue of defendant's negligence. So held in *Grand Rapids & Ind. R. Co. v. Huntley*, 38 Mich. 537.

K. ABSENCE OF OTHER ACCIDENTS.

It is a general rule that defendant cannot introduce evidence to show that the alleged defect or negligent condition had not, or has not, caused similar accidents to other persons, for the purpose of proving that he was not guilty of the negligence alleged.

Illinois.—*Joliet St. Ry. Co. v. Call*, 42 Ill. App. 41; *Knickerbocker Ice Co. v. DeHaas*, 37 Ill. App. 195; *Linck v. Scheffel*, 32 Ill. App. 17.

Indiana.—*Nave v. Flock*, 90 Ind. 205.

Iowa.—*Hudson v. Chicago, etc., R. Co.*, 59 Iowa 581, 8 Am. & Eng. R. Cas. 464.

Maine.—*Branch v. Libbey*, 78 Me. 321, 5 Atl. 71.

Maryland.—*Baltimore, etc., Elevator Co. v. Neal*, 65 Md. 438.

Massachusetts.—*Aldrich v. Inhabitants of Pelham*, 1 Gray (Mass.) 311; *Burgess v. Davis Sulphur Ore. Co.*, 165 Mass. 71, 42 N. E. 501; *Crocker v. Springfield*, 110 Mass. 134; *Lane v. Boston & Albany R. Co.*, 112 Mass. 455; *Marvin v. New Bedford*, 158 Mass. 464, 33 N. E.

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605; *Peverly v. City of Boston*, 136 Mass. 366; *Shoonmaker v. Inhabitants of Wilbraham*, 110 Mass. 134.

New Hampshire.—*Hubbard v. Concord*, 35 N. H. 52.

New Jersey.—*Temperance Hall Assoc. v. Giles*, 33 N. J. L. 260.

New York.—*Buckley v. Leonard*, 4 Denio (N. Y.) 500; *Weiler v. Manhattan Ry. Co.*, 53 Hun 372, 6 N. Y. Supp. 601.

Vermont.—*Lucia v. Meech*, 68 Vt. 175, 34 Atl. 695.

1. Illustrations.

Injury to Passenger—Similar Conduct of Conductor in Starting Train.—In an action for injury to a passenger, based on the alleged negligence of the conductor in starting the train while the passenger was upon the track, evidence was not admissible to show that similar conduct of the conductor on a previous occasion had not resulted in injury, as such evidence could only show that defendant had been guilty of culpable negligence on one occasion without any resulting accident. So held in *Weiler v. Manhattan Ry. Co.*, 53 Hun 372, 6 N. Y. Supp. 601.

Evidence That No Other Freight Had Been Lost by Carrier.—In an action against the carrier for non-delivery of freight, lost from its depot, evidence was inadmissible, as immaterial, to show that other freight of the same kind was always cared for by the carrier in the same manner, and that none had ever been lost before. So held in *Lane v. Boston & Albany R. Co.*, 112 Mass. 455.

Derailment of Street Car Uncoupled on Steep Grade—Injury to Passenger—Experience of Employees in Stopping Cars at Same Place.—In an action for personal injuries to a passenger, caused by the derailment of a street car which had been uncoupled on a steep grade, evidence as to the experience of the servants of defendant in stopping cars at the point named on the day of the accident was inadmissible, likewise it was proper to refuse to admit evidence that they had stopped cars there before that day without accident, such evidence not tending to rebut the evidence of negligence in the particular instance. So held in *Joliet St. Ry. Co. v. Call*, 42 Ill. App. 41.

Others Passing Defect in Highway in Safety.—In an action for injuries from a defect in a highway, evidence that others had passed and repassed the place in safety is inadmissible. So held in *Kidder v. Inhabitants of Dunstable*, 77 Mass. 342.

No Prior Accidents to Mine Employees.—In an action for injuries to a miner, evidence is not admissible to show that no accident had ever before happened in the mine, there being too many uncertain and undetermined elements, which might effect the safety of the workmen in the mine, to make such evidence valuable. So held in *Burgess v. Davis Sulphur Ore. Co.*, 165 Mass. 71, 42 N. E. 501.

Numerous Horses Driven Past Mortar-Box in Highway without Being Frightened.—In an action for injuries caused by plaintiff's horse becoming frightened, at night, at a mortar-box left in the highway, evidence is not admissible to show that numerous horses had been driven past the box in the day time without becoming frightened as such evidence would tend to raise collateral issues, and because an object may be such as to frighten ordinary horses only at night. So held in *Bloor v. Town of Delafield*, 69 Wis. 273, 34 N. W. 115.

No Prior Accidents from Defect in Sidewalk.—In an action for personal injuries from an alleged defect in a sidewalk, the defendant city cannot show that no prior accident has occurred at the place of the alleged defect, as such evidence would raise a collateral issue, and had no legitimate bearing, as claimed, on the question whether the defect might have been remedied by the exercise of reasonable care and diligence on the part of the city. So held in *Marvin v. Bedford*, 158 Mass. 464, 33 N. E. 605.

Many Others Using Same Drive-Way without Injury.—In an action for personal injuries from a negligently maintained drive-way, if it was really dangerous, the fact that many others had used it without injury was immaterial. So held in *Nave v. Flock*, 90 Ind. 205.

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Absence of Barriers at Defect in Highway—Others Passing in Safety.—In an action for the death of a driver of a vehicle from the absence of barriers at a defect in a highway, it was held that the fact that other persons had passed and repassed for several years over the highway at the place in question without accident, was not evidence that the town had performed its duty in making the highway reasonably safe. *Lutton v. Town of Vernon*, 62 Conn. 1, 23 Atl. 1020.

In this case it is said in the opinion: "There is nothing whatever in the record to show 'that the use and experience of others relied upon' was at all or substantially similar to that of the plaintiff's decedent, or even that the defendant claimed that it was."

Tipping of Loose Board in Sidewalk—Others Frequently Passing without Noticing Defect—Rebuttal.—But in an action from personal injuries from a fall resulting from the tipping up of a loose board in a sidewalk, evidence is admissible, to rebut plaintiff's theory that the nature of the defect, its long prior existence, and the condition of the walk charged the city with notice of the existence of the defect complained of, for the purpose of showing, by witnesses who testify to having frequently passed over the walk without noticing the defect, that if there had been a loose plank they would have noticed it. So held in *McGrail v. City of Kalamazoo*, 94 Mich. 52, 53 N. W. 955.

Drippings from Eaves of Adjoining House—Dampness of Other Brick Walls in Vicinity Not Exposed to Such Drippings.—So in an action for injury to the wall of a building, alleged to have been caused by drippings from the eaves of an adjoining house, evidence of the bad condition from dampness of other brick walls in the immediate vicinity, against which there were no drippings from the eaves of houses, was admissible. So held in *Lotz v. Scott*, 103 Ind. 155, 2 N. E. 560.

L. ADEQUACY OF APPLIANCE OR SAFETY OF PLACE— ABSENCE OF OTHER ACCIDENTS.

But it has been held, on the question whether defendant had exercised the care required by law, that defendant may show that the appliances, or conditions complained of had proved adequate and safe, by introducing evidence of the absence of other accidents attributable to them.

Alabama.—*Birmingham Union Ry. Co. v. Alexander*, 93 Ala. 133, 9 So. 325.

Connecticut.—*Calkins v. City of Hartford*, 33 Conn. 57.

Illinois.—*Bloomington v. Legg*, 151 Ill. 9, 37 N. E. 696.

Iowa.—*Allen v. Burlington, C. R. & N. R. Co.*, 57 Iowa 623, 11 N. W. 614.

Kansas.—*Field v. Davis*, 27 Kan. 400.

Massachusetts.—*Peverly v. City of Boston*, 136 Mass. 366; *Stowe v. New York, etc., R. Co.*, 113 Mass. 521.

Minnesota.—*Doyle v. St. Paul, M. & M. Ry. Co.*, 42 Minn. 79, 43 N. W. 787.

New Hampshire.—*Darling v. Town of Westmoreland*, 52 N. H. 401.

New York.—*Jarvis v. Brooklyn El. R. Co. (City Ct.)*, 16 N. Y. Supp. 96, 40 N. Y. S. R. 825; *McGuire v. Ogdensburg & L. C. R. Co. (Supr. Ct.)*, 18 N. Y. Supp. 313.

Tennessee.—*Burke v. Louisville & N. R. Co.*, 54 Tenn. 451.

1. Illustrations.

Dangerous Proximity of Cattle Chute to Track—Others Riding Past on Side of Cars.—Where evidence for plaintiff had been introduced to the effect that a certain cattle chute was dangerously near defendant's track, defendant should have been permitted to show that persons had frequently ridden past it in safety while holding to the side of a car. So held in *Allen v. Burlington, C. R. & N. R. Co.*, 57 Iowa 623, 11 N. W. 614.

Whether Railroad Crossing Safe for Vehicles.—In *Birmingham*

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Union Ry. Co. v. Alexander, 93 Ala. 133, 9 So. 525, it is held that on the issue whether a railroad track, at the time and place of the accident to plaintiff, was in a safe condition for the passage of vehicles, evidence that other vehicles were constantly crossing under similar conditions, without inconvenience or accident, is admissible.

Foot Caught by Splinter in Rail of Track—Such Accidents Unknown.—In an action for injuries alleged to have been caused by plaintiff's foot being caught by a splinter on the inside of a rail in a railroad track, evidence is admissible, for the purpose of showing whether it was so caught, and whether defendant was chargeable with negligence therefor, danger from such cause not being self-evident, to prove by experienced witnesses that such accidents had been unknown. So held in *Doyle v. St. Paul, M. & M. Ry. Co.*, 42 Minn. 79, 43 N. W. 787.

Injury to Driver of Train at Grain Elevator—Failure to Provide Barriers—Absence of Similar Accidents during Five Years.—In an action for an injury to the driver of a team, while he was at the elevator in question to unload grain, evidence was admissible to show that the elevator had been in operation for at least five years; that frequently as many as fifty or sixty wagon-loads of grain were received and unloaded at the elevator in one day; that the number received and unloaded would average about twenty-five loads per day; and that, notwithstanding the great number of loads of grain that had been unloaded there during the five years prior to the accident to plaintiff, not a single similar accident had ever before occurred, as such evidence tended to show that defendant was not negligent as claimed, in failing to provide a sufficient barrier to prevent wagons from being backed out of elevator by an unruly team and off an inclined plane leading to it. So held in *Field v. Davis*, 27 Kan. 400.

Others Passing Obstruction upon Sidewalk without Injury.—In an action for injuries received in consequence of an obstacle upon the sidewalk, of such a character that the attention of all who passed that way would naturally be drawn to it and their experience of its effect in obstructing travel would be substantially the same, evidence that others passed it without harm, when it was in the same condition as at the time when plaintiff received her injury, is admissible to show that it was not dangerous to a person using ordinary care. So held in *Calkins v. City of Hartford*, 33 Conn. 57.

Safety of Machinery or Work—Manner in Which It Has Served Its Purpose.—Where the question is as to the safety of any machinery or work, the manner in which it has served its purpose is a matter material to the issue, as tending to show notice of its condition. So held in *Bloomington v. Legg*, 151 Ill. 9, 37 N. E. 696.

Other Horse Not Frightened by Pile of Lumber.—Where it is an issue whether a pile of lumber was likely to frighten horses, it is competent to show that other horses passing it were not frightened by it. So held in *Darling v. Town of Westmoreland*, 52 N. H. 401.

Absence of Guard Rail—Absence of Accidents to Plaintiffs on Other Nights.—In *Smith v. City of Gilman*, 38 Ill. App. 393, an action for personal injuries from a fall from a sidewalk, the negligence complained of was the failure to put a guard rail by the side of the walk. It was held that evidence of the fact that, on other nights than that of the accident, plaintiff went over the walk without difficulty or danger was admissible.

2. Limitations of and Exceptions to Rule.

Sufficiency of Other Like Cattle Guards—Direct Proof.—In an action for injuries to plaintiff's crops resulting indirectly from a defective cattle guard, testimony that another cattle guard, constructed like the one complained of, had proved sufficient to turn cattle was properly rejected, as it would have introduced a collateral issue; and whether or not the cattle guard complained of was sufficient was susceptible of direct proof. So held in *Downing v. Chicago, etc., R. Co.*, 43 Iowa 96.

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Absence of Barriers Along Highway—Others Passing in Safety.

In an action for personal injuries caused by the absence of barriers or railing along an elevated part of a highway, where the accident occurred in a manner so peculiar and exceptional as to put the necessity of such a safeguard to a test that ordinary travel would not furnish, it was held that the experience of others who had passed safely along the same road was not pertinent, and evidence of it inadmissible in behalf of the town. *Taylor v. Town of Monroe*, 43 Conn. 36.

Insufficient Width of Highway—Other Vehicles Passing Each Other without Difficulty.—In an action for injuries from an alleged defective highway, where one of the defects relied on is its insufficient width, evidence that other persons with their vehicles had previously, when the highway was in the same condition as when plaintiff was injured, passed or met other vehicles at the same place, without collision or accident, and had room to spare on each side, is inadmissible to show that the way was sufficient in width, as such facts are susceptible of direct proof. So held in *Aldrich v. Inhabitants of Pelham*, 67 Mass. 510.

Ferry-Boat without Barriers—Stock Drowned—No Similar Accidents from Use of Such Boats.—In an action for the value of stock, which were drowned, through the alleged negligence of defendant in not furnishing his ferry boat with barriers, it was not competent to prove that just such a boat had been used to transport animals over the ferry daily for thirty years, and no such accident had ever happened before. So held in *Lewis v. Smith*, 107 Mass. 334.

Defect in Derrick—Pin Working Out—Absence of Knowledge of Similar Occurrence.—In an action for injuries to an employee, alleged to have resulted from a defect in a derrick, it cannot be shown in defence by those engaged in the use of the machine that they had never known a pin like the one in question to work out. So held in *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380.

Negligent Construction and Operation of Elevator—No Accidents during Four and a Half Years.—In an action for personal injuries from the negligent construction and operation of an elevator, and in failing to employ a competent operator, evidence was not admissible to prove that no accident had happened to the elevator previous to the one in question, during the four and a half years it had been in use, as it would not tend to rebut evidence of negligence at the time of the accident. So held in *Hodges v. Bearse*, 129 Ill. 87, 21 N. E. 613.

Similar Freight Usually Arriving in Good Condition at Same Port.—But in an action against the carrier for injuries to goods shipped by sea, the fact that similar goods, shipped by sea to the port of delivery, usually arrived uninjured, is admissible against defendant, as tending to show that any damage to the freight was the result of negligence. So held in *Steele & Burgess v. Townsend*, 37 Ala. 247.

Prompt Arrival of Other Goods Sent by Vendor—Failure to Properly Mark—Defective Bill of Lading.—And where goods are sent by a carrier, and neither the bill of lading nor the direction upon the goods gives the residence or full name of the purchaser, and they are delayed in transmission, and finally destroyed, in an action to recover their cost, the purchaser may prove prior purchases of similar goods by him of the same vendor, and that they were all sent by the same carrier, with bills of lading containing his full name and residence, and reached him without difficulty, as such evidence tended to show the omission of the vendor to properly mark the goods in question, and to have a proper bill of lading made out. So held in *Finn v. Clark*, 94 Mass. 523.

Death of Fireman—No Similar Accidents from Proximity of "Mail-Catchers" to Passing Trains.—And in an action for the death of a locomotive fireman from the proximity of a "mail-catcher" to passing trains, testimony of a number of witnesses, familiar with the op-

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eration of such appliances, was admissible to show that no similar accident, within their knowledge, had occurred from their use, as tending to prove that the "mail-catcher" in question was dangerously located. So held in *Chicago, B. & Q. R. Co. v. Gregory*, 58 Ill. 272.

M. CONTRIBUTORY NEGLIGENCE—ABSENCE OF ACCIDENTS TO OTHERS.

On the issue of contributory negligence, evidence to show that other persons, under the same or similar circumstances, were not injured by reason of the defect or condition complained of is generally held incompetent. *City of Birmingham v. Tayloe*, 105 Ala. 170, 16 So. 576; *Crocker v. Springfield*, 110 Mass. 134; *Bloor v. Town of Delafield*, 69 Wis. 273, 34 N. W. 115.

Other Persons Driving Over Alleged Defect in Safety.—In an action for injuries from an alleged defect in a highway, sustained by plaintiff while he was driving a vehicle, evidence is not admissible to show that other persons drove at considerable speed, in other vehicles, over the alleged defective place, either for the purpose of showing that plaintiff was not in the exercise of due care, or that the place was not defective. So held in *Crocker v. Springfield*, 110 Mass. 134.

Defective Street Crossing—Other Persons Passing Over Alleged Defect in Safety.—In an action for injuries to plaintiff, his horse and buggy, from an alleged defective crossing, built by defendant by order of the selection of the town, evidence is not admissible to prove that other persons passed over the alleged defect in safety, such evidence not being competent either for the purpose of proving that the crossing was defective or in a suitable condition, at the time and place of the accident to plaintiff, or as a test of the degree of care exercised by plaintiff. So held in *Branch v. Libbey*, 78 Me. 321, 5 Atl. 71.

N. COLLATERAL QUESTIONS.

In the cases under this head the evidence was rejected as tending to raise collateral questions which the other side was not bound to be prepared to meet.

Other Accidents at Railroad Crossing.—In an action for injuries to plaintiff, struck by a train while driving a carriage over a crossing, evidence was not admissible to show that other accidents had occurred at the same crossing within a short time. So held in *Menard v. Boston & Maine R. Co.*, 150 Mass. 386, 23 N. E. 214.

Another Passenger Drowned While Landing from Ferryboat, at Same Place.—In an action for the death of a passenger, drowned in attempting to land from a ferry boat, evidence of another accident having occurred at the same place, under similar circumstances, is not admissible. So held in *Davis v. Oregon & Cal. R. Co.*, 8 Ore. 172.

Other Stock Killed at Same Crossing.—In an action to recover the value of a colt killed by a train at a crossing, evidence that stock had frequently been killed at the crossing is irrelevant and inadmissible, as relating to collateral facts. *Croddy v. Chicago, etc., R. Co.*, 91 Iowa 598, 60 N. W. 214. See also, *Hudson v. C. & N. W. R. Co.*, 59 Iowa 581, 13 N. W. 735.

Highway Left in Unsafe Condition—Access to Plaintiffs Tavern—Carriages of Travelers Upset.—In an action against a railroad for rendering difficult the access from a highway to plaintiff's tavern, by changing the grade of the highway, evidence of the collateral fact that the carriages of travelers had been upset by reason of defendant's omission to leave the highway in a safe and suitable condition was inadmissible. So held in *Hubbard v. And. & Ken. R. Co.*, 39 Me. 506.

Whether Position of Plank at End of Bridge Rendered Highway Unsafe—Accidents to Others at Same Place.—In an action for personal injuries from a defect in a highway, where the question was the position of a plank at the end of a bridge, and whether it rendered the way unsafe, evidence of the collateral fact that other persons with their vehicles had received injuries at the place of the alleged defect

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was not admissible to show that the highway was unsafe for travelers. So held in *Bremner v. Newcastle*, 83 Me. 415, 22 Atl. 382.

Defective Sidewalk—Prior Accidents Near Same Place.—In an action for personal injuries caused by a defective sidewalk, evidence of prior accidents on the walk, near the place in question, is not admissible. So held in *Barrett v. Village of Hammond*, 87 Wis. 654, 58 N. W. 1053.

Injury Caused by Ice on Sidewalk—Existence of Defect—Accidents to Other Persons at Same Place—Rationale of Rule.—In an action for injuries from an alleged defect in a sidewalk, caused by ice, evidence is not admissible, for the purpose of proving the existence of a defect in the walk, to show that other persons than plaintiff met with difficulty at the place of the accident, and had slipped there. So held in *Hubbard v. Concord*, 35 Mass. 52. In this case it is said in the opinion: "In this case the evidence (of similar accidents) could have no other effect than to lead the jury to the conclusion that the sidewalk was defective. Whether it ought to have that tendency would depend on the same questions in reference to the care and prudence exercised by those other persons, and all the other circumstances attending these particular cases, as arise in this case in connection with the plaintiff's accident. Before those instances of difficulty and slipping at the place of the accident should be permitted thus to bear upon the questions at issue here, it ought to be proved to the jury what were the precise circumstances attending them, and whether they did or not happen under such circumstances as would show a defect for which the town would be answerable in those cases, in other words, a trial must be had in those cases, as between the town and each of the persons who met with the difficulty alleged, in the same manner and upon the same ground as one involved in this case between these parties."

Stone in Highway—Overturning of Vehicle—Similar Accidents About Same Time.—On the issues whether a stone which caused the overturning of plaintiff's vehicle was in the traveled part of the highway, and constituted a defect therein, evidence was inadmissible to show that similar accidents had happened at about the same time to other persons who drove against the stone, as such evidence would tend to confuse the minds of the jury by raising collateral issues. So held in *Phillips v. Town of Willow*, 70 Wis. 6, 34 N. W. 731.

Fall into Same Hole in Sidewalk During Same Night.—In an action for personal injuries from a fall into a hole in a sidewalk in the nighttime, testimony that plaintiff's witness fell into the same hole during the same night is inadmissible, being collateral to the main issue. So held in *Moore v. City of Richmond*, 85 Va. 538, 8 S. E. 387.

Defects in Gravel Road—Other Vehicles Overturned While Passing Same Obstruction.—In an action against a gravel road company for personal injuries alleged to have been caused from defects in the road, where plaintiff's injuries were sustained through the overturning of his buggy, evidence that others, in attempting to pass the same obstruction by driving around it, within a few days of the accident to plaintiff, and at or near the same place where plaintiff's buggy was overturned, had their sleighs, though driven in a careful manner, also overturned, was outside the issues and inadmissible. So held in *Ramsey v. Rushville & M. G. R. Co.*, 81 Ill. 394.

Icy Sidewalk—Other Persons Falling at Same Place, at or About Time of Accident.—In an action against a city for personal injuries resulting from a fall on an icy sidewalk, testimony of witnesses other than plaintiff, that, at about the time of the accident, they had fallen at the same place, was incompetent, although elicited by questions as to what had called their attention to the slope of the sidewalk. So held in *Richards v. City of Oshkosh*, 81 Wis. 226, 51 N. W. 256. In this case it is said in the opinion: "Evidence of previous accidents at the same place similar to the one complained of may be admissible, but even in that case, such evidence should be limited strictly to the question of notice."

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Defective Highway—Accident to Another Person at Same Place, a Year Before.—In an action for injuries from a defect in a highway, which defendant town was bound to keep in repair, evidence of an accident at the same place to another person, a year before the injuries complained of, was inadmissible as concerning a collateral fact. So held in *Blair v. Inhabitants of Pelham*, 118 Mass. 420.

Dangerous Crossing—Negligent Operation of Train—Failure to Fence—Stock Frequently Killed at Crossing.—In an action to recover the value of a colt killed by a train at a crossing, based on the allegations that the crossing was in a dangerous condition; that the train was negligently operated; and that the accident occurred at a place where defendant had a right to fence and failed to do so, evidence that stock had frequently been killed at such crossing was irrelevant, as concerning a collateral fact, and therefore inadmissible. So held in *Croddy v. Chicago, Rock Island & Pac. Ry. Co.*, 91 Iowa 598, 60 N. W. 214.

Open Area-Way under Show Window—Defendant Informed of Prior Falls into Same Opening.—In *Mathews v. City of Cedar Rapids*, 80 Iowa 459, 45 N. W. 895, it appeared that, under a well-lighted and attractive show window in a city, there was an open area-way about five feet long and fifteen inches wide, extending about five inches of its width into the sidewalk, and the other ten inches under the building, whose wall over the opening was about three feet above the level of the walk; and that plaintiff, was attracted to the window, and fell into the opening. In an action for his injuries, it was held that evidence that other persons had previously fallen into the same opening, and that the owner of the building had been informed of the fact was inadmissible as it concerned a collateral fact, which defendants were not bound to be prepared to meet.

Loose Board in Sidewalk—Subsequent Falls upon Sidewalk.—In an action for personal injuries from a fall caused by the tipping up of a loose board in a sidewalk, evidence is inadmissible to show that others fell upon the same walk three or four days after the plaintiff was injured, as it would raise a collateral issue, and not assist the jury in determining the legitimate issues. So held in *McGrail v. City of Kalamazoo*, 94 Mich. 52, 53 N. W. 955.

O. IRRELEVANCY.

In the following cases evidence of other accidents or defects was rejected as having no possible bearing on any issue involved.

Derailment from Defective Track—Injury to Passenger—Similar Accidents on Other Parts of Road.—In an action for injuries to a passenger, resulting from a derailment caused by the bad condition of the track, plaintiff should be allowed to show the condition of the track only at the place of the accident and in its immediate vicinity, and should not be permitted to show that similar accidents had previously occurred on other parts of the road. So held in *Hipsley v. Kansas City, St. Jo., etc., R. Co.*, 88 Mo. 348, 27 Am. & Eng. R. Cas. 287.

Injury to Passenger—Condition of Track Elsewhere—Previous Wrecks.—In an action for injury to a passenger, sustained by reason of the derailment of his train, which resulted from the alleged defective condition of the track, all questions as to the condition of the track elsewhere, as well of previous wrecks, should have been kept from the jury. So held in *Missouri Pac. Ry. Co. v. Mitchell*, 75 Tex. 77, 12 S. W. 810.

Defect Admitted—Bad Condition of All Defendant's Rolling Stock.—In an action for the death of a brakeman, where it was admitted that his death resulted from the defective condition of the couplings of a narrow-gauge car, though it was error to admit evidence that the narrow-gauge rolling stock of his employer was all in a bad condition, the error was harmless. So held in *Wells v. Denver & Rio Grande W. Ry. Co.*, 7 Utah 482, 27 Pac. 688.

Note

Death of Employee—Cars Crushed against Gravel Bank on Prior Occasions.—In *Sullivan v. Salt Lake City*, 13 Utah 122, 44 Pac. 1039, an action for the death of an employee of the defendant city, resulting from his being crushed against a gravel bank by a car, testimony was inadmissible to show that the witness had seen cars crushed against the bank before the accident in question, or that it was a common occurrence, as defendant could not be held for past negligence from which no injury resulted, or for habitual negligence.

Fall from Unguarded End of Elevated Railway Platform—Testimony That Witness Had Never Heard of Similar Accident.—In an action for injuries to an intending passenger from a fall from the unguarded end of an elevated railway station platform, testimony of defendant's superintendent, that he had never heard of any one walking off elevated railway platforms, should have been excluded, where it was not shown that there were any such unguarded platforms. So held in *Jarvis v. Brooklyn El. R. Co. (City Ct.)*, 16 N. Y. Supp. 96.

Failure to Give Passenger Time to Alight—Accident to Another Alighting Passenger at Same Depot—Indefinite Testimony.—In *Gulf, Colo. & Santa Fe Ry. Co. v. Rowland*, 82 Tex. 166, 18 S. W. 96, an action for personal injuries from alleged negligence in not stopping car at a depot for a sufficient time to allow a passenger to alight in safety, plaintiff was allowed to prove that some short time before and about the day of plaintiff's injury, a lady fell on the platform at the same depot while alighting from the defendant's train of cars, that witness did not see her fall, but saw her getting off the train and heard her brother say "there," and looked and saw her getting up from the platform and the train moving off; that he did not know how long the train stopped at that time, but it only stopped for a very short while; that he supposed she would not have fallen if the train had stopped long enough for her to get off. There was a claim for exemplary damages. It was held that this testimony was wholly irrelevant to any issue then before the court.

Fire from One of Two Locomotives—Other Fires from Other Engines.—In an action for the destruction of property by fire alleged to have been started by one of defendant's locomotives, where plaintiff has proved with reasonable certainty that one of two locomotives caused the fire, evidence that at other times other engines of defendant emitted sparks is inadmissible, the issue being whether both of such two locomotives were properly equipped and managed. So held in *Tribette v. Illinois Cent. R. Co.*, 71 Miss. 212, 13 So. 899.

Fall upon Defective Sidewalk—Similar Accident to Plaintiff—Place Not Located.—In an action for personal injuries from a fall upon a defective sidewalk, testimony of a witness that he had fallen on the same sidewalk because of a defect therein, but was unable to state the exact place of such defect, was inadmissible for any purpose. So held in *Hoyt v. City of Des Moines*, 76 Iowa 430, 41 N. W. 63.

Defect in Highway—Similar Accident a Year Before.—In an action for personal injuries from a defect in a highway, evidence of a similar accident, at the same place, sustained a year before, of which the town had notice, is inadmissible, especially if it appears that the highway has been in the same condition for twenty-four hours before the accident to plaintiff. So held in *Blair v. Inhabitants of Pelham*, 118 Mass. 420.

Brakes Across Highway—Similar Accidents Prior to Their Construction.—In an action for personal injuries caused by brakes made across a highway, evidence is inadmissible to show that within a week of the time of the accident, a person was upset at the same place, and a lady was thrown out of a wagon, at about the time of the accident in question, or within two or three months of that time, several similar accidents, from the same cause, occurred, it appearing that the brakes in question were made a day previous to the accident. So held in *Sherman v. Kortright*, 52 Barb. (N. Y.), 267.

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Burning of Mill—Use of Steam Engine—Other Fire from Another Cause.—In an action for the burning of property, caused by the use of a stationary steam engine, evidence was not admissible to show the collateral fact that the mill caught fire the year before, it appearing that such fire was not communicated to the mill by the use of the engine in any way. So held in *Burbank v. Bethel Steam Mill Co.*, 75 Me. 373. In this case it is said in the opinion: "If it appeared that the fire (the former one) was communicated to the mill in 1875, by the use of the engine, we think it would be admissible."

Collision between Vessels—Cross-Examination—Other Accidents While Witness Was Captain.—In an action for injuries from a collision between vessels, it is not competent, upon the cross-examination of the captain or pilot of defendant's vessels, for plaintiff to ask as to other accidents which have happened while he has occupied such position. So held in *Mailler v. Express Propeller Line*, 61 N. W. 312.

Ice in Depression in Sidewalk—What Caused Witness to Notice Condition of Walk on Preceding Day.—In an action for personal injuries from a fall upon ice which had accumulated in a depression in a sidewalk, a witness, who had testified that the day before the injury to plaintiff she saw ice in the depression, was asked, "Is there anything which causes you to remember particularly the condition of that walk on that day?" Plaintiff admitted that his purpose was to show that the witness remembered it because she stepped on the ice in the depression, and also that the fact that she slipped did not tend to show defendant's liability. The question was excluded, but the witness was allowed to state the extent of the examination which she made of the depression. It was held that it was within the discretion of the trial court to exclude the question. *Neal v. City of Boston*, 160 Mass. 518, 36 N. E. 308.

Hole in Bridge—Experiences of Witnesses in Driving Over Bridge.—But in an action for personal injuries from a defect in a bridge, it was held that witness may testify as to the particular circumstances which called their attention to the defect, as that the wheels of their vehicles ran into the hole, or their horses shied at it. So held in *Tomlinson v. Town of Derby*, 43 Conn. 562.

A. R. Y.

KANSAS CITY, M. & B. R. Co. v. NICHOLS.

(Supreme Court of Mississippi, May 22, 1905.)

[38 So. Rep. 371.]

Carriers—Injuries to Passengers—Res Ipsa Loquitur.*—Where employees of a railroad company attempted to couple two cars while in dangerous proximity to a train on an intersecting track, and caused a collision, injuring a passenger on the train, the railroad company was presumptively negligent.

Appeal from Circuit Court, Pontotoc County; E. O. Sykes, Judge.

Action by Henry Nichols against the Kansas City, Memphis & Birmingham Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

*See foot-notes appended to *Lincoln Traction Co. v. Webb* (Neb.), 14 R. R. R. 369, 37 Am. & Eng. R. Cas., N. S., 369; *Cheetham v. Union R. Co.* (R. I.), 13 R. R. R. 292, 36 Am. & Eng. R. Cas., N. S., 292; foot-notes appended to *Rowdin v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 672, 36 Am. & Eng. R. Cas., N. S., 672; *Jones v. United Rys. & Elec. Co.* (Md.), 13 R. R. R. 631, 36 Am. & Eng. R. Cas., N. S., 631.

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J. W. Buchanan, for appellant.

Mitchel & Mitchel, for appellee.

TRULY, J. In *Yazoo & Miss. Valley Railroad Co. v. Humphrey*, 36 South. 154, we said: "There is a large and well-defined class of cases in which for injuries to passengers the negligence of the carrier is implied from the mere happening of the accident. In such cases proof of injury to the passenger joined to proof of the accident makes out against the carrier a prima facie case of failure to observe that high degree of care required of it under the law, and, if not rebutted, entitles the plaintiff to recover. This rule applies when a passenger train strikes an animal on the track and a passenger is thereby injured, or when the injury results from a collision between two trains on the same track, and other similar instances. And this is the law irrespective of statutory provision, and was the law prior to the adoption of the rule of evidence now embodied in section 1808, Rev. Code 1892." The instant case falls clearly within that statement of the rule. Appellee, while a passenger on appellant's train, was injured by the negligence of its employees in charge of the train by recklessly attempting to make a coupling of two cars while in dangerous proximity to a train upon another track at that time moving across its roadway; the result being the coach in which appellee was riding collided violently with such train, throwing appellee from the doorway of the coach onto the platform, and thence to the ground, inflicting the injuries complained of. This was certainly a happening not ordinarily incident to the prosecution of the carrier's business in the customary manner, but was such an accident as could not occur without the gross negligence of the operatives in charge of the train. In such state of case the liability of the railroad company is too firmly established to permit of disputation. The accident was not due to a coupling made in the "usual and ordinary way" on a mixed train, but was the direct result of the collision of the coach with a car standing across the track—a distinction clearly recognized by the accomplished circuit judge. The facts of the case being in the main undisputed, and fully sustaining the amount of recovery awarded, we see no ground for disturbing the verdict.

The judgment is affirmed.

WALL v. ATLANTIC COAST LINE R. R.

(Supreme Court of South Carolina, April 8, 1905.)

[51 S. E. Rep. 95.]

Carriers—Baggage—Delay in Delivery.*—In an action for loss of baggage, defendant denied any liability except for a certain amount, and on the day of trial produced the baggage in question, which it tendered to plaintiff, who refused to accept it. Held, that the measure of damage was any reasonable loss and expense occasioned by the delay, together with the value of the goods at the time and place they should have been delivered, less their value according to their condition at the time and place of tender.

Appeal from Common Pleas Circuit Court of Darlington County; Watts, Judge.

Action by Lula Wall against the Atlantic Coast Line Railroad. From a judgment for plaintiff, both parties appeal. Affirmed.

Miller & Lawson, for plaintiff.

P. A. Willcox and *W. F. Dargan*, for defendant.

POPE, C. J. This is a controversy by an action begun in the magistrate court by the plaintiff against the defendant because of the alleged loss of a valise, for which she held the check of the railroad, which contained her wearing apparel. The defendant denied any liability, except to offer to allow her the sum of \$10, and on the day of trial produced the valise in question; claiming that it had been, through misadventure, carried past Hartsville to the city of Sumter. It tendered the valise to the plaintiff, which she declined to accept. The magistrate gave a judgment against the defendant for \$75. Upon exceptions taken by both plaintiff and defendant, the appeal was heard by Judge Watts, presiding judge of the circuit court, who in his judgment reduced the plaintiff's judgment from \$75 to \$55; but, of the \$55 adjudged the plaintiff, he subtracted \$5, the costs of the defendant, which left her with a net judgment of \$50. She has appealed from that judgment, and, in consequence of her appeal, defendant also appealed.

This belongs to that class of cases (being on the law side) in which this court is powerless to interfere with the findings of fact of the court below. At one time it seemed to us that the judgment of the circuit judge should have been reduced by the amount purchased by the plaintiff of wearing apparel, of \$29.65, in excess of the value of the articles which plaintiff alleged she lost, being contained in her valise; but the plaintiff also claimed that she

*See foot-note appended to *Lewark v. Norfolk & S. R. Co.* (N. Car.), 14 R. R. R. 420, 37 Am. & Eng. R. Cas., N. S., 420; *Lee v. St. Louis, etc., Ry. Co.* (N. Car.), 14 R. R. R. 260, 37 Am. & Eng. R. Cas., N. S., 260; *Ryland & Rankin v. Chesapeake & O. Ry. Co.* (W. Va.), 13 R. R. R. 279, 36 Am. & Eng. R. Cas., N. S., 279; foot-note appended to *Louisville & C. Packet Co. v. Bottoff* (Ky.), 13 R. R. R. 236, 36 Am. & Eng. R. Cas., N. S., 263.

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had been subjected to a great deal of pain and annoyance, and some cost, at the failure of defendant to deliver her valise promptly, and it is likely that the circuit judge made some allowance to the plaintiff from this vexatious delay of the defendant, which delay was occasioned by the negligence of their agent in the town of Marion in issuing a check to the plaintiff in these words: "From Marion to Hartsville," while on the check attached to the valise itself, he placed the words, "From Marion via Hartsville to Sumter, S. C." This unfortunate mistake on the part of the agent of the defendant was the cause of this trouble. These matters are discussed and the rule laid down in regard thereto in the case of *Nettles v. Railroad Company*, 7 Rich. Law, 190, 62 Am. Dec. 409; also *Dill v. Railroad Company*, 7 Rich. Law, 158, 62 Am. Dec. 407. In the first case cited supra the court said: "In such cases the measure of damages would seem to be any reasonable loss and expenses which has been occasioned by the delay, together with the value of the goods at the time and place they should have been delivered, taking therefrom the value according to their condition at the time and place of actual delivery or tender." The second case (*Dill v. Railroad Company*, supra) is to the same extent.

Our great trouble in this case is that Judge Watts has ordered the valise returned to the plaintiff, and from this part of his judgment neither the plaintiff nor the defendant has appealed. It must therefore stand. Under these circumstances, with some hesitation, we have decided to affirm the judgment in its entirety.

It is the judgment of this court that the judgment of the circuit court be affirmed.

CHICAGO, B. & Q. RY. CO. v. ANDERSON.

(Supreme Court of Nebraska, Dec. 21, 1904.)

[101 N. W. Rep. 1019.]

Statute—Title of Act.—The title, "An act to fix a maximum standard of freight charges on railroads, and to prevent unjust discrimination therein, or secret rates, rebates or drawbacks therefor" (Comp. St. 1903, c. 72 art. 5), contains only one subject.

Freight Rates—Discrimination—Validity of Statute.*—A statute forbidding railroad companies to charge for transportation for any specific distance a greater sum than they charge for carriage over a greater distance is within legislative discretion, and is valid.
(Syllabus by the Court.)

Commissioners' Opinion. Error to District Court, Kearney County; Adams, Judge.

Action by Albert H. Anderson against the Chicago, Burling-

*For the authorities in this series on the constitutionality of statutes prescribing a penalty to compel carriers to perform their duties to the public, see foot-note appended to *Lexington Grocery Co. v. Southern Ry. Co.* (N. Car.), 14 R. R. R. 349, 37 Am. & Eng. R. Cas., N. S., 349.

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ton & Quincy Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

J. W. Deweese and Frank E. Bishop, for plaintiff in error.

M. D. King, for defendant in error.

AMES, C. The defendant operates a line of railroad extending from Curtis, in this state, eastward through Axtell to Minden. In the winter there are ice fields at Curtis, from which people both at Axtell and Minden may be supplied, but at the latter place alone is there competition with another railroad. In order to meet such competition, so that Curtis ice will be purchased for consumption at Minden, it became necessary to transport it between the two last-named points during the winter of 1902 for a freight charge of three cents per hundred pounds, which defendant did continuously in the months of January and February in that year. During the same months the company transported ice from Curtis to Axtell for the defendant in error, Anderson, for which service it demanded and received compensation at the rate of four cents per hundred pounds. The difference in distance is ten miles, in favor, of course, of Axtell. This action was brought by Anderson to recover the difference of one per cent per hundred pounds between the charge made against him and the rate in force at the same time between Curtis and Minden. There was a judgment for the plaintiff in a justice's court, and afterwards on appeal in the district court, and the defendant below prosecutes error. The facts as above recited are not in dispute.

Article 5 of chapter 72 of the Compiled Statutes of 1903 is an act entitled "An act to fix a maximum standard of freight charges on railroads, and to prevent unjust discrimination therein, or secret rates, rebates or drawbacks therefor." Approved February 28, 1881. Sess. Laws 1881, c. 68, p. 310. Section 2 of that act is as follows: "No railroad company in this state shall hereafter charge, collect or receive for the transportation of any merchandise or other property upon the railroad owned or operated by such company within the state, a higher rate for such service than was charged by such company for the same or like service on the first day of November, A. D. 1880, as shown by the published rates of such company. And no railroad company shall demand, charge, collect or receive for such transportation for any specific distance a greater sum than it demands, charges, collects or receives for a greater distance." It is contended that this section, if not the whole act, is void, because of duplicity of subjects in the title. In support of this contention, it is argued that the subject of fixing a "maximum standard of freight charges upon railroads" is separate and distinct from that of preventing unjust discrimination, and secret rates, rebates, and drawbacks therein and therefor. We are unable to agree with this view, because, as it seems to us, the prevention of all these latter-mentioned practices is essential to the fixity—that is, maintenance—of any standard whatever. There are, indeed, standards of con-

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duct in plenty, variation from which is permitted and even contemplated; but they cannot properly be called "fixed standards," in the sense of being settled, firm, immovable, in which sense it seems to us evident that the Legislature used the qualifying word in this instance. A standard of freight rates from which transportation companies should be permitted to depart at will, generally or specially, openly or secretly, could hardly be regarded as a real or true standard, in any sense. Counsel for plaintiff in error admit, in argument, that the subjects are so nearly related in nature that they might properly have been united in the title to one bill or act; but they say that the syntactical arrangement of the title in this instance is such as to divide them into two or more distinct classes. If this were true, we should think that the line or lines of discrimination would need to be very clearly and obviously drawn, so as to be apparent without careful scrutiny, in order to defeat an act of the Legislature, of the validity of which every reasonable presumption is to be indulged. A very slight transposition and reconstruction of the sentence suffices, as we understand counsel, to meet their own requirements. Omit the disjunctive "or" and the adverbs "therein" and "therefor," whose auxiliary offices are requisite only for definiteness of expression, and transfer the words "of freight charges on railroads" to the end of the sentence, and the singleness of subject becomes evident. The title will then read: "An act to fix a maximum standard and to prevent unjust discrimination, secret rates, rebates or drawbacks of freight charges on railroads." Surely an important legislative enactment ought not to be annulled for so slight an error, if it is an error, of syntax.

We do not feel called upon to enter upon the inquiry whether the discrimination complained of in this instance was just or unjust, considered solely in the light of the circumstances in which it was made. It is said in some of the decisions that the justice or injustice of freight rates is a judicial rather than a legislative question, and, in the connection in which this utterance has been made, we do not know that it is open to criticism; but it is not to be overlooked that legislative, executive, and judicial functions merge in each other by imperceptible degrees, so that it is often impossible to distinguish clearly between them, and that the exercise of discretion and judgment by the Legislature is indispensable to the framing and enactment of any statute. So long as they keep within their province, the courts are not at liberty to sit in review of their conduct, or decide upon its wisdom or justice. By section 2 of the act above quoted, the Legislature determined that it is unjust for a railroad company to charge for carriage for any specific distance a greater sum than it charges for a greater distance, and absolutely prohibited the practice. We are unable to say that we are better qualified to decide upon this matter than were the members of the two houses, or that, if we were so, there is anything in the nature of the judicial office that confers upon the court jurisdiction to revise the legislative judgment. The objection that in particular cases and classes of cases the

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statute may work injustice is one from which the wisest and most beneficent laws are not exempt, and one which law-makers necessarily consider in weighing the advantages and disadvantages to the general public of any proposed measure. That is their chief and most important duty, and it is because it is so that it is believed that legislation is most safely intrusted to representative bodies, whose members are elected from all classes of the community and from all regions of the state.

It is therefore recommended that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be affirmed.

GENERAL FIRE EXTINGUISHER CO. v. CAROLINA & N. W. RY. CO.

(Supreme Court of North Carolina, Dec. 17, 1904.)

[49 S. E. Rep. 208.]

Carriers of Goods—Negligence—Proximate Cause.—Though a carrier of goods was negligent in failing to forward goods shipped, it is not liable for the loss of the goods by fire, where it was not negligent with respect to the fire, in the absence of evidence that the negligence in failure to forward the goods was the proximate cause of the loss.

Appeal from Superior Court, McKinley County; W. R. Allen, Judge.

Action by the General Fire Extinguisher Company against the Carolina & Northwestern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Plaintiff on March 12, 1902, delivered to the Seaboard Air Line Railway Company at Charlotte a car load of iron piping to be delivered to the Rhods Manufacturing Company at Granite Falls, N. C. The Seaboard Air Line Railway Company issued therefor its bill of lading, "Released," contracting to deliver it to the consignee or to its connecting line at Lincolnton, N. C., to be carried to its destination. The jury, in response to an issue submitted, found that the Seaboard Air Line Railway Company delivered the piping to the defendant company at Lincolnton, being the connecting line between said point and Granite Falls, on March 15th, being Saturday. About one half of the piping was carried to its destination by defendant. The remaining half, while in the defendant's possession awaiting shipment, was destroyed by fire communicated to the car by the defendant's warehouse, which was burned on the morning of March 18th. The delay in forwarding the whole of the piping on the day of its delivery, or Monday following, was caused by the failure of defendant to have

*See foot-note appended to Bibb Broom Corn Co. v. Atchison, T. & S. F. Ry. Co. (Minn.), 14 R. R. R. 407, 37 Am. & Eng. R. Cas., N. S., 407.

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sufficient cars for that purpose. The defendant was at that time a narrow-gauge road. The car containing the piping was on the track of the Seaboard Air Line Railway Company near the warehouse of defendant. It was in evidence that the warehouse was burned about 1 o'clock on the morning of the 18th of March. There was no evidence as to how the fire originated. It was in evidence that, when the fire was discovered, the warehouse was enveloped in flames. No night watchman was kept at the depot. The defendant kept tubs and barrels filled with water at the depot. The people of Lincolnton had no provision for "fighting fire"—depended on buckets of water. The jury, having found that the piping was delivered to defendant company, responded affirmatively to the second issue: "Was the destruction of that part of the shipment of pipe by fire caused by the negligence of the defendant as alleged in the complaint?" The defendant in apt time requested the court, in writing, to instruct the jury: "That if the jury find as a fact, from the evidence, that part of the pipe was destroyed by fire without any fault on the part of the defendant, and that it provided such appliances and equipments for protecting the property in its control and possession from fire as were ordinarily in common use in the town of Lincolnton, and exercised such care over the same as an ordinarily prudent person would have done under similar circumstances, then the jury should answer the second issue 'No.'" The court declined to give the instruction. Defendant excepted. The court, in response to plaintiff's request, instructed the jury on the second issue: "That it is the duty of a common carrier to carry and deliver with reasonable promptness under all circumstances, and if, after defendant had received said shipment or car of pipe from the Seaboard Air Line Railway, it could with reasonable promptness [have] carried the shipment of pipe from Lincolnton to its destination before the fire occurred, it was defendant's duty to do so, and such failure would be negligence, and if this negligence [was the] cause of injury, the second issue should be answered 'Yes.'" "The law imposes upon common carriers the obligation to have and to furnish sufficient facilities for reasonably prompt transportation of goods tendered for carriage, and would be liable for failure to transport promptly, whether the failure is due to a want of facilities or to a capitious refusal to carry; and, if the jury shall find that the failure of defendant to carry and deliver the said car or shipment of pipe to its destination before the said fire occurred was due to the want of sufficient cars to carry the usual and ordinary amount of freight over its road, then defendant was negligent, and this was the cause of the injury, the second issue should be answered 'Yes.'" The defendant excepted. From a judgment for the plaintiff, the defendant excepted.

Osborne, Maxwell & Keerans and *J. H. Marion*, for appellant.
W. F. Harding, for appellee.

CONNOR, J. (after stating the case). In the view which we

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take of the case, it becomes unnecessary to pass upon the defendant's exceptions to his honor's charge upon the first issue. Assuming that, as found by the jury, the piping had been delivered to the defendant company, and that the defendant was in default in not having, as was its duty, a sufficient number of cars to send it within a reasonable time to Granite Falls, we are of the opinion that the defendant was entitled to the instruction asked, and his honor should not have given the instruction asked by the plaintiff. The defendant, by its failure to ship within a reasonable time, became liable for such damages as naturally and proximately resulted from such breach of contract or duty. *Lindley v. R. R. Co.*, 88 N. C. 549. *Pearson, J.*, in *Ashe v. De Rossette*, 50 N. C. 299, 72 Am. Dec. 552, says: "When one violates his contract, he is liable only for such damages as are caused by the breach, or such as, being incidental to the act of omission or commission, as a natural consequence thereof, may reasonably be presumed to have been in contemplation of the parties when the contract was made. This rule of law is well settled, but the difficulty arises in making its application." In that case a quantity of rice was sent to the mill of defendant's intestate pursuant to a contract that it was to be worked in its "turn." The rice was not worked in its turn. The mill with its contents was thereafter burned. In an action on the contract for failure to have the rice beaten in its turn, the plaintiff claimed the value of the rice as the measure of the damage to which he was entitled. This court held that, in the absence of any evidence of negligence in respect to the burning of the mill, he was not entitled to recover the value of the rice. The court said: "There is nothing to show that the contingency that the rice might be burned, if left in the mill, was in the contemplation of the parties. On the contrary, its being burnt was an accident unlooked for and unforeseen, and can in no sense be considered as having been caused by the fact that it was not beat in the turn promised by the defendant's intestate. Consequently the damages were too remote." *Wells v. Wilmington & W. R. R.*, 51 N. C. 49, 72 Am. Dec. 556, in which the principle was applied to a contract of carriage. Upon the second trial of *Ashe v. De Rossette*, supra (53 N. C. 240), the court below submitted the question to the jury to say whether the promise was made in contemplation of the imminent risk from fire, etc., and they so found. This court held that there was no evidence to sustain the finding, saying: "So, notwithstanding the opinion of the jury, as it is a mere matter of opinion, and there is no evidence in regard to it, we are disposed to adhere to the opinion previously expressed by us." In *Whitford v. Foy*, 65 N. C. 265, the case is approved, and the distinction pointed out wherein a bailee misuses the property, or by conduct converts it to his own use, in which case, if the property is lost or destroyed, he is liable for its value without regard to the cause of such loss, in an action of trover under the former system, or for a conversion now. The court says: "But such a rule has never been applied to other contracts, still less to a mere neglect by a trus-

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tee, when no fraud is imputed." In *Sledge v. Reid*, 73 N. C. 440, the principle was applied to the case of a wrongful taking by a sheriff of a mule, the court refusing to give damages for loss of plaintiff's crop. The court cite *Ashe v. De Rosette*, supra, and *Hadly v. Baxendale*, 9 Exch. 341, the leading case on the subject; *Edmondson v. Fort*, 75 N. C. 404; *Foard v. R. R. Co.*, 53 N. C. 235, 78 Am. Dec. 277.

The principle has been frequently applied in other courts to cases against carriers negligently delaying the shipment of freight. In *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695, the defendants, common carriers by water, received the plaintiff's goods for shipment by way of canal. They used a lame horse, and thereby the boat was delayed. When the boat reached the Juniata Division of the canal, it struck an unprecedented flood, and the plaintiff's property was injured. In an action for the negligent delay it was sought to recover the value of the property. The court said that the proximate cause of the disaster was the flood; the fault of having a lame horse was a remote one, which, by concurring with the extraordinary flood, caused the injury. "In any other than a carrier's case, the question would present no difficulty. The general rule is that a man is answerable for the consequences of a fault only so far as the same are natural and proximate, and as may on this account be foreseen by ordinary forecast, and not those which arise from a conjunction of his fault with other circumstances of an extraordinary nature." After discussing the question at some length, the court say: "Now, there is nothing in the policy of the law relating to common carriers that calls for any different rule, as to consequential damages, to be applied to them. They are answerable for the ordinary and proximate consequences of their negligence, and not for those that are remote and extraordinary; and this liability includes all those consequences which may have arisen from the neglect to make provision for those damages which ordinary skill and foresight is bound to anticipate." *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Denny v. N. Y. C. R. R.*, 13 Gray, 481, 74 Am. Dec. 645. The court cites with approval *Morrison v. Davis*, supra, saying: "The defendants failed to exercise due care and diligence, in not being possessed of a sufficient number of efficient working engines to transport the plaintiff's wool with the usual ordinary and reasonable speed. The consequence of this failure on their part was that the wool was detained six days at Syracuse. This was the full and entire effect of their negligence, and for this they are clearly responsible." The property was burned in defendant's warehouse after its arrival at the point of destination. It was held that the defendant was not liable. *Mich. Cent. R. R. Co. v. Burrows*, 33 Mich. 6; *Hoadley v. N. Trans. Co.*, 115 Mass. 305, 15 Am. Rep. 106; *R. R. Co. v. Reeves*, 77 U. S. 176, 19 L. Ed. 909.

The contract with the plaintiff, by which the defendant carried the freight "released," relieved it of its common-law liability as insurer, but not against injury resulting from its own negligence.

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Smith v. R. R., 64 N. C. 235; 6 Cyc. 393. As his honor properly told the jury, the burden was therefore on the plaintiff to show that the piping was destroyed by the negligence of the defendant. Of course, in view of the law, as we have seen, such negligence, if any, referred to the burning of the warehouse—either in respect to the origin of the fire, or the facilities for controlling it. His honor told the jury that the measure of duty in this respect was ordinary care, or the care of the prudent man. There is no suggestion as to the origin of the fire. It may, so far as it appears, have been caused by rats, matches, incendiary, or any other of the unaccountable causes from which human experience teaches it is next to impossible to provide. In regard to keeping a watchman at the depot we are not prepared, in the absence of any evidence that it is usual to do so, to say that it was the duty of defendant to do so. It would seem that, if the defendant used the same precautions used by citizens of Lincolnton, it would discharge its duty. While it is true that this court has, following the Supreme Court of the United States, and probably a majority of the state Supreme Courts, held that, except in very rare and exceptional cases, negligence is a question of fact, and the measure of duty is the conduct of the prudent man, we think that it is still the duty of the judge to explain to the jury the law in the light of the testimony. *Russell v. R. R.*, 118 N. C. 1098, 24 S. E. 512; *Hinshaw v. R. R.*, 118 N. C. 1047, 24 S. E. 426. We have no purpose to question or shake the doctrines as laid down in those and later cases. In the application of the rule the most careful and anxious attention and desire to keep true to the line cannot always secure results satisfactory to minds approaching cases from opposite points of view, and often preconceived mental bias. In this case there was no conflicting evidence. The jury had a full and intelligent description of the conditions, a judge of marked ability and clearness of judgment heard the testimony, and, if there had been no evidence of the way in which owners of property in the same town protected their houses from fire, the jury would have had nothing, save their own experiences and their individual opinions as to what a prudent man would have done in respect to property situated as was the defendant's to protect it from fire, other than the damage incident to the passing of engines. What may have been the duty of the court in instructing the jury in such condition of the evidence is not presented in this case. We are of the opinion that the defendant was entitled to have the jury told that the measure of duty was the care taken by prudent citizens of Lincolnton in that respect of their property. Defendant's exception in that respect must be sustained. His honor should have told the jury that there was no evidence showing that the delay in shipping was the proximate cause of the destruction of the property. The inquiry would thus have been narrowed to the question of negligence in respect to the means provided for "fighting fire." What would have been the liability of the defendant if the freight had been delayed be-

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yond the number of days fixed by the statute it is unnecessary to suggest. We have not considered the exceptions directed to the first issue.

There must be a new trial.

MICHAELS *et al.* v. ADAMS EXP. CO.

(Supreme Court of New Jersey, Dec. 2, 1904.)

[59 Atl. Rep. 142.]

Carriers—Loss by Fire—Directing Verdict.*—A box of merchandise was intrusted to an express company for carriage under a stipulation that in case of loss by fire the carrier should not be held liable unless such fire occurred through its negligence. On the trial of an action for nondelivery of the goods the testimony at the close of the case showed the contract of carriage, and the loss of the goods by fire, but failed to show any negligence of the defendant, either affirmatively or inferentially. Held, that a verdict for the defendant was properly directed by the trial court.

(Syllabus by the Court.)

Action by Aaron J. Michaels and others against the Adams Express Company. Verdict for defendant. Rule to show cause. Denied.

Argued February term, 1904, before GUMMERE, C. J., and DIXON, GARRISON, and SWAYZE, JJ.

Thomas S. Henry, for plaintiffs.

Vredenburg, Wall & Van Winkle, for defendant.

GARRISON, J. The declaration counted upon the nondelivery of a box of merchandise intrusted by the plaintiffs to the defendant as a common carrier. The defendant pleaded specially that the goods of the plaintiffs had been accepted for carriage under a stipulation that the defendant should not be held liable for any loss occurring from fire in any of its stores or depots unless the fire occurred through its negligence. The plaintiff's replication to this plea was a denial of the existence of the contract. At the trial the plaintiffs proved the shipping of the goods, and their destruction by fire in a storehouse of the defendant. The defendant's testimony was to the same effect with more of detail, and in addition it proved the contract set up in its plea. From the testimony of neither party did any negligence on the part of the defendant appear either affirmatively or inferentially. This being the state of the proofs, the trial court, at the conclusion of the case, directed a verdict for the defendant. This ruling was clearly correct, and disposed finally of the case. Mere nondelivery and proof of loss by fire did not make out the case of the

*As to the burden of proving carrier's liability, when such liability is limited, see foot-note appended to *Georgia Southern & F. Ry. Co. v. Johnson, King & Co.* (Ga.), 14 R. R. R. 398, 37 Am. & Eng. R. Cas., N. S., 398.

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plaintiffs, which, in view of the contract of carriage, must rest upon the negligence of the carrier with respect to the loss by fire. Such negligence not appearing in the testimony of either party the defendant was entitled to a judgment for costs against the plaintiffs.

The record contains a plea by which the defendant sets up that before the commencement of the plaintiffs' suit it tendered to the plaintiffs the sum of \$50, and that upon the refusal of the plaintiffs to receive the said \$50 the same was paid into court. A replication admits the tender set up in this plea, and renews the plaintiffs' refusal to accept the sum so tendered. No issue upon this plea appearing on the transcript, the verdict that was directed by the trial court applies solely to the issue joined upon the defendant's other plea, by which the defendant denies all liability by force of the contract set forth in that plea. The situation referred to in *Levan v. Sternfield*, 55 N. J. Law, 45, 25 Atl. 854, is therefore not presented in the present case. The right of the plaintiffs to take this \$50 out of court is not raised by a rule to show cause why a new trial should not be granted. It is the subject of a practice motion. The verdict was properly directed upon the issue that appeared upon the transcript. The plaintiffs' rule is discharged, with costs.

WESNER & WHITE MFG. CO. v. ATLANTIC COAST LINE R. R.

(Supreme Court of South Carolina, March 20, 1905.)

[50 S. E. Rep. 789.]

Carriers—Freight Shipment—Delay in Delivery.*—In an action against a carrier for failure to promptly deliver freight, where special damages are claimed, the complaint must allege that the carrier knew of the use to which the freight was to be put, and that special injury would result from delay, and that it contracted to transport with reference to such damage.

Appeal from Common Pleas Circuit Court of Orangeburg County; Klugh, Judge.

Action by the Wesner & White Manufacturing Company against the Atlantic Coast Line Railroad. From an order refusing a motion to strike out of the complaint certain allegations, defendant appeals. Reversed.

J. T. Barron and Moss & Lide, for appellant.

Bowman & Wannamaker and Jas. F. Izlar, for respondent.

WOODS, J. In this action plaintiff seeks to recover of the defendant railroad company \$1,995 damages for the alleged delay in transporting 270 bundles of wire, and also for the alleged injury caused to the wire during transit. The complaint contains

*See foot-note appended to *Lewark v. Norfolk & S. R. Co.* (N. Car.), 14 R. R. R. 420, 37 Am. & Eng. R. Cas., N. S., 420.

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three separate causes of action. After giving due notice to plaintiff, defendant made a motion before his honor Judge Klugh at his chambers, at Orangeburg, on May 6, 1904, to strike out, as irrelevant and redundant, "so much of paragraph 6 of the second cause of action as alleges that, 'by reason of the damage thereto and the delay in the transportation of said goods by the said carriers and the defendant, the plaintiff was forced to stop or shut its manufacturing enterprise from the 4th to the 20th day of January, A. D. 1904, both inclusive, and to pay five employees or hands for fifteen days at the rate of ninety cents each per day, amounting to the sum of \$67.50; to stop the manufacture of bed springs for the same length of time; to suffer the business of the plaintiff to cease and become disorganized, besides being greatly worried and annoyed by said delay, damage, injury, and inconvenience in said transportation caused as aforesaid.' And also, for the same reason, so much of paragraph 4 of the third cause of action as alleges that 'the business of the plaintiff interrupted the enterprise and manufacture of bed springs stopped, the manufactory of plaintiff compelled to shut down and cease work.'" The motion was refused, and from this ruling defendant appeals.

The judgment of the circuit court will have to be reversed. It is true, the complaint alleges the defendant was "fully cognizant of the fact that the plaintiff's stock of wire was low, and that plaintiff wanted the same at once, and that there was necessity for a hurried shipment." But there is no allegation that the defendant knew whether the goods were for sale, or for plaintiff's own use, or that it had any knowledge of the nature of plaintiff's business, or of the special injury that would result to it by reason of a delayed shipment, and that it contracted to transport the wire with reference to any such special damage. Nor is there any allegation that the plaintiff could not obtain wire from some other source, and that the defendant knew it could not be so obtained. There was nothing, therefore, in the complaint upon which to base the claim of special damages for interruption of plaintiff's business of manufacturing bed springs, and the pay of hands incident to such interruption. The case therefore falls distinctly within the principles stated in *Traywick v. Southern Railway Co.* (recently filed) 50 S. E. 549.

The judgment of this court is that the judgment of the circuit court be reversed.

MAXFIELD v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine, March 13, 1905.)

[60 Atl. Rep. 710.]

Carriage of Passengers—Degree of Care—Standard of Care.*—In the actual transportation of passengers, common carriers are required by public policy and safety to exercise the highest degree of care consistent with the business in which they are engaged. They are required to do all that human care, vigilance, and foresight can do under the circumstances, considering the character and mode of conveyance, to prevent accident to passengers. But the standard recognized by law is that of ordinary care with respect to the exigencies of the particular case, and the "standard by which to determine whether a person has been guilty of negligence is the conduct of a prudent, careful, or diligent man."

Same—Same—Station Platforms.—In view of the great peril involved in the transportation of passengers by steam railways, a very high degree of vigilance, foresight, and skill is required to fill the measure of ordinary care in order to prevent accident and injury. So, with respect to the duty owed to the passenger on the platform of a railway station, the company is required to exercise ordinary care for the protection and safety of a passenger in that situation; but it is obvious that different precautions and safeguards, and a less degree of skill and foresight, may be sufficient to meet the requirements of ordinary care under those circumstances. The correct principle obviously is that in all cases the amount of care bestowed must be equal to the emergency, however the standard may be denominated.

Same—Same—Same.—It is the duty of a railroad company to exercise all ordinary care to maintain its platform in such a reasonably safe and suitable condition that the passengers who are themselves in the exercise of ordinary care can walk over it in safety.

Action by Lizzie M. Maxfield against the Maine Central Railroad Company for personal injuries. Verdict for plaintiff for \$1,158.35. Motion for new trial overruled.

Argued before WISWELL, C. J., and WHITEHOUSE, STROUT, SAVAGE, PEABODY, and SPEAR, JJ.

Scott Wilson and E. L. Bodge, for plaintiff.

Nathan & Henry B. Cleaves, Stephen C. Perry, Wallace H. White, and Seth M. Carter, for defendant.

WHITEHOUSE, J. This was an action to recover damages for personal injury which the plaintiff sustained on the 22d of December, 1902, by slipping on the platform at Newhall station, in the town of Windham, on the Mountain Division of the defendant's railroad, as she was walking from the station door to the cars for the purpose of taking the morning train to Westbrook. It is alleged in her declaration that this platform had negligently been allowed to remain covered with ice in the line of travel from

*As to the degree of care required of passengers, see foot-note appended to *Hart v. Seattle, R. & S. Ry. Co.* (Wash.), 14 R. R. R. 430, 37 Am. & Eng. R. Cas., N. S., 430; *O'Brien v. St. Louis Transit Co.* (Mo.), 14 R. R. R. 413, 37 Am. & Eng. R. Cas., N. S., 413; *Lincoln Traction Co. v. Webb* (Neb.), 14 R. R. R. 369, 37 Am. & Eng. R. Cas., N. S., 369; *Topp v. United Rys. & Electric Co.* (Md.), 14 R. R. R. 248, 37 Am. & Eng. R. Cas., N. S., 248.

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the door of the station to the cars, and had thereby been rendered slippery and dangerous for passengers having occasion to walk over it for the purpose of entering or leaving the car.

It was not in controversy that on the morning in question the plaintiff entered the station, purchased a ticket for the 8 o'clock train from Newhall to Westbrook, and attempted to walk across the platform for the purpose of entering the car, when she slipped upon the platform and fell, severely spraining her ankle. The jury rendered a verdict in her favor for \$1,158.35, and the case comes to this court on the defendant's motion to set the verdict aside as against the evidence.

Upon the question of the defendant's liability, the principal controversy between the parties was one of fact respecting the precise condition of the platform at the time and place of the accident on the morning of December 22d.

It appears from the testimony of the clerk of the weather bureau at Portland that a light snow had fallen there in the afternoon of the day before, changing to rain at 3:16 p. m., and that the rain continued to fall more or less during the night, ceasing at 5:20 on the morning of the 22d. It also appears from this record that the temperature at Portland on Sunday, the 21st, was 15 degrees below the freezing point in the morning—the average during the day—and when the rain began to fall in the afternoon being substantially at the freezing point. On Saturday, the 20th, it was 10 degrees below the freezing point in the morning; the highest during the day being 1 degree above at 2 o'clock in the afternoon. It was 6 below at 8 o'clock in the evening. At 8 o'clock on the morning of the 22d, at the time of the accident, the temperature at Portland appears to have been 11 degrees above the freezing point.

It is contended, however, that this record of the temperature at Portland is by no means conclusive evidence of the temperature at Newhall, 12 miles further inland, and, even if it were, it is insisted that the temperature above shown is not necessarily inconsistent with the contention that the platform of the Newhall station at the time of the accident there was in fact a thin coating of ice, which had formed during the continued cold weather prevailing during the two preceding days. It is further said that the plaintiff's claim on this point is strengthened by uncontradicted testimony in her behalf that prior to the freezing weather of Saturday and Sunday, the 20th and 21st, water had been dripping from a defective or obstructed gutter at the edge of the roof projecting over the platform, and that the mixture of snow and water, colloquially termed "slush," found on the platform that morning, and not wholly removed by the station agent's shovel, tended to conceal the icy and slippery condition previously created and then existing.

On the other hand, the defendant as earnestly contended that there was no ice whatever on the platform at the time of the accident; that an hour before it happened the station agent found about half an inch of slush there, and scraped it off with a large

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shovel, leaving the platform wet, but with only such slush upon it as the shovel failed to reach by reason of the inequalities of the surface. The defendant also claimed that it sufficiently appeared from the plaintiff's own testimony and that of her son that the leaking of the gutter, if any, near the door of the station, could not have caused any coating of ice at the edge of the platform where the plaintiff fell.

Upon this issue of fact the testimony was conflicting. The plaintiff's positive testimony that there was a coating of ice, upon which she slipped and fell, and that no sand or ashes had been sprinkled upon it, is emphatically corroborated by her daughter-in-law, who states that she remembers the difficulty with which they picked their way along in passing from the station door to the cars, although they both wore rubbers over their shoes.

Four other witnesses, apparently disinterested, give clear and unequivocal testimony that there was a coating of ice on the platform, with a little slush or snow and water on top of it. Two of them state that it was icy and slippery, and that they experienced difficulty in walking safely over it.

In behalf of the defendant, four of its employees—the station agent, conductor, brakeman, and carpenter—state positively that while the platform was wet, and in some places partly covered with a little slush, there was no ice upon it. One other witness for the defendant testified that there was not a particle of ice on the platform, and two of them testify that they didn't see any ice, but admit that the platform was slippery. There is no claim on the part of the defendant that the precaution of sprinkling sand or ashes on the platform had been exercised by its agents to prevent passengers from slipping upon it in walking from the door of the station to the cars.

Whether this evidence warranted a finding that there had been a breach of duty on the part of the defendant towards its passengers was a question which was submitted to the jury under instructions to which no exceptions were taken.

It has been seen that at the time of the accident the plaintiff had purchased her ticket for Westbrook, and that the relation of carrier and passenger had been fully established between her and the defendant company. *Rogers v. Steamboat Co.*, 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491. She was then entitled to the care and protection of its servants. But a great variety of terms have been employed by different courts and law writers to express the nature and extent of the obligation due from carriers to passengers under such circumstances. In the actual transportation of passengers, common carriers are required by public policy and safety to exercise the highest degree of care consistent with the business in which they are engaged. They are required to do all that human care, vigilance, and foresight can do under the circumstances, considering the character and mode of conveyance, to prevent accident to passengers. *Libby v. M. C. Railroad Co.*, 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812. But the standard recognized by law is that of ordinary care with respect to the exigen-

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cies of the particular case, and the "standard by which to determine whether a person has been guilty of negligence is the conduct of a prudent, careful, or diligent man." Bigelow on Torts, 261.

In view of the great peril involved in the transportation of passengers by steam railways, a very high degree of vigilance, foresight, and skill is required to fill the measure of ordinary care in order to prevent accident and injury. So, with respect to the duty owed to the passenger on the platform of the railway station, the company is required to exercise ordinary care for the protection and safety of a passenger in that situation; but it is obvious that different precautions and safeguards and a less degree of skill and foresight may be sufficient to meet the requirements of ordinary care under those circumstances. Many courts, however, have used the same phraseology to describe the duties of the carrier to the passenger, whether on the platform or in the cars. In *Knight v. Railroad Co.*, 56 Me. 234, 96 Am. Dec. 449, a through passenger sustained an injury on the wharf while passing from the railway station to the steamboat; and it was held that the defendant railroad company was "bound to exercise the same degree of care in making the wharf safe and convenient for passengers to travel over, which is required of common carriers of passengers," and "that common carriers of passengers are required to exercise the strictest care which is consistent with the reasonable performance of their contract of transportation." See, also, *Tobin v. Railway Co.*, 59 Me. 183, 8 Am. Rep. 415.

In *Jordan v. N. Y., N. H. & H. Railroad Co.*, 165 Mass. 346, 43 N. E. 111, 32 L. R. A. 101, 52 Am. St. Rep. 522, the plaintiff was injured by reason of a defect in the floor of the ladies' toilet room in the station, and in the opinion the court say: "The plaintiff was a passenger, and the defendant owed her the highest degree of care consistent with the proper management of the business in which it was engaged."

But the correct principle appears to have been recognized in *Moreland v. B. & P. Railroad Co.*, 141 Mass. 31, 6 N. E. 225, in which it was held that a railroad corporation is not bound to exercise the same care towards a passenger who is passing through the station grounds on his way from the train to the highway that it is under obligation to exercise while the passenger is on the train. In the opinion the court say: "The degree of care is not fixed solely by the relation of carriers and passengers. It is measured by the consequences which may follow the want of care. A railroad company is held to the highest degree of care in respect to the condition and management of its engines and cars, because negligence in that respect involves extreme peril to passengers, against which they cannot protect themselves. It would not act reasonably if it did not exercise greater care in equipping and running its trains than in regard to the condition of its station grounds."

In 6 Cyc. 608, the rule deduced from the decisions is thus stated: "The care required of the carrier for the protection of

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the passenger on his premises involves reasonable care to provide and maintain safe and adequate station houses, platforms, walks, steps, and landings for the use in waiting for approaching and leaving trains." In Am. & Eng. Enc. of Law, vol. 5, p. 532, the carrier's duty is thus stated: "The rule seems to be that with respect to the station appointments the carrier is bound to exercise ordinary care in view of the dangers to be apprehended."

This reasonable doctrine was also recognized and expounded in a luminous opinion of this court in the recent case of *Bacon v. Steamboat Co.*, 90 Me. 46, 37 Atl. 328. In that case it was held "that the degree of care which the defendant company was bound to exercise for the protection and safety of its passengers upon a wharf occupied by the company was that of reasonable diligence or of common care and prudence." In the opinion the court say: "In all cases the amount of care bestowed must be equal to the emergency, however the standard be denominated. We do not mean to say that the distinction between ordinary and gross negligence or between ordinary and extraordinary care does not still exist, but, in reply to the suggestion made by the plaintiff's counsel that the same degree of care should be exercised by the defendants when wharfingers or tenants of a wharf used in conjunction with their boats as is imposed on them while common carriers of passengers, we do mean to say that we perceive no reason for imposing so extreme an obligation upon the defendants when they have completed their trip and ceased to be longer performing the duties of common carriers; and the authorities do not support any such application of the rule of extraordinary care as is contended for." See *Caven v. Branite Co.*, 99 Me. 278, 59 Atl. 285.

It was the duty then of the defendant company to exercise all ordinary care to maintain the platform in question in such a reasonably safe and suitable condition that passengers who were themselves in the exercise of ordinary care could walk over it in safety. If the plaintiff's contention was correct—that at the time and place of the accident there was a coating of ice on the platform, partly covered with slush—it would not be contended that such a condition was a reasonably safe one for the accommodation of passengers. There was sufficient evidence in behalf of the plaintiff, if accepted as true, to support this contention. That evidence was not in itself so unreasonable or improbable or so overborne by undisputed facts that this court would be warranted in rejecting it as incredible. The evidence being conflicting, it was the province of the jury to decide this controverted question of fact. They evidently accepted the plaintiff's version as correct. They drew their conclusion not simply from the words of the witnesses, but from their manner and bearing as well, and we do not feel justified in declaring that their conclusion was manifestly wrong. The conduct of the plaintiff appears to have been that of reasonably prudent people under like circumstances. There was no want of ordinary care on her part.

Nor are the damages disproportionate to the injury. The

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plaintiff is shown to have had an established business as a canvasser which yielded a net income of \$350 per year. At the time of the trial a year and four months had already elapsed, and she was still unable to walk without crutches. The testimony of the physician tended to show that six months or a year more would be required to complete the recovery, and a "joint injured to that extent almost never gets as well as new." For this loss resulting from her incapacity to resume her vocation, for the expense of medical attendance and nursing, and a reasonable compensation for her suffering, the damages awarded cannot be deemed excessive.

Motion overruled.

LITTLE ROCK TRACTION & ELECTRIC CO. v. WINN.

(Supreme Court of Arkansas, May 27, 1905.)

[87 S. W. Rep. 1025.]

Carriers—Street Railroads—Passengers—Ejection—Exemplary Damages.*—Where a street railway conductor improperly refused to accept plaintiff's transfer because it was too late, and required plaintiff to pay another fare or leave the car, but in doing so the conductor acted in obedience to the rules of the company, as he understood them, and was guilty of no unnecessary rudeness, plaintiff was not entitled to recover exemplary damages.

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by Robert P. Winn against the Little Rock Traction & Electric Company. From a judgment for plaintiff, defendant appeals. Reversed as to allowance of exemplary damages only.

Rose, Hemingway & Rose and *Cantrell & Loughborough*, for appellant.

Dan W. Jones and *Arthur Neill*, for appellee.

RIDDICK, J. This is an appeal from a judgment recovered by the plaintiff, Robert P. Winn, against the Little Rock Traction & Electric Company, for damages which he claimed to have suffered by reason of the fact that a conductor on one of its cars refused to receive a transfer ticket which he presented, and, upon his refusal to pay another fare, compelled him to leave the car. It seems from the testimony that the transfer ticket had been delivered to plaintiff a half hour or so before he presented it for passage. But this was due to no fault of plaintiff, but to the fact that the car on which he presented it had been delayed, and was behind its scheduled time. As it was over 15 minutes old,

*As to the right to recover exemplary or punitive damages for injuries to passenger, see foot-notes appended to *Pickett v. Southern Ry. Co.* (S. Car.), 14 R. R. R. 269, 37 Am. & Eng. R. Cas., N. S., 269; *Yazoo & M. V. R. Co. v. Mattingly* (Miss.), 14 R. R. R. 48, 37 Am. & Eng. R. Cas., N. S., 48.

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the conductor to whom it was presented for passage, acting on what he supposed to be the rules of the company, refused to receive it, whereupon the plaintiff refused to pay another fare, and was required to leave the car. He testified that the night was very cold, and that, by reason of having to stand on the street some time longer, and to walk a part of the way home, his feet were frostbitten, and that he suffered considerably from the effects of such injury. The jury assessed the actual damages at \$100, and also allowed an additional \$100 damages by way of exemplary damages.

After considering the evidence, we are of the opinion that the evidence is sufficient to support the judgment as to actual damages, but there does not appear to be any evidence whatever to support the judgment for exemplary damages. The evidence shows that the conductor acted in obedience to the rules of the company as he understood them. He was guilty of no unnecessary rudeness; only stating to plaintiff that he could not accept the transfer, as it was over 15 minutes old, and that he would have to pay his fare or leave the car. We see nothing in this that entitles plaintiff to exemplary damages.

The judgment is affirmed as to actual damages, but is reversed as to the exemplary damages, and the claim therefor dismissed.

CHICAGO, B. & Q. R. CO. v. TROYEE.

(Supreme Court of Nebraska, May 17, 1905.)

[103 N. W. Rep. 680.]

Passengers—Persons Accompanying Stock—Personal Injuries—Liabilities—Freight Trains—Assumption of Risks—Degree of Care.*—A person traveling on a freight train on a stock shipper's pass or contract, for the purpose of attending to and caring for the live stock being shipped on such train, sustains the relation to the carrier of passenger, but in a restricted and modified sense.

(a) Such a person while so traveling assumes such risks and inconveniences as necessarily attend upon caring for such stock, and such as are incident to the means and methods employed by the company in the operation of its freight trains; and, as thus modified, the liability of the railway company to such shipper for personal injuries by him sustained by reason of the negligence of its employees is that of a carrier for hire.

(b) A shipper thus traveling on a freight train carrying live stock does not assume the risk of negligence by the carrier, but only such dangers as result from his peculiar duties while the railroad is being carefully operated.

(c) In such a case the duty devolves upon the carrier to exercise the highest degree of care, skill, and diligence for the safety of the passenger practically consistent with the efficient use and operation of the mode of transportation adopted.

*See foot-notes appended to *Rowdin v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 672, 36 Am. & Eng. R. Cas., N. S., 672.

As to the degree of care due a person accompanying live stock, see foot-note appended to *Chicago, B. & Q. R. Co. v. Troyer* (Neb.), 9 R. R. R. 797, 32 Am. & Eng. R. Cas., N. S., 797.

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Injury to Person Accompanying Stock—Collision with Engine on Other Track While Walking Towards Car—Negligence—Question for Jury.—In an action for damages for negligence against a railway company for personal injury to a shipper of stock, riding in a freight train, by coming in collision with a moving switch engine in the yards of the defendant company, it is made to appear that the train on which the plaintiff was being carried came into the defendant freight yards about midnight, and that he was required to change way cars before proceeding further on his journey. The way car on which he had been riding was left about 30 car lengths from the place where he was required to take another one. To reach the other way car, the plaintiff and other passengers were required to walk the length of the train between the track on which it stood and another track eight feet distant. The distance between cars or engines on these two adjacent tracks was four feet. While walking along the train and toward its head, where the other way car was supposed to be, a switch engine passed the plaintiff on the adjacent track, going in an opposite direction; and about the time he reached the head of the train, on his way to the other way car, the same switch engine returning, and moving in the same direction, overtook and struck him, inflicting an injury which is sought to be compensating in damages. Held, under the evidence, that the question of the alleged negligence of the company was a matter for the jury to determine under proper instructions of the court, and that the evidence is sufficient to warrant a finding that the defendant company was guilty of actionable negligence which was the proximate cause of the injury complained of.

Contributory Negligence—Question for Jury.—Held, also, that the question of contributory negligence was for the jury and that under the facts and circumstances narrated in the opinion it cannot be said as a matter of law that the plaintiff was guilty of contributory negligence, so as to preclude a recovery on the cause of action stated in his petition.

Instructions.—Error cannot be successfully predicated on the giving of an instruction which is similar in substance to the one requested by the party complaining, and given by the court.

Barnes, J., dissenting.
(Syllabus by the Court.)

On rehearing. Affirmed.

For former opinion, see 97 N. W. 308.

HOLCOMBE, C. J. Plaintiff below, defendant in error, recovered a judgment against the defendant railroad company, plaintiff in error, to secure a reversal of which the company prosecutes this proceeding in error. An opinion has heretofore been handed down, in which the conclusion was reached that the judgment rendered in the district court should be affirmed, and it was accordingly so ordered. 97 N. W. 308. The statement of facts found in that opinion is challenged, and we find it advisable, in order to avoid any possible misconception of our position, to briefly restate what we conceive to be the salient features of the case material to an intelligent discussion of the questions proper to be considered in disposing of the alleged errors relied on to secure a reversal of the judgment below. The plaintiff was a passenger on one of defendant's freight trains carrying live stock, the destination of which was the South Omaha market. At the time of the accident resulting in the injury which is made the basis of plaintiff's right to a recovery, he was traveling on a stock shipper's pass or contract, which permitted the carrying of a

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person on the same train to accompany and attend the stock, if necessary, while in transit. In this instance the plaintiff was shipping a car load of hogs from Aurora to South Omaha, and under his contract was a passenger on the same train, it appearing, however, that little, if any, attention was required in looking after the stock that was being shipped by him. When the train on which plaintiff was riding reached Lincoln, which was near the hour of midnight, the business of the company required a rearrangement of the train from that point on to Omaha, and it became necessary for the plaintiff to leave the caboose or way car, in which he was then riding, and take another one to be attached to the train as made up in the Lincoln yards for its onward trip to South Omaha. This transfer took place near the center of the freightyards of the defendant company, and in the midst of a network of tracks composing the same. The way car on which the plaintiff rode was at the north end of the train as it came into the Lincoln yards, and the one to which he was required to transfer was on the south end of the train as it was being rearranged, and it thus became necessary for him to travel the length of the train, or about 30 car lengths, and in a direction parallel with the tracks, in order to pass from the one way car to the other. While he and a companion were walking between the tracks and by the side of the train on which he had been riding, and just as he came to the southern end of it, and while in the act of turning across the track on which his train was standing, the locomotive having been attached, he was struck by a switch engine on the adjoining track, moving in the same direction he was traveling, and which while going north had passed him on his way to the head of the train to find the other way car. The collision inflicted serious physical injury, for which he brings this action, alleging negligence on the part of the company. It is alleged in the petition, in substance, that when said train stopped in said yards the conductor in charge of the same ordered the plaintiff and other passengers to get out of the way car in which they were riding, and negligently compelled the plaintiff and the other passengers to go into and upon the yards of the defendant company; that the yards were dark, and there was great traffic and bustle, and moving of trains and cars upon the tracks; that neither the conductor nor any of the trainmen assisted or offered to assist the plaintiff to find the car upon which they were to complete the trip, or to reach any place of safety in or near said yards, but, on the contrary, negligently left and abandoned the plaintiff and the other passengers in said yards, well knowing that such negligent abandonment placed the plaintiff and the other passengers in great danger from trains and engines on said track; that, while the plaintiff with the other passengers were seeking their way out of the yards, the servants of the defendant company in charge of and operating a certain locomotive about the business of the defendant, and who were running the said engine along a track nearest to the track whereon stood the train on which the plaintiff was a passenger, negligently ran its engine at a high and

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unnecessary rate of speed, and negligently ran upon and against the plaintiff, and negligently struck the plaintiff with said engine or some projecting part or appliance of the same, and greatly and permanently injured the plaintiff, etc. It appears that the distance between the tracks was approximately eight feet, and, with the overhanging of the cars, there is four feet of space between the cars or engines as they stood or moved along on two parallel adjacent tracks. It thus appears that a position, if maintained, in the space thus existing between the cars on adjoining tracks, would leave a person unexposed to contact by the moving objects on either track; but it is obvious a slight deviation from the center line of this space between the tracks would render a person standing or walking thereon liable to be struck by a moving car or engine being moved up and down the tracks between which such person stood or was walking. With this brief statement of the situation, we will endeavor to note the vital objections argued against the judgment obtained by the plaintiff in the court below.

1. The defendant company contends that its relation to the plaintiff is not that of carrier and passenger, but that the relation existing at the time of the injury was more nearly analogous to that of employer and employee. On the other hand, it is insisted by counsel for plaintiff that he was a passenger in the fullest sense of the word, and that the carrier must respond in damages, under our passenger statute, for all injuries sustained, except such as are occasioned by the criminal negligence of the passenger, or from his violation of some express rule or regulation of the company actually brought home to his notice. Section 10,039, Cobbey's Ann. St. 1903. We are not disposed to accept either of the views thus advanced as being a correct statement of the relations of the parties to each other in the action at bar. At least, we do not find it necessary in this action to base the plaintiff's right of recovery on the broad ground that he was a passenger in the fullest sense of the word, and entitled to the full protection given by statute to passengers, within the meaning of the word as therein used, while being transported by common carriers. The decisions of this and other courts recognize, we think, a well-defined distinction between passengers transported in the ordinary way and those persons traveling, as was the plaintiff, on a freight train for some special purpose connected with the passage thus provided for. In *Omaha & R. V. R. Co. v. Crow*, 47 Neb. 84, 66 N. W. 21, it is held by this court that a shipper of stock who, for the purpose of enabling him to care for the stock in transit, receives a drover's pass, is not, while accompanying his stock, entitled to all the rights and privileges of an ordinary passenger for hire, and that his contract of passage is under the implied conditions that he will submit to whatever inconveniences are necessarily incident to his undertaking. In other words, as we understand the decision, it is that such a passenger traveling upon a freight train is subject to the inconveniences, the methods and appliances that are used and resorted

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to in the operation and movements of freight trains used in the prosecution of the business of traffic in freight commodities, which is the primary object of the operation and running of such trains. Such a person, says the court, is for certain purposes a passenger, but he is not such in the usually unrestricted sense of that term. His contractual right is to proceed on the freight train upon which his stock is shipped from the place of shipment to its destination. His duty is to care for his stock in transit, and his rights and privileges as a passenger are limited by the necessity of traveling on such freight train, and by the requirement that he should care for his stock. In *Mo. Pac. Ry. Co. v. Tietken*, 49 Neb. 130, 68 N. W. 336, 59 Am. St. Rep. 526, it is held that such a person so riding on a freight train carrying his stock "assumes such risks and inconveniences as necessarily attend upon caring for such stock, and, modified accordingly, the liability of the railway company to such shipper for personal injuries by him sustained by reason of the negligence of its employees is that of a common carrier for hire." The rule is restated in the case of *Omaha & R. V. Ry. Co. v. Crow* upon its second appearance in this court. 54 Neb. 747, 47 N. W. 1066, 69 Am. St. Rep. 741. It is also decided in the latter case that such a shipper does not assume the risk of negligence by the carrier, but only such dangers as result from his peculiar duties while the railroad is being carefully operated. Says the court: "He [the passenger] must ride on the train with the animals. He must care for them en route, and in various ways subject himself to perils not incident to ordinary travel. To the extent that such requirements interfere with the operation of the ordinary rules of liability, the duty of the carrier is accordingly modified. * * * The statute fixing the liability of carriers to ordinary passengers is, from the nature of the case, not applicable; but, subject to the different conditions reasonably arising from the special arrangements and duties created by such a contract, the common law as to carriers of passengers applies. The carrier, subject to such modifications, is still bound to the exercise of the highest degree of care of which human foresight is capable, and contributory negligence is a defense." It must, we think, be accepted as the settled doctrine of this jurisdiction that a person with right of passage on a freight train for the purpose of attending to his stock being shipped by the railroad company on such train sustains to the company the relation of passenger to carrier, but in a restricted and modified sense. He is required to perform the duties for which his passage is provided, and for such purposes assumes the risks incident to their performance. In fixing the liability of the carrier, then, regard must be had to the means and methods employed by the company in the operation of its freight trains in the accomplishment of the business for which primarily employed, and the risks and hazards inherent in and necessarily attendant on the carriage of passengers by this method. "From the composition of such a train and the appliances necessarily used in its efficient operation, there cannot,

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in the nature of things, be the same immunity from peril in traveling by freight train as there is by passenger trains, but the same degree of care can be exercised in the operation of each. The result, in respect of the safety of the passenger, may be wholly different, because of the inherent hazards incident to the operation of one train and not to the other; and it is this hazard the passenger assumes in taking a freight train, and not hazard of peril arising from the negligence, or want of proper care, of those in charge of it. Ordinarily, carriers of passengers for hire, while not insurers of absolute safe carriage, are held to the exercise of the highest degree of care, skill, and diligence practically consistent with the efficient use and operation of the mode of transportation adopted." *Chicago & Alton R. R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313; *Olds v. New York, etc., Ry. Co.*, 172 Mass. 73, 51 N. E. 450.

Judged by these tests, and measuring the duties and responsibilities of the parties to the present controversy, it is for us next to consider and determine the question of negligence of the defendant company for the injury complained of, which is relied on as a basis of recovery by the plaintiff.

2. It is contended that the negligence of the plaintiff alone contributed to his injury, and that the evidence fails to show any negligence on the part of the defendant. Whether or not the defendant company is to be held liable because of its alleged negligence in respect of the injury complained of is to be determined by the facts and circumstances surrounding and leading up to the act as a result of which the plaintiff came in collision with the engine of defendant as above stated. As the situation then existed, it became necessary for the plaintiff to find his way from the way car in which he had been riding to the other end of the train, a distance of about 30 car lengths. The fact that the passengers on this train, of whom there were several, were compelled to change from one car to another, and from one part of the yard to another, was, we are warranted in assuming, known to the servants of the defendant company who were operating the engines, moving cars, and making up the trains that were then being arranged in its freightyards. They knew, and must have known, that such a change would lead to more or less confusion and doubt as to the proper and exact place to go, and the particular place where the car would be found in which to continue their journey. It was known that this change must be made by walking some distance between the tracks. There was no well-defined roadway by which passengers could go from the one place to the other. The travel, necessarily, was along and between parallel tracks laid close together, many of which were occupied with moving cars and engines being changed about in the yards. More or less noise and confusion of a bewildering character surrounded those transferring themselves from one car to the other. It can hardly be doubted that the same duty devolved upon the company to guard against injury to its passengers while changing from one way car to the other that

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rested upon it at all times during the journey of the passenger. The passenger, as it occurs to us, had a right to rely on the belief that the company would, with reasonable prudence and caution, operate its trains and engines in such a way as not to unnecessarily endanger those who were of right, and at the company's direction, in a position to be injured by such engines and appliances. The plaintiff, in passing, as he did, towards where he must take the other car, proceeded along the only practicable route that he might travel. He walked down by the side of the train on which he had ridden until he had reached the point where he might reasonably expect to find the way car on which he was to finish his journey, and in the neighborhood of which it was to be attached to the train as it was to proceed to its destination. Before he had left the position between the two tracks where he had been traveling, and while seemingly just in the act of turning to cross the track on which his train was standing, in so doing, it is obvious he deviated in a slight degree from the exact center of the path along which he had been traveling, so as to bring his body within the path of the moving engine on the adjoining track where he was struck by it and injured. It is in evidence that he was thrown a considerable distance. He testifies that he heard nothing of bell or whistle or other warning sound. The engineer on the moving engine saw him a considerable distance in advance—about 100 feet—but, from the position he was then in, the engineer thought he would clear his body by about a foot. Was the engineer justified in taking such chances? Would the company be free from negligence when no effort was made to bring the engine under perfect control so as to pass with safety the plaintiff and his companion, who, by reason of the train on the other side of them, were compelled to occupy a more or less perilous position between the two tracks? The defendant company owed to the plaintiff the duty of exercising the highest degree of care and caution for his personal safety consistent with the convenient and efficient operation of its engines and cars in its freight yard in the proper prosecution of its business. Whether it had discharged this duty under the circumstances was for the determination of the jury under the pleadings and the evidence in support thereof. All the attendant facts and circumstances—the time of night, whether the yards were dark or lighted, the distance necessarily traveled in going from one car to the other, the facilities and opportunities afforded for making the transfer, the location of the tracks with reference to each other, the movements of engines and cars thereon, and the precautions taken to avoid injury to those making such transfer—were matters for the consideration of the jury in determining the question of negligence under proper instructions of the court, and we are of the opinion that the evidence is sufficient to warrant a finding that the defendant company, through its servants, was at the time, under the circumstances shown in evidence, guilty of actionable negligence, and that such negligence was the proximate cause of the injury.

3. It is contended that the plaintiff was guilty of contributory negligence which precludes any recovery on his part. This contention is based almost entirely on the proposition that he failed to use his senses of sight and hearing, and thus allowed himself to be run down, as it were, by the moving engine on the adjoining track. It is contended that, if further warning or knowledge was necessary in order to induce him to be reasonably careful, this was furnished when the engine which struck him passed him going to the north as he was walking by the side of his train toward the south, and to avoid which he pressed closer to his standing train in order to be entirely out of danger from its passing. It is said that he, without looking backward, listening for, or paying any attention to the running of this engine upon the adjoining track after he had observed it running to the north, proceeded on his way to the south, wholly heedless of its further movements on its return, when it ran onto him in the manner complained of. It is also argued that he was negligent not only in failing to listen and look for the engine and to observe its movements, but that in stepping to one side of the center of the path between the tracks where he was walking, so as to come in the path of the projecting portions of the engine, his act was equivalent to stepping between the rails of the track with knowledge, which he is shown to have possessed, that this track was being used by passing engines and cars used in and about the business of the company in its freightyard where the injury occurred. Whether or not the plaintiff is to be charged with contributory negligence precluding a recovery must, we think, be determined by the attending facts and surrounding circumstances, and that the question of negligence on his part is peculiarly one of fact to be determined by the jury. Of course, the duty devolved on the plaintiff to proceed on his way from one car to the other with that degree of care and caution to avoid injury that would be exercised by a man of ordinary prudence and foresight under like circumstances. The caution and prudence that he was required to display must be commensurate with the known dangers surrounding him, and of those which he had reasonable cause to believe to be impending. He was reasonably familiar with the yards, and had prior to this occasion changed way cars in the same way he was then attempting to make the change. The plaintiff, at the time of the injury complained of, was going from one way car to the other, where he had a lawful right to be, and where he found himself in a place of danger, not only on the invitation, but at the direction, of the defendant company. Whether the plaintiff in fact exercised that degree of care and caution required of him was a question for the jury, under the evidence bearing on the subject. It is apparent that he proceeded with all due caution between the tracks, and in a safe position, as he was traveling to the head of the train on which he had been riding. His testimony warrants the inference that he was alert and observant of the movements around him in order to avoid injury to himself. That he did not observe the return

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of the engine as it was running to the south, and going as swiftly as the evidence warrants a jury in finding it was running, cannot, we are satisfied, justify the conclusion that he was guilty of contributory negligence as a matter of law. In respect to the question of his moving his body while standing or walking between the two tracks so as to come within the path of the projecting parts of the engine, it is to be noted that but a slight deviation or swerving from a line marking the middle of the path between the tracks would bring the body of a person so as to come in contact with the overhanging portions of the cars or engines as they were standing or moving on the adjoining tracks. A person in walking between the two tracks, or preparing to turn across one of them, would at times, in all probability, and perhaps unconsciously, swerve his body from the true center line so as to come within the path of the overhanging parts of a car or engine moving on the adjacent track. Under such circumstances we cannot believe that negligence ought, as a matter of law, to be imputed to one who, while thus traveling, permitted himself to depart from the straight and narrow path in so slight a degree, and because of which came in collision with a moving object on the track, the coming of which he was wholly unconscious of. It is to be borne in mind that the plaintiff, in finding his way from one way car to the other, might reasonably assume that the defendant company would not expose him to any danger which, by the exercise of that degree of care and caution required of it to those in its charge as passengers, could be avoided. The plaintiff was required to exercise reasonable care, but at the same time he could rely upon the faithful observance by the employees of the defendant company of such precautionary measures, consistent with the proper prosecution of its business, as would secure to passengers a safe transfer from one car to the other. The principle underlying cases of this kind, and the reasons for the rule, are well stated in the case of *Terry v. Jewett*, 78 N. Y. 344. In discussing the doctrine of the relative duties, rights, and responsibilities of carriers and passengers, the court says: "The rule is well settled that a traveler crossing a railroad track on a public highway is bound to use his eyes and ears to ascertain whether a train is approaching, but this rule has not been held in this state to apply to passengers who are crossing a track at a station to get on a train. There is a difference between the care and caution demanded in crossing a railroad track on a highway and in crossing while at a depot of a railroad company to reach the cars. No absolute rule can be laid down to govern the passenger in the latter case under all circumstances. While a passenger has a right to pass from the depot to the train on which such passenger intends to travel, and the company should furnish reasonable and adequate protection against accident in the enjoyment of this privilege, the passenger is bound to exercise proper care, prudence, and caution in avoiding danger. The degree of care and caution must be governed in all cases by the extent of the peril to be encountered and the circumstances attending the

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exposure." At the request of the defendant, the jury were instructed that if it found from the evidence that the railroad company had been negligent in some or all of the particulars alleged against it, and it also found that the plaintiff himself had been guilty of negligence which caused or helped to produce the injury, then the law is that, if both parties are found to be guilty of negligence, neither one could recover from the other for the injury caused by such negligence, and that in this action the plaintiff could not recover from the railroad company. The jury were also told that in making the transfer from one car to the other the plaintiff was bound to make careful use of his senses of sight and hearing, and to use all the care and caution of an ordinarily cautious and prudent person under such circumstances, commensurate with the dangers of the situation, to protect and save himself from injury or accident, and especially to avoid collision with an engine or cars running on an adjacent track; and that if the jury found that the plaintiff did not exercise such care and caution at or immediately before the time of the collision, then he is not entitled to recover damages from the defendant company. Negligence was properly defined, and these instructions, we think, fairly submitted to the jury the question of the alleged contributory negligence of the plaintiff, and the finding of the jury must, under well-settled principles of remedial law, be regarded as conclusive.

4. Complaint is also made because of the submission to the jury by an instruction of an issue raised by the pleadings of the alleged negligence of the defendant company in the manner of constructing its tracks in the freightyards where the accident happened. It is contended that the petition states no cause of action in this regard, and that the evidence did not justify the submission of such a question to the jury. In the absence of any attack on the pleading, and in view of the theory upon which the parties tried the case, the pleadings must, we think, be held to have presented this issue. We are disposed to the view that, with no other issue of negligence, a verdict under the record as presented in favor of the plaintiff could not be upheld. But the allegation respecting the construction of the tracks has only an incidental bearing upon the negligence charged. The defendant company tendered an issue on this question, and its evidence was elaborate on the proposition that the tracks in the yards were properly constructed. Competent evidence was introduced on both sides in order to maintain the issue. It was spoken of in the instructions in connection with the other alleged acts constituting the negligence charged. The defendant, we are satisfied, was in no wise prejudiced. In fact, instructions were given at the request of the defendant inviting a verdict from the jury upon all questions regarding the negligence charged and all allegations in respect thereof, which were in substance the same as the one given by the court of which complaint is made. The defendant cannot, therefore, predicate error upon the giving of an instruction which is substantially the same as one given at its

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own request. The judgment rendered cannot rightfully be disturbed solely on the ground of the court's submitting to the jury in one of its instructions, in the way it was submitted, the question of the negligence of the defendant because of the manner of constructing its tracks in its freight yards where the injury occurred. Upon an examination of the whole record, we are of the opinion that no substantial error prejudicial to the rights of the defendant is found therein, that the evidence supports the finding of the jury, and that the judgment rendered thereon ought to be affirmed, which is accordingly ordered.

The judgment of affirmance is adhered to.

NEWLIN v. IOWA CENT. RY. CO.

(Supreme Court of Iowa, June, 14, 1905.)

[103 N. W. Rep. 999.]

Carriers—Injuries to Passengers—Contributory Negligence—Dismounting from Moving Train.*—In an action against a railroad for injuries to a passenger claimed to have been caused by starting the train with a jerk after it had come to a stop near plaintiff's destination, evidence held to show that in fact plaintiff attempted to dismount from the train after it started again, and was consequently guilty of contributory negligence.

Appeal from District Court, Monroe County; C. W. Vermillion, Judge.

Action to recover damages for injuries alleged to have been received by being thrown off from the platform of a passenger coach by reason of the sudden starting of the train while plaintiff was attempting to alight therefrom. On the issue raised by a general denial of the allegation of the plaintiff's petition there was a verdict for plaintiff in the sum of \$50, and from a judgment on the verdict the defendant appeals. Reversed.

Geo. W. Seevers and *T. B. Perry*, for appellant.

Hoffman & Jackson and *J. C. Mabry*, for appellee.

MCCLAIN, J. The sole question presented on this appeal is whether the trial court erred in overruling the motion for a new trial on the ground that the verdict was without support in the evidence. The only negligence on the part of the employees of the defendant which plaintiff attempted to establish was alleged negligence in announcing the name of the station prior to a stopping of the train at a place before the station was reached, so

*As to whether it is contributory negligence to alight from a moving train or street car, see foot-notes appended to *Flaherty v. Boston & M. R. R.* (Mass.), 14 R. R. R. 246, 37 Am. & Eng. R. Cas., N. S., 246; foot-notes appended to *Newcomb v. New York Cent., etc., R. Co.* (Mo.), 13 R. R. R. 10, 36 Am. & Eng. R. Cas., N. S., 10; *McDonald v. City Electric Ry. Co.* (Mich.), 12 R. R. R. 436, 35 Am. & Eng. R. Cas., N. S., 436.

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that plaintiff was induced to go out upon the platform of the passenger coach, preparatory to getting off at a place where there was no station platform, and afterwards, without warning to the plaintiff, suddenly starting the train again for the purpose of pulling up to the station platform, by which sudden starting plaintiff was thrown from the platform to the ground, and received the injuries complained of. The testimony of plaintiff tended to show that as the train approached Albia from the north (that being plaintiff's destination) "the train whistled, and then run a piece (I don't know how far; a right smart piece) and stopped, and they commenced getting off." "I got out at the door, and I was either on the second step from the ground, or the last (I don't know which), when they gave a quick jerk, which jerked me loose." He further says that, before the train gave the jerk which caused him to fall, it was at a full stop. He further says that while he was standing on the steps there was a sudden jerk, which threw him out to the side, straight onto the ground; that he didn't "ride the car" any distance after it started, but as the car started he was thrown off, and fell to the ground. Plaintiff further testified that he was rendered unconscious by the fall, and remained unconscious while his wounds were being dressed by a physician. The only witness who testified for the plaintiff with reference to the place where plaintiff fell or was thrown from the train said that he was the night policeman at the station at the time plaintiff was injured; was at the depot when the train came in; that the train stopped before it reached the station, in accordance with its usual custom, north of the clearance point of the Wabash & Iowa Central tracks, which both come into the same station; that the switch stand for these two tracks is about opposite the north end of the station, and that, upon being advised that some one had been thrown from the train, he went to the opposite side of the train from the station, and found plaintiff lying on the ground about 75 or 100 feet north of the switch stand, the point where he was found being 25 or 30 feet south of the point of clearance of the two tracks. It is conclusively shown by half a dozen witnesses, including the conductor, the car inspector, a bus driver, and two passengers, that the train stopped before reaching the clearance point for the two tracks, and that when it was thus stopped the platform of the car from which plaintiff fell was two or three hundred feet north of the clearance point, and therefore more than that distance north of the point where plaintiff fell. These witnesses testify that plaintiff was not jerked off, and did not attempt to get off the platform while the train was stopped north of the clearance point, but that he attempted to get off from the platform and fell when the front part of the train was opposite the station platform. The testimony of these witnesses, as well as that of plaintiff's witness, is wholly inconsistent and irreconcilable with the testimony of the plaintiff that he was attempting to get off the car platform while the train was stopped north of the clearance point, and was caused to fall to the ground by the jerking of

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the train as it started up. If the plaintiff fell while attempting to get off the train after it was in motion, he was plainly guilty of contributory negligence, and there was nothing in the evidence to indicate any excuse for such an action. The place where he was found on the ground unconscious was so far south of the place where he would have fallen, were he jerked off the platform by the starting of the train, that it is impossible to believe his account with reference to being jerked off the platform when the train started.

Without further discussing the details of the evidence, we reach the conclusion that the uncontroverted testimony as to the place where the train stopped and the place where plaintiff was found conclusively negatives the testimony that he was jerked from the train, and proves beyond question that he fell from the train while attempting to dismount after the train was in motion, and therefore shows that he was guilty of contributory negligence.

The court should have sustained the motion to set aside the verdict and grant a new trial, and the judgment is reversed.

HUTCHEIS v. CEDAR RAPIDS & M. C. RY. CO.

(Supreme Court of Iowa, June 7, 1905.)

[103 N. W. Rep. 779.]

Injury to Alighting Passenger—Failure to Let Down Step—Evidence.*—Where plaintiff, a passenger on a street car, in alighting fell by reason of defendant's negligence in failing to let down a folding step, evidence that immediately after plaintiff fell she exclaimed "Yes; let down the step after I fall! was admissible; the declaration being relevant to evidence that the step was let down after plaintiff fell.

Street Car Passengers—Degree of Care.†—A street railway is bound to use extraordinary care and precaution to protect its passengers from injury.

Same—Same—Negligence—Contributory Negligence—Instructions.—In an action against a street railway by a passenger for personal injuries, there was no inconsistency between an instruction that defendant was held to the exercise of extraordinary care and precaution to prevent injury to plaintiff, and that plaintiff was bound to exercise only ordinary care and caution, and an instruction that if plaintiff was not guilty of contributory negligence, and was injured by reason of defendant's negligence, she was entitled to recover.

Contributory Negligence—Burden of Proof—Instructions.—In an action against a street railway by a passenger for personal injuries,

*See foot-notes appended to *Dixon v. Northern Pac. Ry. Co.* (Wash.), 14 R. R. R. 619, 37 Am. & Eng. R. Cas., N. S., 619; *Atlantic, etc., Ry. Co. v. Gardner* (Ga.), 14 R. R. R. 602, 37 Am. & Eng. R. Cas., N. S., 602.

†See foot-notes appended to *Hart v. Seattle R. & S. Ry. Co.* 14 R. R. R. 619, 37 Am. & Eng. R. Cas., N. S., 619; *Atlanta, etc., Ry. Louis Transit Co.* (Mo.), 14 R. R. R. 413, 37 Am. & Eng. R. Cas., N. S., 413; *Lincoln Traction Co. v. Webb* (Neb.), 14 R. R. R. 369, 37 Am. & Eng. R. Cas., N. S., 369; *Topp v. United Rys. & Electric Co.* (Md.), 14 R. R. R. 248, 37 Am. & Eng. R. Cas., N. S., 248.

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an instruction that if the plaintiff failed to use ordinary care, and such failure contributed to the injury, defendant was not liable, and that, as to the issue of plaintiff's contributory negligence, the burden of proof was on her to establish by a preponderance of the evidence that she was in the exercise of ordinary care and caution, was not misleading as to the burden with reference to contributory negligence.

Damages—Instructions.—While, in personal injury actions, present worth, rather than the aggregate of future damage, should be estimated yet where no specific instruction as to present worth is asked, the jury may be directed as to the general basis on which the right to recover is founded, and allowed to fix such sum as, in their judgment, is reasonable.

Recovery by Husband for Injury to Wife—Measure of Damages.†—A husband can recover for injuries to his wife such compensation as the jury deem a money equivalent for the loss of such services, assistance, companionship, and society as he has been deprived of by the injury.

Same—Damages—Set-Off—Wife's Earnings.—If a wife, after receiving personal injuries, should be able to earn money in an independent business, such earnings would be no set-off to the damages which her husband might have recovered, or which she may recover under an assignment from him of his right of action, for damages for deprivation of her services, and for expenses incurred for medical attendance, etc.

Action by Husband for Injury to Wife—Assignment of Right of Action—Damages—Services.—In an action for personal injuries, plaintiff could recover, under an assignment to her by her husband of his right of action for damages for deprivation of her services, only the value of the services of which he had been or in the future might be deprived by reason of the injury.

Appeal from Superior Court of Cedar Rapids; James H. Rothrock, Judge.

Action to recover damages for personal injuries alleged to have resulted from falling or being thrown to the pavement in attempting to alight from a street car operated by the defendant company. Verdict and judgment for plaintiff for \$2,000. Defendant appeals. Affirmed.

Chas. A. Clark & Son and Wm. G. Clark, for appellant.
Rickel, Crocker & Tourtellot, for appellee.

McCLAIN, J. Between 9:30 and 10 o'clock p. m., plaintiff, together with her daughter and son-in-law, was a passenger on one of the open or summer cars of defendant, running from the eastern part of the city of Cedar Rapids along the First avenue westward, across the bridge over the Cedar river to the western part of the city. The cars of this kind were provided with a step on each side, extending the full length of the car, by means of which the passengers entered and left the seats, which extended crosswise the full width of the car. For the purpose of enabling the car to cross the bridge occupied by double tracks of the defendant company, the step on the side of the car from which passengers should properly leave the car was so constructed that while crossing the bridge it could be folded up against the side

†See foot-note appended to *Smith v. Lehigh Valley R. Co.* (N. J.), 11 R. R. R. 746, 34 Am. & Eng. R. Cas., N. S., 746.

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of the car, so as not to strike the trestlework of the bridge. These cars are also provided with a bar or hand rail that is let down on the side of the car next to the trestlework of the bridge, so as to prevent passengers leaning out and coming in contact with the bridge. This bar is let down to about the middle of the car while it is crossing the bridge, and is immediately raised after the bridge is crossed. When the car on which plaintiff was riding reached the west end of the bridge, the bar was raised by the employees, and the car was stopped at the first street crossing west; and plaintiff, who was sitting on the right hand side of the car, attempted to alight, but fell to the pavement, as it is alleged, because the step, which had been folded up while the car was crossing the bridge, had not yet been let down so that it could be used by plaintiff in alighting. There was evidence tending to show the state of facts here described, and there is no question as to the sufficiency of the evidence to establish the negligence of the defendant in not having the step in proper position to enable the passengers to alight with safety, nor as to the evidence showing freedom from contributory negligence on the part of plaintiff. The verdict of the jury is conclusive as to defendant's liability, unless it may be for errors of law claimed by appellant to have been committed by the court.

1. Plaintiff's witnesses were allowed, over defendant's objection, to testify that after plaintiff fell, she exclaimed, "Yes; let the step down after I fall!" this declaration being relevant to similar evidence tending to show that the step was let down after plaintiff fell, and not, as it should have been, at the time when the bar was raised, after the car left the bridge, and before it stopped at the street crossing. The objection to the admission of proof of this declaration is that it could not be shown as a part of the *res gestæ*. Under recent decisions of this court, proof of the declaration was admissible. It was made immediately after the accident, with reference to the cause of the fall, without opportunity for premeditation. Without elaboration, it is sufficient to refer to *Rothrock v. Cedar Rapids (Iowa)* 103 N. W. 475; *Alsever v. Minneapolis & St. L. R. Co.*, 115 Iowa, 338, 88 N. W. 841, 56 L. R. A. 748; *Keyes v. Cedar Falls*, 107 Iowa, 510, 78 N. W. 227.

2. The court instructed the jury that: "The defendant is what is known as a common carrier of passengers, and it is defendant's duty, by itself and its employees, to use extraordinary care and precaution to protect its passengers from injury. Therefore, in determining whether the defendant, by its employees, was guilty of negligence which caused the accident to the plaintiff, you should hold it to the exercise of extraordinary care and caution to prevent injury to her. But in determining whether the plaintiff was guilty of negligence which contributed to the accident, you should hold her only to the exercise of ordinary care and caution." In the next instruction the court told the jury that: "If you find from a preponderance of the evidence that the plaintiff was a passenger on one of defendant's cars, and that she

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attempted to alight therefrom, but that by reason of the negligence of defendant's employees, or one of them, the step along the side of the car had not been let down so that she could step upon the same, and that, by reason of said step not being so let down, she fell to the pavement and was injured," and that she was not guilty of contributory negligence, then their verdict should be for the plaintiff; otherwise for the defendant. It is now contended for appellant that, while the last instruction quoted was correct, the first was erroneous, in requiring of defendant's employees extraordinary care and caution, and that the two instructions are inconsistent. Counsel do not claim that the carrier of passengers is not bound to exercise a very high degree of care and foresight for the safety of the passengers, but they contend that, after all, the care and caution thus required is only reasonable care under the circumstances, and therefore that it was erroneous to instruct as to extraordinary care. It is true that the courts now generally discourage the classification of negligence into slight, ordinary, and gross, and the corresponding recognition of degrees of care. "The expression 'extraordinary care,' in the view of some courts, means no more than that the carrier should use reasonable care, and that this reasonable care is a relative term, having reference to the duties which the carrier has undertaken, and to the risks incident to the business." 3 Thompson, Negligence, § 2746. But we are not referred to any authority in this state or elsewhere in which it has been held error to instruct the jury that the carrier of passengers is bound to use extraordinary care and caution for the safety of the passenger, and we think that the expression in the instruction given is no more than equivalent to the rule well recognized in this state, and, indeed, universally in the American courts, that the carrier should use the highest degree of care that is reasonably consistent with the practical conduct of the business. *Pershing v. Chicago, B. & Q. R. Co.*, 71 Iowa, 561, 32 N. W. 488; *Bonce v. Dubuque Street R. Co.*, 53 Iowa, 278, 5 N. W. 177, 36 Am. St. Rep. 221; *Root v. Des Moines City R. Co.*, 113 Iowa, 675, 83 N. W. 904; 3 Thompson, Negligence, § 2722 et seq. There is no inconsistency between the two instructions, for the first one defines what will constitute negligence of a carrier of passengers, and the second states that if, by reason of such negligence, the plaintiff is injured, she is entitled to recover.

3. An instruction as to contributory negligence is complained of because the jury are directed that if they find that plaintiff failed to use ordinary care, and that her failure to do so in any degree contributed to her injury, their verdict should be for the defendant. The argument is that this language throws the burden of proving contributory negligence upon the defendant. But in the same instruction the jury are expressly told that as, to the issue of plaintiff's contributory negligence, the burden of proof is upon her to establish by a preponderance of the evidence that she was in the exercise of ordinary care and caution, and not guilty of negligence which contributed to her injuries. Taking

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the whole instruction together, the jury could not have been misled as to the burden with reference to contributory negligence, and could not have failed to understand that, unless plaintiff established by a preponderance of evidence her freedom from negligence, she was not entitled to recover.

4. Plaintiff alleged and proved an assignment to her from her husband, prior to the institution of the action, of his right to recover for injuries suffered by him by being deprived of his wife's services, and for expenses incurred or to be incurred for medical and surgical attendance, nursing, care, etc. But it is urged that the court erred in its instructions to the jury as to the measure of plaintiff's recovery under this assignment. The jury were instructed to allow on this ground "such reasonable sum as you may find from the evidence to be the reasonable value of such services as he will lose in the future because of his wife's injuries." The objections argued to this and similar instructions seem to be (1) that the jury were not limited to the present value of the future services; (2) that the jury were not limited to the real value, but were allowed to take into account the peculiar value to the husband of the wife's services, without allegation of any special damage; and (3) that the future earning capacity of the wife was not referred to as proper to be considered in mitigation of such damages. While it is true that, in a proper case, present worth, rather than the aggregate amount of future damage, should be estimated, we have repeatedly approved of general instructions allowing the recovery of damages to be suffered in the future, without specific instructions as to present worth, where no such instruction has been asked; and we have said that "in such cases the best that can be done is to direct the jury as to the general basis on which the right to recover is founded, and allow them to fix such sum as, in their judgment, is reasonable." *Gregory v. Wabash R. Co.* (Iowa) 101 N. W. 761. And see *Lowe v. Chicago, St. P., M. & O. R. Co.*, 89 Iowa, 420, 56 N. W. 519; *Spaulding v. Chicago, K. C. & St. P. R. Co.*, 98 Iowa, 205, 219, 67 N. W. 227. If it is the contention of counsel that the husband's right of recovery is limited to the expense of hiring a domestic servant to do the household work which the wife was in the habit of doing before the injury, then we have to say that no such rule has been recognized in this state. In giving damages to the husband for injuries to his wife, the law does not compute his recovery on a commercial basis, but gives him such compensation as, in the judgment of the jury, is a money equivalent for the loss of such services, assistance, companionship, and society as he has been deprived of by the injury. *Denver Consolidated Tramway Co. v. Riley*, 14 Colo. App. 132, 59 Pac. 476; *Denver & Rio Grande R. Co. v. Gunning* (Colo. Sup.) 80 Pac. 727; *Cooley, Torts* (2d Ed.) 266. We cannot see what bearing the question as to the future possible money earnings of the wife could have on the right of the husband's recovery for injuries to the wife, which right was assigned to the plaintiff. If she should be able in the future to earn money in an independent business,

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such earnings would not belong to the husband, and would be no offset to the damages which the husband might have recovered, or which the wife may recover under the assignment from the husband. *Mewhirter v. Hatten*, 42 Iowa, 888, 20 Am. Rep. 618; *Fleming v. Shenandoah*, 67 Iowa, 505, 25 N. W. 752, 56 Am. Rep. 354; *Hall v. Town of Manson*, 90 Iowa, 593, 58 N. W. 881. The wife, under the assignment, is entitled to recover only the value of the services of which the husband has been deprived, or may be deprived of in the future, by reason of the injury complained of; but there is no reason to think that, under the instructions and the evidence, the jury allowed any sum of damages beyond that which the plaintiff was entitled to recover on this ground.

Finding no error in the record, the judgment of the lower court is affirmed.

ALABAMA & V. RY. CO. v. JONES.

(Supreme Court of Mississippi, June 5, 1905.)

[38 So. Rep. 545.]

Passengers—Invitation to Alight.—Where a flagman of a passenger train said, "This door," to a passenger, as he started to alight after the train had started, such statement was merely a declaration to the passenger as to the door by which he should leave the car, and not an invitation for him to alight.

Same—Contributory Negligence—Alighting from Moving Car.*—Where, after a train on which plaintiff was a passenger had started to move east from a station, plaintiff got off on the south side, clinging to the hand rail with his right hand, and was thereby jerked down onto the platform of the station and dragged backward until his grip on the hand rail was loosened, he was guilty of contributory negligence, as a matter of law, precluding a recovery for injuries so sustained.

Appeal from Circuit Court, Scott County; Jno. R. Enochs, Judge.

Action by Jeff Jones against the Alabama & Vicksburg Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

McVillie & Thompson, for appellant.

Green & Green, for appellee.

Cox, Special Judge. Jeff Jones, an aged negro, was a passenger on one of the defendant's passenger trains from Jackson to Morton. Arriving at Morton in the night, he either fell or was jerked down upon the depot platform as he attempted to alight,

*As to whether it is contributory negligence to alight from a moving train or street car, see foot-note appended to *Flaherty v. Boston & M. R. R.* (Mass.), 14 R. R. R. 246, 37 Am. & Eng. R. Cas., N. S., 246; foot-notes appended to *Newcomb v. New York Cent., etc., R. Co.* (Mo.), 13 R. R. 10, 36 Am. & Eng. R. Cas., N. S., 10; *McDonald v. City Electric Ry. Co.* (Mich.), 12 R. R. R. 436, 35 Am. & Eng. R. Cas., N. S., 436.

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and thereby sustained certain injuries, for which he brought suit and recovered judgment. In his declaration he alleges that defendant so negligently operated its said train as that it did not stop to permit plaintiff and other passengers to get off, or, if stopped at all, which plaintiff denies, said train was so negligently operated as that a reasonable time was not afforded plaintiff and other passengers thereon to get off before the said train was again negligently set in motion by the defendant; that plaintiff, when he reached the platform of said car, was unable to see and appreciate how fast the train was running, as the said platform was negligently without light, and the darkness of the night, together with the blinding effect of coming out of the lighted car, and the plaintiff's inexperience with moving trains under such circumstances, prevented an appreciation of the danger in getting off the train under the circumstances; that then and there the brakeman or porter, defendant's servant, whose duty it was to give direction to passengers as to getting off and on said train, then and there, with knowledge of the danger to which he was exposing plaintiff, negligently directed and commanded plaintiff to get off of said train while in motion, and relying upon the superior knowledge of the said servant of the risk of such action, and then he would not (being charged with plaintiff's safety) direct plaintiff to get off said train unless it was safe to do so, and in ignorance of the danger attendant thereon, especially for persons like plaintiff, having no experience in getting off moving trains, plaintiff obeyed said directions and command, and, taking all precautions then known to plaintiff in pursuance of said direction and command, plaintiff attempted to get off of said train while in motion. The declaration further alleges, in substance, that plaintiff, acting upon the command of defendant's servant in attempting to get off while the train was in motion, caught hold of the hand rail of the steps of said car to get off, and, not being informed by defendant's servant that the effect of so doing would be to drag plaintiff along with said car, was then and there dragged along by said train 100 feet, the servant of defendant whose negligence had caused plaintiff to attempt to get off standing then and there and seeing plaintiff's danger, and, with the appliances at hand to signal the engineer to stop the train, failed so to do, but allowed the engineer to continue to increase the speed of the train until plaintiff was no longer able to hold on, and was then and there hurled by the rapidly moving train with great violence upon the ground.

This declaration could not possibly have been sustained against a demurrer on the ground of contributory negligence, except for the averment that plaintiff attempted to get off the moving train in obedience to the direction and command of defendant's servant. Upon the trial it was evident that the train came to a full stop, and remained standing for an interval variously estimated by the witnesses at from one to five minutes, though guessed by several witnesses, while the watch was held, at a quarter of a minute. The conductor had time to walk a car length from the ladies' car

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to the baggage car, and the porter had time to go from the car for negroes to the baggage car, take off two pieces of baggage and put on one, and signal the conductor, "All right," before the train moved. When plaintiff got to the platform of the car, the train was in motion. It was dark. He did not know how fast the train was going, but he knew it was in motion. His companion just ahead of him jumped or stepped off. He went down to the last step with a small grip in his left hand, and, clutching the hand rail with his right, attempted to get off on the depot platform. He either stepped, fell, or was jerked from the step, and was dragged with his back to the engine a short distance by the train, until defendant's porter, seeing he was being dragged, shouted to him to turn loose, and got hold of him and pulled him out. There is nothing in the evidence to sustain the allegation that a servant of defendant directed and commanded plaintiff to get off the train while in motion. True it is that plaintiff said he was invited off the train by the flagman, but, in response to the question, "What did he say to you?" he responded, "He said, 'This door.'" This clearly was a direction to plaintiff as to which door to leave the car by, and not an invitation to step off the train. The train was moving east. He got off on the south side, and, clinging to the hand rail with his right hand as he stepped or fell, this inevitably jerked him down backward, and caused him to be dragged backward until his grip upon the hand rail was loosed. We see nothing in the facts of this case which tends to acquit plaintiff of negligence in getting off the train at the time in the manner and under the circumstances shown, and that such negligence contributed proximately to his injury is certain.

Reversed and remanded.

CHICAGO, R. I. & P. RY. CO. v. KERR.

(Supreme Court of Nebraska, June 8, 1905.)

[104 N. W. Rep. 49.]

Pleading—Objections on Appeal—Aided by Answer—Railroads—Ejection of Passengers.—Where a petition is for the first time assailed in this court because of its alleged failure to state a cause of action, its allegations will receive a liberal construction, with a view of giving effect to the pleader's purpose, and, if possible, sustaining the petition.

(a) A reviewing court will not only liberally construe a petition thus assailed, in order to uphold it if possible, but will view it in the light of the entire record; and where, from the nature of the answer and the testimony adduced, it appears that both parties have placed the same construction on such petition, this court will not ignore such construction in ruling on the sufficiency of the petition, even though the petition, standing alone, might not admit of such construction.

(b) A defective or ambiguous petition may be aided and its infirmities cured by averments in the answer. *Beebe v. Latimer*, 80 N. W. 904, 59 Neb. 305.

(c) The petition in the case at bar examined, and, when construed

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in the light of the entire record and under the rules above mentioned, held to state a cause of action, and sufficient to support a judgment in plaintiff's favor.

Same—Acts of Servant—Evidence.*—The master is liable for the acts of his servant within the general scope of his employment while about his master's business, though the act be negligent, wanton, willful, or malicious.

(a) Evidence examined, and held sufficient to support a verdict in the plaintiff's favor, and to show that the acts done by the servant which are complained of were within the general scope of his employment and authority, and in furtherance of the business and interests of his master.

(Syllabus by the Court.)

Error to District Court, Douglas County; Slabaugh, Judge.

Action by Alexander D. Kerr, by Celestia Kerr, his guardian, against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

M. A. Low, W. F. Evans, and Woolworth & McHugh, for plaintiff in error.

McCoy & Olmstead, for defendant in error.

HOLCOMB, C. J. The plaintiff (defendant in error) obtained a judgment in the court below for damages for personal injuries alleged to have been sustained by reason of the negligence of the servant of the defendant railroad company (plaintiff in error), and it is sought by this action to secure a reversal of such judgment. The action is grounded on alleged negligence of the conductor of the defendant company while ejecting the plaintiff, a boy about 16 years of age, who was a trespasser on a moving freight train, and in so doing, as is alleged, throwing the plaintiff under the wheel of one of the cars, thereby causing the crushing of one of his lower limbs near the ankle, rendering amputation necessary. It is contended here on the part of the defendant that the judgment cannot be upheld, for the reason that the petition states no cause of action against the defendant, and that under the pleadings the defendant was entitled to a judgment in the court below. It is further contended that under the evidence the company is not liable to the plaintiff for the injury received by him; the conductor's interference, if any, being as contended for, not for the purpose of putting the plaintiff off the train, or of resisting his attempt to board the train, and therefore it was not within the scope of the conductor's employment, and hence the company is not legally liable therefor. The petition, among other things, alleges: "The said Alexander Dundy Kerr [the plaintiff] was in the said town or city of Neola, and, while the said freight train was at said town or city of Neola, wishing to return to his home in said city of Omaha, and without having paid or offering to pay any fare, but peaceably and with the

*See foot-note appended to *Waler v. Great Northern Ry. Co.* (S. Dak.), 14 R. R. R. 819, 37 Am. & Eng. R. Cas., N. S., 819; foot-note appended to *Daniel v. Atlantic Coast Line R. Co.* (N. Car.), 14 R. R. R. 334, 37 Am. & Eng. R. Cas., N. S., 334; *Alabama & V. R. Co. v. Livingston* (Miss.), 13 R. R. R. 464, 36 Am. & Eng. R. Cas., N. S., 464.

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knowledge of the conductor thereon, became a rider on said freight train, in a position thereon on the south side of said train, wholly outside of the wheels of the cars, and south of the south rail of the roadbed, and in a position of safety from harm or injury to the plaintiff while the train was in motion, as was well known to said conductor, unless there was an injury to the train, or the plaintiff was forcibly ejected, or compelled to alight therefrom while the train was running at high speed; and said position of the plaintiff was beneath and in the middle, but at the very side, of the car on which he placed himself, and from which he could and did remove himself without any necessity or possibility of contact with the rail of the roadbed or wheels of the car, and the position of the plaintiff under the car was such that his presence there was and could be no impediment of or interference with the management and further operation of the train on its westward journey. But after said train was in motion, and while it was going on its way as aforesaid, at a slow rate of speed, the said conductor, who was a car length or more in front of the plaintiff (and no other employee of the defendant was near or in sight), in performance of his duty, but in a gruff or angry tone of voice, ordered the plaintiff to get off and keep off of said train, and at the same time, in performing his duty, said conductor proceeded to and did alight from the car on which he (said conductor) was riding, and walked or ran backwards on the ground at the side of the train toward the place where the plaintiff was riding, with the apparent purpose of ejecting plaintiff from the train, and of keeping or preventing him from getting on the train again. The plaintiff heard the said order of said conductor, and, intending to obey it in all respects, proceeded at once to alight from the train upon the ground, which he did in proper, upright position, with his feet upon the ground, entirely outside of the car and train, and with face forward, and the plaintiff was then in a position and place of absolute safety to himself, and would not have received any injuries to his person about or upon defendant's railway, except for the following facts: The plaintiff, the moment after alighting from said train, and before he had an opportunity or was able to turn and peaceably to leave the side of the train and to leave the railway of the defendant, as he intended to do, came full into the arms of said conductor, and said conductor, in the continued performance of his duty to the defendant, then and there, willfully, wantonly, negligently, and with a total disregard for the safety of the plaintiff, and of his duty to avoid doing any injury to him, grasped with his hands the arms and shoulders of the plaintiff, and proceeded violently and negligently to shake the plaintiff, who was small of size, and to swing him about and off of the ground, so that, and wholly because thereof, without any fault on the part of the plaintiff, said conductor did in such performance of his duty, willfully, wantonly, and negligently, cause the right leg of the plaintiff to be thrown over and across the south rail of defendant's railway, and beneath the wheel or wheels of said train thereon, and to be run over and

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crushed a little above the ankle by the wheels of said train, and the leg of the plaintiff was thereby so badly mangled as to render necessary, in order to save the life of plaintiff, the amputation of said leg, as was done, about midway between the ankle and the knee." The answer, while admitting that the plaintiff received certain injuries, denies that the said injuries, or either or any of them, were caused or were the result of any carelessness or negligence on the part of the defendant, or of any of its servants, agents, or employees. It is further alleged in the answer "that all of the said injuries were caused by and were the result of the plaintiff's own carelessness and negligence and unlawful conduct; that the said plaintiff was at the time of receiving said injuries wrongfully, negligently, and unlawfully and without the permission or consent of the defendant, trespassing upon the property of the defendant; that at said time he negligently, wrongfully, and unlawfully boarded one of the freight trains of the said defendant, and got upon one of the freight cars of said defendant in said train, under the floor thereof, while the said car and train were in motion, without the knowledge or consent of the defendant, and for the purpose of riding thereon without paying or attempting to pay or intending to pay the fare for riding thereon; that said position was an exceedingly dangerous one, and that plaintiff well knew at said time that the said position which he took under said car on said train was an exceedingly dangerous one, and that he had no right to get on or remain upon said car at said place or time, or any other place or time; that, while negligently and wrongfully riding upon said car, under the floor thereof, plaintiff negligently and without the exercise of any care or caution alighted from said car and train while the said car and train were in motion; and that, by reason of said negligence and carelessness and unlawful and wrongful conduct, the plaintiff received the injuries in question." The reply is a general denial.

1. With reference to the contention that the petition does not state a cause of action, it occurs to us that both parties to the controversy have at all times during the progress of the trial in the lower court regarded the pleading as sufficient. The defendant company has given the petition such a construction as required it to answer and defend in the action, and it would seem that this court ought not now to construe the petition as not stating a cause of action, unless, under a liberal construction of all of its allegations, aided, if it is, by the allegations of the answer, with the view of sustaining it if possible, the conclusion is irresistible that it is defective in substance, and that no cause of action against the defendant has been stated. The nearest the defendant has approached to a challenge of the sufficiency of the petition, or of the evidence in support of its allegations, was when, at the close of the submission of plaintiff's evidence at the trial, the defendant asked for a peremptory instruction to the jury to return a verdict in its favor on the ground that the testimony introduced in accordance with the averments of the

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petition affirmatively establishes the fact that the acts complained of were acts done by the conductor not in the performance of his duty to the master, and not within the scope of his employment, and are acts for which he himself is liable. The motion can be regarded only as a demurrer to the evidence introduced by the plaintiff in support of the cause of action set forth in his petition. The rule in this jurisdiction is that, where an objection to a petition on the ground that it does not state a cause of action is not interposed till after the trial of the case, the pleadings will be liberally construed, and, if possible, sustained. *Chicago, B. & Q. R. Co. v. Spirk*, 51 Neb. 167, 70 N. W. 926; *Spirk v. C., B. & Q. R. Co.*, 57 Neb. 565, 78 N. W. 272. Against an objection at the inception of a trial to the introduction of any evidence, on the ground that the petition does not state a cause of action, the pleadings attacked will be liberally construed, and, if possible, sustained. *Norfolk B. S. Co. v. Hight*, 56 Neb. 162, 76 N. W. 566. The petition which is attacked for the first time in the Supreme Court on the ground that it does not state a cause of action will be liberally construed. *Omaha National Bank v. Kiper*, 60 Neb. 33, 82 N. W. 102. In the opinion it is said: "The petition was not assailed in the trial court, and the rule is that it should now receive a liberal construction, with the view of giving effect to the pleader's purpose."

Counsel's argument directed to the alleged failure of the petition to state a cause of action is predicated on the averments found therein, wherein it is stated: "The plaintiff heard the said order of said conductor, and, intending to obey it in all respects, proceeded at once to alight from the train upon the ground, which he did in proper, upright position, with his feet upon the ground, entirely outside of the car and train, and with face forward; and the plaintiff was then in a position and place of absolute safety to himself," etc. These allegations, it is urged, negative any possibility of liability on the part of the company for the injuries which were received by Kerr, because the conductor had no duty to perform in removing the plaintiff from the train, nor in preventing him from boarding it. The petition, as drawn, it is asserted, presents a case where a person standing opposite a train, not boarding it or attempting to board it, is assaulted by the conductor. It is conceded that if the conductor should injure a person by the use of unnecessary force in taking him from a train, or in resisting his attempt to board the train, the company could be held liable for his acts; but in this case, it is urged, there is presented simply the question of a servant going outside of his employment to assault a person. This view seems to us to be hardly justified by the pleadings. It omits consideration of an essential element which seems to be fairly, even though somewhat obscurely, stated, wherein it is averred that the plaintiff, the moment after alighting from said train, and before he had an opportunity to depart therefrom, or was able to turn and peaceably leave the side of the train, and to leave the railway of the defendant, came full into the arms of said con-

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ductor, and said conductor, in the continued performance of his duty to the defendant, then and there, willfully, wantonly, negligently, etc., committed the acts complained of. Manifestly the purpose of the pleader was to allege facts showing that the plaintiff was not guilty of contributory negligence producing or contributing to produce the injury he suffered, and that his position was such as to avoid injury to himself by his own acts in leaving the railway train, but that while he was thus in the act of removing himself from the train in obedience to the command of the conductor, and after he had gotten to a place of comparative safety to himself in his effort to extricate himself from the car under which he was riding, he was seized by the conductor for the purpose of ejecting him from the train and from the right of way, and of keeping him therefrom, and in doing so there was inflicted the personal injury for which a recovery is sought. This construction seems to have been given to the pleadings by the parties to the controversy, and we are disposed to hold, in view of the rule of liberal construction to which reference has been made, that the petition, when thus construed, states facts disclosing the liability of the master for the acts of the servant, and will support a judgment in the plaintiff's favor. Related to the rule of construction just considered is another, which is expressed in *Fire Ins. Co. v. Building & Loan Ass'n*, 63 Neb. 698, 88 N. W. 863, where it is held that, "where a petition is assailed for the first time by a demurrer *ore tenus* interposed at the close of the testimony, it will be construed liberally and in the light of the entire record, and where, from the nature of the answer and the testimony adduced, it appears that both parties have placed the same construction on a petition, the court should not ignore construction in passing on such demurrer, even though the petition, standing alone, might not admit of such construction."

We may also, in this connection, call attention to another rule of construction, having a direct bearing on the question now being considered. Conceding that the petition is imperfect and ambiguous as to the situation of the parties when the assault is alleged to have been committed, the defendant, by its answer, has aided a defective petition, and supplied the imperfection, so that the two pleadings, when construed in the light of each other, unmistakably, we think, justify the inference that the injury occurred before the plaintiff had disengaged himself from the train, and while he was in the act of so doing, either by his own action or the action of the conductor, which is alleged as a basis of recovery. In view of the averments of the answer, the conductor was manifestly acting in the strict line of the duties owing to his master, in seeing to it that the plaintiff was compelled to leave the train; and, as thus presented, the question of surpassing importance is whether the injury was occasioned by the willful, wanton, and negligent acts of the conductor in ejecting the trespasser, or by the negligence of the plaintiff in freeing himself from the car on which he was riding, in obedience to the com-

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mand of the conductor to get off of and leave the train. The petition alleges that the injury was caused by the act of the conductor in ejecting him from the car under which he was riding, and the answer alleges that, by the force of his own movements in extricating himself from the car, he permitted his limb to fall on the rail, and to be crushed by the wheel on the moving train. It is said by this court that a petition which is defective by reason of the omission of material facts therefrom will be aided and cured by the averments of such facts in the answer. *Railway O. & E. Acc. Ass'n v. Drummond*, 56 Neb. 235, 76 N. W. 562: "A defective or ambiguous petition may be aided and its infirmities cured by averments in the answer." *Beebe v. Latimer*, 59 Neb. 305, 80 N. W. 904. It is difficult to perceive how it may be said that the plaintiff received the injury while in the unlawful act of stealing a ride, and while he was in the act of leaving the train, and at the same time be said that he had left the train, had ceased to be a trespasser, and that the conductor's acts, as charged, conceding them to be true, were not done in the course of the performance of his duties as such.

2. Can the judgment be upheld, and the plaintiff recover under the evidence? In respect of this question it is insisted that by plaintiff's own statement, assuming the truth of all that is said, it is conclusively established as a fact that the assault which it is alleged was committed by the conductor was not in the performance of any duty which he owed to the company, and was not an act for which the company is responsible. Counsel, in their briefs, say that it is fully admitted that if the conductor had made the assault for the purpose of putting the plaintiff, as a trespasser, off the train, or for the purpose of resisting an attempt to get on the train, such acts would be within the line of his duties, and for any improper conduct in that regard the company would be responsible; but, it is argued, as the alleged assault was not committed for the purpose of putting plaintiff off the train or preventing him from boarding the train, then the assault would not be in the line of the duty of the conductor, but would be an act personal to him, for which the company is not responsible, and that the testimony of the plaintiff puts beyond peradventure of doubt the fact that the assault was not committed for the purpose of either removing him from the train, or preventing him from again boarding it. This contention is based on the theory that the plaintiff at the time of the alleged assault had left the train, and was manifesting no purpose or intention of returning or repeating the trespass he had committed, and for that reason the act of the conductor was not in the course of the performance of his duties. The conductor, in testifying, says he was about a car length from the plaintiff as he was getting off the truss bars on which he was riding; that he had hold of him when he was hurt; that the plaintiff was lying on the ground, and he pulled him away from the train; that the plaintiff was three or four feet from the wheel; and that he pulled him from under the train after the wheel had run over the one foot. The plaintiff

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says he heard the conductor holloa, "You boys get off of here and stay off of here." He testifies that at the time the conductor was about a car length ahead, and in the act of alighting from a freight car, down the side of which he had climbed. The plaintiff then says he immediately tried to get out, and got out; that he took hold of the post with his hands, his feet being out over the outside bar, and swung himself out from under the car; that he alighted on the ground all right, and the force he received while riding on the train caused him to run along two or three steps after getting off, that the conductor ran toward him; that he had his hands on the bar, to try to turn out, and before he could turn out the conductor caught him; that he grabbed and shook him several times, and pretty severely; that he lost his footing, and that the conductor swung him around, and the wheel passed over his foot; that the conductor pulled him out and laid him down beside the track; and that he said to the conductor, "Now, see what you have done." On cross-examination the witness says he was entirely outside the car and train; that he was not aboard the car, nor was he trying to get on the car, but was trying to get out, and that he was standing or walking along the car after he had gotten off the truss rods; that he was outside of the car, not on nor trying to get on the car, and that only his hands were on the car; that while in this position he was assaulted by the conductor; that it was not necessary to assault him to get him off the car, and that he was not trying to get on the car, and that there was no assault to keep him from getting on the car; and that he was not trying to get on.

This evidence drawn out in cross-examination, the substance of which we have given, is especially relied on to establish the essential fact contended for, to wit, that the conductor's assault was not within the scope of his duties, since it was neither for the purpose of putting the plaintiff off the train, nor for the purpose of preventing him from getting on the train. The record does not necessarily establish the fact contended for, nor are we to be governed solely by the statements of the witness as testified on cross-examination—especially so where, in order to ascertain the real and exact situation, reference must be had to his testimony preceding, as well as that which follows. It is from all that is said and testified to by him, reconciling all parts wherever possible, that we may ascertain the truth of the matter in controversy. When so considered, we think the fair inference is that as the plaintiff was removing himself from under the car where he was riding, and after he had alighted on the ground in a position not altogether upright, but approximately so, and before he had freed himself from the train, and while his hands were hold of the bars or rods where he had been riding, and as he was moving forward with the train, he came in contact with the conductor, who was traveling toward the rear of the train in order to drive him away, and who, seizing hold of him while yet in the position described, by throwing him around, threw his foot or limb on the rail and under the wheel, by reason of which he received

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the injury complained of. We are not to be understood as saying this is the literal truth, but there is evidence in the record tending to establish this state of facts, and sufficient to support the verdict of the jury, who obviously found such to be true. The plaintiff's companion, being somewhat older, testifies that at the time of or immediately preceding the injury the plaintiff was "sitting kind of sidesaddle-like" on the truss rods, with his feet hanging over the outside rod, and that, while the conductor was coming toward the plaintiff, the witness saw him start to get out, and saw his feet on the ground; that his feet were on the ground, and he was in a kind of crouched position; that his hands were not on the ground. A brakeman (one of the defendant's witnesses) testifies that the plaintiff was lying by the side of the track as the conductor made a run or jump or spring towards the car under which the plaintiff had been riding. As to the contention that this evidence indisputably establishes the fact that the plaintiff had left the train, and had ceased to be a trespasser, and was making no attempt to again board it, we think it falls far short of proving such to be the case. Suppose the plaintiff had been riding on top of a freight car, and, at the command of the conductor, had descended the ladder at the side, with the view of leaving the train in obedience to the command, but just as he had alighted on the ground, and while yet hold of the ladder on which he had descended, and while outside of the train, and with no intention of returning to it, but while in the position mentioned, the conductor seized him and threw him in such a manner as to injure his person by the car passing over his limb; could it be successfully contended that the act of the conductor was beyond the scope of the duties of the servant to his master, and for which no liability would attach to the latter? These two boys had been playing hide and seek with the trainmen. They had been dodging from side to side of the train in order to escape the trainmen and steal a ride to Omaha. The conductor was endeavoring to prevent them from so riding, as it was his duty to do. He was chasing them from the train. He was not only ejecting the plaintiff from the car on which he was riding at the time of the injury, but he was endeavoring to prevent him, as well as his companion, from riding on the train anywhere or in any position other than as regular passengers upon payment of fare. This was obviously his object in pursuing the plaintiff. This is why he seized him, shook him, and swung him so that he lost his footing, if he did so. He had no personal ill will or malice toward the plaintiff, and so testifies. It was not for revenge nor any other purpose than to prevent the plaintiff from riding in the manner he was endeavoring to ride, and from trespassing on the company's rights, that actuated the conductor in doing what he did at the time.

The fact that the plaintiff was not at the time trying to again board the train, or intending to do so, cannot materially affect the situation, or alter the rights, duties, and liabilities of the respective parties. Such might be material, had the plaintiff en-

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tirely removed himself from the train and right of way, and for the time being ceased to be a trespasser, but he had not done this. He was still trespassing. He was yet hold of the car on which he had been riding. The act of removing himself from the train had not been completed. The act of the conductor, assuming the plaintiff's theory to be correct, was but one of a series of continuing acts set in motion with the view of ejecting the plaintiff from the train—a place where he had no business to be—and until the act had been fully completed, and the purpose for which the different acts were set in motion accomplished, the conductor was, as it seems to us, manifestly acting within the scope of his employment, and in the furtherance of the interests and business of the master. It was his business to drive off trespassers, and to keep them off, and it was this very business he was engaged in when the acts of which complaint is made were performed. In brief, if the boy was hurt under the train, as he undoubtedly was, and as a part of the transaction of his riding on and attempting to leave the train when ordered so to do by the conductor, by what manner of reasoning is the inference warranted that he had left the train, and had ceased to be a trespasser, and for that reason the conductor's acts were beyond the scope of his authority? If plaintiff was hurt while leaving the train, then it was his own or the conductor's wrongdoing that contributed to the injury; and, if the latter, then the conclusion, we think, is irresistible that it was done in the course of the performance of his duties and in the line of his employment.

The general rule is that a master is liable for injuries to third persons arising from the negligence of his servant while in the lawful and authorized employment of the master. *Toledo, W. & W. R. Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489; *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156; *Gass v. Coblenz*, 43 Mo. 377; *Harriss v. Mabry*, 23 N. C. 240. The authorities say a master is liable for the acts of his servant within the general scope of his employment while about his master's business, though the act be negligent, wanton, willful, or malicious, and this is so though the act complained of has been expressly forbidden by the master. 4 Cur. Law, 608, and authorities cited. See, also, *Burns v. Glens Falls R. Co.* (Sup.) 38 N. Y. Supp. 856; *Craker v. Chicago & N. W. Ry. Co.*, 36 Wis. 657, 17 Am. Rep. 504, and *Cohen v. Dry Dock R. Co.*, 69 N. Y. 170. In the last case cited, in the opinion it is said: "A master is liable for the wrongful act of his servant, to the injury of a third person, where the servant is engaged at the time in doing his master's business, and is acting within the general scope of his authority, although he is reckless of the performance of his duty, or, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances, goes beyond the strict line of his duty, and inflicts unnecessary and unjustifiable injury." On the other hand, it is said: "A master is not liable for a malicious or wanton act of a servant, done outside of his employment, without regard to

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his services, and in order to effect some purpose of his own." *Mott v. Consumers' Ice Co.*, 73 N. Y. 543. In this same case, however, it is declared that "for the acts of a servant within the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interests, the master is responsible, even though the act be done negligently, wantonly, or even willfully."

Tested by the principle deducible from these authorities, there seems little room to doubt that the acts of the conductor alleged in the petition, and as testified to by the plaintiff, and for which the company is sought to be held responsible, if believed by the jury, were within the general scope of the employment of the servant; were committed while he was engaged in his master's business, and with a view to the furtherance of the business and interests of the master. This court, in an early case, has recognized and given expression to the rule adverted to, wherein it is held that "a corporation is liable for acts committed in the course of the agent's employment, or in connection with the transaction of the business of the corporation." *Miller v. Burlington & M. R. Co.*, 8 Neb. 219. A case well in point is *Hamilton v. Chicago, M. & St. P. Ry. Co.* (Iowa) 93 N. W. 594. There a conductor, in ejecting a trespasser from the train after he had climbed thereon the second or third time, seized him by the collar, slapped and beat him with his hand, and then stopped the train and put the trespasser off. It is held that the beating administered by the conductor was within the line of his employment, and that the master was liable. In the opinion it is said: "There is no question that if, in removing plaintiff as a trespasser, the defendant's conductor, who was charged with the duty of removing trespassers from the train, caused him to suffer personal injury by reason of attempting to put him off at a dangerous place or by using unreasonable or unnecessary violence, the defendant would be liable for his acts, even though they were wanton, willful, malicious, and unlawful." Citing a number of authorities. "This proposition," continues the court, "is conceded by counsel for appellant, but he contends that the evidence shows the beating of the plaintiff to have been a separate and distinct transaction. It was not as a result of any personal malice or ill will of the conductor, but because, as conductor, he was irritated by the conduct of the plaintiff, and, as he declares, was with the purpose of teaching the plaintiff a lesson, so that when he was put off he would stay off. There is nothing to indicate that the conductor, under pretense of discharging his duty as conductor, was taking the opportunity to injure plaintiff on account of his personal ill will. He was confessedly acting throughout as conductor, discharging the duty to prevent plaintiff, as a trespasser, from riding on the train. We think the case is plainly one where the wrongful acts of the conductor, if any, were chargeable to the defendant." The same may be said of the facts in the case at bar. The conductor was manifestly acting through no personal ill will to the plaintiff. His acts were with the view of removing

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the plaintiff, as a trespasser, and to prevent a recurrence of the trespass. He was, if the plaintiff's story is believed, forcibly removing him from the train, and from the position in connection therewith he was occupying when the assault was committed, for the express purpose and with the sole object in view of preventing him from further riding on the train, which he was endeavoring to do, and to prevent a continuance of the trespass, and the act complained of was one of a series or a part of a continuous act brought about for this very purpose. The case, as it appears to us, is clearly distinguishable from those cases holding the master not liable where the act of the servant is done outside of his employment and without regard to his services. The difficulty, of course, lies in applying the rule, and drawing correctly the line which shall determine whether the act is within or without the scope of the duties of the servant in the course of his employment. In *Georgia R. & B. Co. v. Wood* (Ga.) 21 S. E. 288, 47 Am. St. Rep. 146, cited by defendant in support of its contention, it appears that certain boys had been attempting to steal a ride upon a train, and that, at the time of the act complained of, they had left the train and right of way, and were standing in a yard on private property. A stone was thrown by one of the trainmen at one of the boys, which struck a girl who was standing on her father's porch. The company was held not liable, because the act was not within the scope of the employment of the servant, who was acting in the capacity of a brakeman. The court says that no presumption arises that the servant was acting within the scope of his employment in throwing a stone at this boy, with a view to injuring him, after he had desisted from the trespass and gone off from the train. "If," says the court, "the brakeman, while these boys were engaged in the trespass, had, in attempting to prevent the trespass or cause them to desist, injured one of them through negligence or carelessness, or by using more force than was necessary for the purpose, the company would perhaps be liable. * * * But after the boy had desisted the company would not be responsible for an injury inflicted on him by the brakeman in attempting to punish him for the trespass." For like reason it is held in *Golden v. Newbrand*, 52 Iowa, 59 N. W. 537, 35 Am. Rep. 257, that the master was not liable for the acts of the servant, because, under the circumstances, they were not within the scope of the duties for which employed. In that case the servant was employed to protect property, the same being a brewery operated by the master. The party assaulted had thrown a brick into the brewery, striking some of the property therein, and then turned and ran, when the servant, after chasing him some 15 or 20 feet from the building, shot the fleeing party in the back of the head. It is said by the court: "We think that the fact that the deceased was retreating from the brewery at the time the fatal shot was fired shows conclusively that it was not fired for or with the intent of protecting the brewery, or in the line of Roenspeiss' [the servant's] duty. * * * To protect the brewery," says

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the court, "did not require Roenspeiss to shoot and kill a person retreating therefrom." *Davis v. Houghtellin*, 33 Neb. 582, 50 N. W. 765, 14 L. R. A. 737, is also relied on. In that case the servant was employed to guard certain feed upon certain premises, and to seize and detain persons who might be found disturbing the feed. The party injured had occasion to be on the premises, and while there the servant, in attempting to seize and detain him, carelessly and negligently shot and killed him. There was no allegation that the third party was molesting the feed or attempting to do so, and it was held a demurrer to the petition was rightly sustained. The case, we think, in principle, is clearly distinguishable from the one at bar. Other like cases are cited, but it will serve no useful purpose to advert to them at length. Suffice to say that the facts in these several cases on which the right to recover must rest are held to negative the idea that the servant at the time of the act complained of was acting in the line of his duty, and within the scope of the employment for which he was engaged. In such case the servant is held to be, at the time when the injury was inflicted, acting for himself, and as his own master, and therefore the master employing him was not liable. The act relied on as establishing the liability of the master in each instance is held not connected with the business in which the servant was engaged, and that the relation of master and servant was for the time suspended. As we have attempted to elucidate in the case at bar, the acts of the servant which are made the basis for a recovery were in the furtherance of the master's business, and with the view of discharging the duties of the servant, owing to the master, by ejecting the plaintiff as a trespasser, and preventing a recurrence of the trespass then being committed. This was in the line of his duty. It was a part of his employment. For the acts of the servant while so engaged, even though wanton, willful, or unlawful, as is expressed by the authorities, the master is held liable.

Entertaining, as we do, the views heretofore expressed, the conclusion is reached that the evidence is sufficient to sustain the verdict, and to disclose a liability on the part of the defendant company for the acts of the servant as alleged in the petition and proven by the evidence. Finding no prejudicial error in the record, we are of the opinion that the judgment should be affirmed, and it is accordingly so ordered.

Affirmed.

ANDERSON *v.* MOBILE & O. R. Co.

(Supreme Court of Mississippi, June 19, 1905.)

[38 So. Rep. 661.]

Carriage of Freight—Acceptance of Shipment—Cotton Burned on Platform—Failure of Conductor to Furnish Car.*—Where plaintiff's cotton, after being ginned, was placed on a platform which had been built by a railroad for cotton for shipment, and, according to custom, the manager of the gin requested the railroad's agent at the nearest station to have a car sent for the cotton, but a train conductor failed to follow his instructions, so that no car was sent, and the cotton while on the platform was destroyed by fire, there was no relation of carrier and shipper.

Same—Limiting Liability.†—A carrier may, by contract, exempt itself from liability for fire not attributable to its negligence.

Appeal from Circuit Court, Monroe County; E. O. Sykes, Judge.

Action by Enoch Anderson against the Mobile & Ohio Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Suit by appellant, Anderson, against appellee, to recover the value of five bales of cotton destroyed by fire, alleged to have been burned after the acceptance of the cotton by appellee for shipment. After plaintiff had introduced all his evidence and rested, the court gave a peremptory instruction to find for defendant. From verdict and judgment in accordance therewith, plaintiff appeals.

The plaintiff's evidence was in substance as follows: On the morning of September 17, 1904, Saturday, plaintiff hauled the cotton to the gin of the Clay County Cotton Oil Company to be ginned. The gin was located within about 150 yards of defendant's depot at Muldon, Miss., and the defendant had constructed a spur from the main line to the ginhouse, and had built a platform for cotton to be placed on and loaded for shipment when ginned at this gin. Plaintiff's cotton was ginned and placed on this platform about 2 o'clock on the same day it was hauled to the gin. It was the custom of the managers of the gin to make requisitions on the depot agent at Muldon for cars to ship cotton from this platform when they were needed, and the managers of the gin would load the cotton on the cars and notify the depot agent, and give him the number of bales in the cars and the names of the parties to whom the cotton belonged, and the agent would then issue bills of lading to the different parties. Sometimes it would be two or three weeks before the bills of lading were issued, and the usual forms of the bills of lading so issued had a clause exempting the railroad company from loss by fire

*See foot-note appended to *Lackland v. Chicago & A. Ry. Co.* (Mo.), 11 R. R. R. 414, 34 Am. & Eng. R. Cas., N. S., 414.

†See foot-notes appended to *Powers Mercantile Co. v. Wells-Fargo & Co.* (Minn.), 12 R. R. R. 504, 35 Am. & Eng. R. Cas., N. S., 504.

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except where it originated from its own negligence. On Saturday, September 17, 1904, the managers of the gin went to the depot agent at Muldon and requested him to have a car set on the spur track to load with cotton, informing him that there were 35 bales on the gin platform for shipment. The depot agent telegraphed the superintendent of the railroad company for the car, and he was instructed to have a train crew that would be there that day to switch the car into the spur track; but the conductor of this crew, although requested to do so by the depot agent, failed to put the car on the track. That evening, as was his custom under the rules of the company, the depot agent reported to the general agent of the railroad company the number of bales of cotton on hand, and in this report he stated that there were 35 bales of cotton on the gin platform and 1 on the depot platform. The cotton was left on the gin platform, and some time during the night of September 17, 1904, the ginhouse caught fire and burned up, and plaintiff's cotton was also burned. There was no evidence that in any way tended to show that the fire was caused by the defendant railroad company.

Plaintiff's motion for a new trial was overruled, and he appeals.

Leftwich & Tubb, for appellant.

J. M. Boon, for appellee.

TRULY, J. Under no theory of this case is it possible for a verdict in favor of the appellant to be sustained. There was no bill of lading issued or demanded, no actual delivery of the cotton, and the circumstances do not establish in any wise an implied acceptance by the appellee of the freight for shipment. There were no dealings between the parties which could possibly be construed as creating, by operation of law, any contract of carriage. *Tate v. Railroad*, 78 Miss. 850, 29 South. 392, 84 Am. St. Rep. 649. The appellee might, however, concede that it was in possession of the cotton for shipment, for the appellant's testimony proved conclusively that, even had it been accepted and bill of lading issued therefor, the contract thus established would have absolved the carrier from any liability for loss under the circumstances disclosed by this record. For this reason: It affirmatively appears from the testimony introduced in behalf of the appellant that the fire by which the cotton was destroyed originated in a ginhouse, and was in no sense caused by the negligence of the appellant, and the loss is clearly shown to have been beyond its power of prevention. This phase of the case is therefore plainly controlled by *Millsaps v. Railroad*, 76 Miss. 923, 25 South. 359.

That a carrier can by contract restrict its common-law liability as an insurer, and exempt himself from liability for fire not attributable to its negligence, is well settled. *Newberger Cotton Co. v. R. R. Co.*, 75 Miss. 307, 23 South. 186. If there was any existent contract in this case, appellant acknowledges that it was of this nature, and the proof shows that the loss arises from the

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excepted cause. Technical rules of pleading cannot avail the litigant, who, in attempting to develop his own case, plainly proves a perfect legal defense for his adversary. The action of the trial judge in granting the peremptory instruction was manifestly correct.

Affirmed.

CONROY v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, June 21, 1905.)

[74 N. E. Rep. 672.]

Street Car Passenger—Termination of Relation.*—Where a passenger on a street car alighted and started to cross the street behind the end of the car, when she was injured by falling over one of the rails, which projected above the surface of the ground, she had ceased to be a passenger before she was injured.

Street Railways—Tracks—Construction—Care Required.—Where a street railway was empowered to lay its tracks in a reserved space in a street from which horses and ordinary teams and vehicles were excluded, but which was open to the use of pedestrians, the fact that that part of the street was not open to vehicle traffic did not impose on the railway company duties other than those which a street railway is under because of its location in any street with reference to persons who had been or might be passengers.

Exceptions from Superior Court, Suffolk County; Wm. Schofield, Judge.

Action by Francis Conroy against the Boston Elevated Railway Company. Finding was entered in favor of defendant, and plaintiff brings exceptions. Overruled.

Malachi L. Jennings, for plaintiff.

Chas. S. French, for defendant.

BARKER, J. That part of the defendant's railway with which this action is concerned was in a public way, the control of which was in a board of park commissioners. The railway tracks were in the center of the street in a reserved space from which horses and ordinary teams and vehicles were excluded, but which was open to the use of the public on foot. After alighting from a car, the plaintiff walked upon this reserved space a few feet to a point behind the end of the car, and then attempted to walk across the part of the street occupied by the tracks. She fell over one of the rails, and was injured. The suit is in tort to recover compensation for her injuries. It was tried without a jury, and with a finding for the defendant, and is here upon exceptions taken by the plaintiff to the refusal of the presiding justice to give certain rulings.

All that we deem it necessary to say in overruling the excep-

*See foot-notes appended to *Anderson v. Seattle-Tacoma Interurban Ry. Co.* (Wash.), 14 R. R. R. 380, 37 Am. & Eng. R. Cas., N. S., 380; *Hudson v. Lynn & B. R. Co.* (Mass.), 13 R. R. R. 622, 36 Am. & Eng. R. Cas., N. S., 622.

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tions is that when the plaintiff left the car she ceased to be a passenger (*Creamer v. West End Street Railway Co.*, 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. Rep. 456); that the fact that the part of the street where the tracks were laid was not allowed to be traveled by ordinary vehicles imposed upon the defendant with reference to those persons who had been or might be its passengers no duties other than those which a street railway is under because of its location in any street; and that if, under the declaration, the case could be treated as one to recover compensation because of a want of repair or defect in some portion of a highway which for some reason the defendant was bound to keep in repair, the bill of exceptions does not show that the presiding justice was bound to find the rail a defect nor that there was any defect.

Exceptions overruled.

JACKSON *et al.* v. NATCHEZ & W. RY. CO.

(Supreme Court of Louisiana, May 8, 1905.)

[38 So. Rep. 701.]

Excursionists—Contributory Negligence—Riding Home on Platform of Crowded Train.*—Excursionists have the right to return home on the train by which they were taken out, and if, owing to the crowded condition of the train, they can secure no safer position than the platforms, it is not negligence on their part to ride thereon.

Contributory Negligence—Defense—Failure to Deny Negligence.—The defense of contributory negligence is not inconsistent with the denial of negligence on the part of defendant.

Injury to Passenger—Wreck—Failure to Rescue Promptly—Absence of Emergency Tools.—The failure to equip a train with the tools usually carried by trains for emergency use in case of a wreck is negligence, and, where, for want of such tool, a passenger is not rescued as promptly as would otherwise have been practicable from his position in the debris of a wreck, the railroad company will be held responsible in damages for such additional sufferings, regardless of whether the wreck itself was or was not caused by its negligence.

Same—Collapse of Bridge—Degree of Care—Inspection—Materials.†—A railroad company will be held responsible for the injury to a passenger resulting from the collapse of one of its bridges, unless it can show that the bridge was as safe as the highest degree of practical care and skill could make a bridge of that class, and that, to the fullest

*As to whether it is contributory negligence for a passenger to ride on the platform of a car, see foot-notes appended to *Halverson v. Seattle Elec. Co.* (Wash.), 13 R. R. R. 282, 36 Am. & Eng. R. Cas., N. S., 282; foot-note appended to *Brunnchow v. Rhode Island Co.* (R. I.), 12 R. R. R. 512, 35 Am. & Eng. R. Cas., N. S., 512.

†As to the degree of care required of a carrier of passengers, see foot-notes appended to *Topp v. United Rys. & Elec. Co.* (Md.), 14 R. R. R. 248, 37 Am. & Eng. R. Cas., N. S., 248; *Lincoln Traction Co. v. Webb* (Neb.), 14 R. R. R. 369, 37 Am. & Eng. R. Cas., N. S., 369; foot-notes appended to *O'Brien v. St. Louis Transit Co.* (Mo.), 14 R. R. R. 413, 37 Am. & Eng. R. Cas., N. S., 413; foot-notes appended to *Hart v. Seattle, etc., R. Co.* (Wash.), 14 R. R. R. 430, 37 Am. & Eng. R. Cas., N. S., 430.

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extent that the highest degree of care and foresight could suggest, such bridge was inspected for discovering and remedying and defects that might have developed in it from the operation of the road or other causes, and, in case the defect was latent in the materials, then that the materials were thoroughly tested before being put in position. (Syllabus by the Court.)

Appeal from Tenth Judicial District Court, Parish of Concordia; J. L. Dagg, Judge.

Action by Amelia Jackson and husband against the Natchez & Western Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Harry Hinckley Hall and Samuel Lucius Elam, for appellant.
Nathan Meredith Calhoun and Dinkelspiel & Hart, for appellees.

PROVOSTY, J. The defendant railway company gave a Fourth of July excursion for colored people out of Vidalia to Turtle Lake, as had been done for several years past. Vidalia is a town situated on the Louisiana side of the Mississippi river, opposite Natchez, Miss. Turtle Lake is a picnic grounds near the station of the same name on the defendant's railway. Neither on the grounds nor at the station is there any protection whatever against the weather for excursionists, save two or three negro cabins in the vicinity of the station, where shelter for a limited number of persons might perhaps be had for the asking.

It was a one-day excursion, going out in the morning and returning in the evening. The train was composed of one locomotive, one tank car, one box car, two coaches, two flat cars, and five box cars. Going out, the train was crowded even to the platforms, and the regular afternoon train out of Vidalia carried more people to Turtle Lake. Others, who had come in wagons, stayed over to return in the evening on the excursion train. The train was taken to a station beyond Turtle Lake, to be brought back at about 9 o'clock; but, some rain having fallen, and the track being slippery, the locomotive was unable to pull the entire train, even in its empty condition, and five cars were dropped on the way. A drizzling rain had set in, and the night was so dark that a person could not recognize his elbow neighbor, except by the sound of his voice. A crowd of eight or nine hundred excursionists stood on both sides of the track, in the dark and the rain, awaiting the arrival of the train. It came on in the dark, without a single light aboard save the headlight of the locomotive. What took place might have been anticipated, and can be readily imagined. There was a wild scramble in the dark for getting aboard, even before the train had fully stopped.

Plaintiff, a healthy, vigorous young colored woman, was one of the excursionists. She says she scrambled with the rest to get aboard, and got on the platform of one of the coaches, and secured a hold on the jamb of the door, while her companion and friend, Jennie Stewart, held on her, with an arm around her waist. Sam Gross testifies that he accompanied plaintiff to, and

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helped her on, the platform, and advised her to try to get inside, out of the weather.

After waiting some 10 minutes for everybody to get aboard, the president of the road, Davis, who was in charge of the excursion, went around with a lantern to see how eight or nine hundred people had managed to crowd themselves on one locomotive, one tank car, one box car, two coaches, and two flat cars. In this enumeration of the cars we intentionally include the locomotive, because it afforded coigns of vantage where not a few were lucky enough to get a foothold, and even also a handhold probably. Plaintiff was not so fortunate as that, if we are to believe defendant's contention that she occupied a position between two coaches, holding on by the tips of her feet to the edge of the platform of one coach, and by her buttock to the railing of the platform of another. A man, says Davis, was found "standing with one foot on the platform of the coach, and his other foot on the head block of the box car; and there was a little girl standing right up by the side of him. She was hanging by a brake staff, with nothing else underneath, except she had her hand on a coupler."

Whatever plaintiff's position was, the train, after moving about 100 yards and coming to a stop from the inability of the locomotive to pull it, finally started, and had made about three miles, at a rate estimated at from three to eight miles an hour, when a bridge gave way, right under where plaintiff was, and plaintiff fell among the wreckage, and suffered the injury for which she brings the present suit in damages, charging that the accident occurred through the negligence of the defendant company.

Plaintiff's end of the coach had dropped down until the coach stood at an angle of 45 degrees. Plaintiff was found outside of the platform, half seated on the edge of it, holding onto the railing with both hands, up to her waist in the debris of the bridge, both her feet under the platform behind her, and both her legs caught, below the knee, between it and a piling, one of them apparently simply caught and pinned, the other held crushed and mashed against the piling.

In that position of torture she remained for about three hours, until an ax could be procured from a distance and the piling chopped away. The engine had gone out of commission for want of water, and could not be utilized for getting this ax, or for hauling to Vidalia that part of the train which had crossed in safety. The next morning it was supplied with water from the bayou by means of buckets, and plaintiff was taken to Vidalia, after she had remained on an improvised stretcher all night in the woods and in the weather. The record does not specify at what hour she reached Vidalia, but by that time, although she had received medical aid immediately after she had been extricated from her horrible position, she was in a dying condition. The most powerful restoratives had to be administered to her, and for 48 hours her life hung by a thread. The mashed leg had to be amputated. The other, which had only a simple frac-

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ture, was reset. The record leaves it doubtful whether she has the use of this other leg; but she testifies that she can no longer earn a livelihood, and that she is now dependent upon her father for support.

The coach, in falling, became uncoupled from that in front, and the latter crossed safely. Defendant's contention is that, when the coaches separated, plaintiff lost her precarious foothold, and dropped straight down into the wreckage, and that her injury was due exclusively to her fault in occupying this dangerous position. Plaintiff and her companion, Jennie Stewart, say that with the sudden dipping of the coach they slipped and fell, and that plaintiff's feet were caught in the wreckage, whereas only Jennie Stewart's dress was thus caught.

Accompanying Davis and his solitary lantern on the inspection tour before the starting of the train, there went Campbell, justice of the peace and mayor of Vidalia, Roundtree, deputy sheriff, and Johnson, colored deputy sheriff. All four testified for defendant.

Davis says he found plaintiff in the acrobatic position between the two coaches, described above.

Campbell says that she "was sitting on the floor of the platform, just to the left of the door, with one foot stretched straight out on the platform, and the other sorter hanging over towards the step."

Johnson says that he saw plaintiff sitting either on the floor of the platform, or on the hand railing—he could not be positive which—"with her legs hanging down between the cars."

Roundtree does not remember seeing plaintiff, nor having heard the colloquy described by Davis and Johnson as having taken place between her and Davis wherein Davis is said to have urged her to get down and to have warned her of the danger of her position. Plaintiff and her companion, Jennie Stewart, deny positively that Davis spoke to plaintiff.

When the case came on for trial, defendant applied for a continuance on the ground of the absence of four material witnesses, namely, Lucas Johnson, Joel Baer, Israel Garner, and Clarence Bryant. Davis, the president of the defendant company, made an affidavit to the effect that he expected to prove by these absent witnesses that they were "on the same coach with plaintiff at the time of the accident, and that plaintiff was sitting on the guard or the hand rail of the platform of the coach with her feet resting, or upon, the platform of the coach immediately in front of the coach on which plaintiff was sitting down on said guard or hand rail"; that they were near plaintiff "and could well see the position she was in." For the purpose of avoiding a continuance, plaintiff admitted that said witnesses, if present, would testify as stated in the affidavit.

Cross-examined as to the extent of his information touching these witnesses, Davis said that Lucas Johnson had told him that "there was a man right by the side of this girl, and he was pulling his feet out from behind the same tie that was in front of

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her, and that this was Israel Garner, and that he was in Arkansas." Questioned as to when and where Lucas Johnson had told him this, Davis answered:

"It was, I think, in Judge Elam's office, on the day, if I remember, when we expected to try the case, the latter part of last week."

Questioned further, he answered:

"I don't know whether it was that day or not. I saw him over here; he was here. Q. Is Lucas Johnson a colored man? A. Yes, sir. Q. Is he a black man or a mulatto? A. I didn't pay particular attention to his color; I did not see him but a few minutes. Q. Is he a tall man or a low man? A. I didn't pay particular attention to him; I expect he is an ordinary-sized man. Q. Is he a slender man or a stout man? A. I think my answer will cover that. Q. But you actually did have a conversation with him? A. Yes, sir; that is, my attorney did, and I think I told him who he was."

Touching Clarence Bryant, he said:

"I don't remember who—I think Tom Johnson—told me about Clarence Bryant. I believe so; I am not positive; and Clarence Bryant lives in Natchez, Miss. I don't know whether I talked with him or not. I did not talk with him in Judge Elam's office. I saw him, and I may have talked to him, but that was last week, before this affidavit was filed."

Touching Joel Baer, he says:

"Capt. Richardson, of the Natchez & Vidalia Ferry, informed me in reference to Joel Baer, and I sent for Joel Baer and tried to have him to come down to the ferryboat on the Natchez side. He is a watchman, as I understand, on the Betsy Ann, and was asleep and would not come."

A great many witnesses on the trial were asked if they had seen any of these four men on the excursion, or at the picnic, and not one of them had seen any of them; and not one of them knew them, or of them, except one, Sol. Carter, who knows Lucas Johnson when he sees him.

Under the foregoing testimony, it is not over certain that Clarence Bryant, Joel Baer, and Israel Garner are not so many Mrs. Harries, or that, if real creatures of flesh and blood, and produced on the witness stand, they would have testified as stated, or that Lucas Johnson would have done so; but certain it is that if they had so testified nobody would have believed them, for at the time of the accident there was not even the solitary lantern, and it is an incontestable fact in the case that the night was too dark for anything to be seen, and it is simply impossible that the witnesses should have seen the position of plaintiff's feet. Among the large number of witnesses who testified in the case, not a single one was able to name a single one of the persons who were on the particular car on which he or she was, except their own traveling companion, of whose presence they were cognizant otherwise than by sight, and except also in a few instances where they recognized a neighbor by his or her voice.

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The facts must be taken to be that the plaintiff was standing on the platform, and that with the sudden dip of the car she slipped, as she and her companion Jennie Stewart say they did.

Davis is flatly contradicted by plaintiff and her companion, Jennie Stewart, and by his own two witnesses who accompanied him on the inspection tour; by Campbell, who says that plaintiff was seated on the floor of the platform; and by Johnson, who says that plaintiff's "legs were hanging down between the cars"; and to some extent he is contradicted by Sam Gross, who helped plaintiff to get on the platform, and advised her to try to get inside, out of the weather; and is corroborated only by what it is admitted his absent witness, Lucas Johnson, and his three other, more or less mythical, absent witnesses, would swear to if present. The jury evidently believed plaintiff's statement, and refused to credit Davis and his four continuance witnesses; and the case, as a whole, impresses this court in the same way.

So far as the pretended admissions made by plaintiff while her legs were being mashed between the car platform and the bridge piling, and after reaching Vidalia, are concerned, and so far as the statement made by some of defendant's witnesses to the effect that plaintiff was not suffering while pinned in the wreckage are concerned, the jury evidently did not believe them. The said admissions were not heard by the persons who were holding plaintiff up, or by any of the bystanders. These heard plaintiff crying out in her agony, and calling upon the Lord. From the excess of pain she fainted twice. By the time she reached Vidalia she was, as already stated, in a dying condition. The court believes the plaintiff when she says:

"No sir, I did not say anything like that. I did not have that much sense then."

Defendant's able counsel argue that plaintiff must have been standing outside of the railing of the platform, as testified to by Davis and his four continuance witnesses, because she was found outside of the railing after the accident; but while counsel argue that the space between the uprights of the railing were not sufficient to allow of plaintiff's having slipped through, the testimony on the point is silent, and, the court will add, unnecessarily and suspiciously silent.

A dilemma is presented to defendant. Plaintiff's position was reasonably secure, or it was not. If it was reasonably secure, her adopting it as the only chance provided her for getting home that night out of the dark and rain was not negligence, on the same principle that riding on the platform of the coach is not negligence where no better accommodation is provided. 6 Cyc. 653. It is also to be noted that, if it be true that she occupied it, then that she occupied it safely until the bridge broke down, and, presumably, might have continued to occupy it safely to the end of the journey but for the breaking down of the bridge.

On the other hand, if it was so insecure that her occupying it, even under stress of the circumstances, was unreasonable, then it was the bounden duty of Davis, as conductor of the train, to

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insist upon her getting down, even if his sole means of compelling her was to refuse to start the train until she had done so. He had no right to assume that she realized as fully as he did the danger of the position. Under certain circumstances it is the duty of the carrier to protect the passenger against his or her own negligence, under penalty of the failure to do so being regarded as the proximate cause of a resulting accident. 6 Cyc. 641. And all the more imperative is this duty in a case where it has been the overcrowding of the train, resulting from the mismanagement of the carrier, that has forced the passenger to occupy the dangerous position. 6 Cyc. 623.

Indeed, considering that people were riding on the top of the box cars, on the engine, and virtually wherever they could manage to hold on—and all through defendant's fault by not providing better accommodation—and with the full knowledge of the president of the road, any charge against a passenger, especially against a young colored woman, of riding in a negligent manner, comes out of the mouth of the defendant with poor grace.

But it is not necessary to go into all these questions, since the court finds that plaintiff was riding on the platform.

Davis says that he went around the train telling those who were in dangerous places that they had to get off, but he does not say that he requested those who had been so fortunate as to secure standing room on the platforms to get down. His statement is that those on the platforms were not in so dangerous a position, because "they are protected by the guard rails."

The clear duty of Davis was to exclude from the train all those who, not belonging to the excursion and unprovided with tickets, had no right thereon. His lame excuse that he could not control the crowd cannot serve. Nothing shows that he could not have done so; at any rate, he made no serious effort in that direction. He had in his own hands the remedy of refusing to start the train until all those not belonging thereon should have got off. The truth of the matter is that the utter inadequacy of the accommodation, and the darkness, had brought about a situation of very great difficulty, calling for heroic treatment, and that Davis, instead of dealing seriously with it, followed the course least troublesome to himself, evidently not realizing the extent of his responsibility in the premises.

Those who were on the platforms had a right to remain there. Their contract entitled them to get home on that particular train (6 Cyc. 581), and, if the platform was the safest place they could secure, they had the right to occupy it. Defendant's witness Roundtree says that the cars were a perfect jam; that he tried to get on, but could not.

Under the circumstances—the choice lying between riding on the platform and staying the greater part of the night, if not all night, in the rain and the dark—it was not negligence for plaintiff to ride on the platform. *Rapalje & Mack*, Dig. vol. 2, p. 503, No. 476; *Id.* p. 375; *Lynn v. Southern Pac. Co.* (Cal.) 36 Pac. 1018, 24 L. R. A. 710; *A. & E. E. of L.* vol. 5, p. 678; 6 Cyc. 653, notes 38 and 39.

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We conclude that plaintiff was not guilty of contributory negligence, and pass to the question of defendant's negligence.

The learned counsel for plaintiff argue that the defendant, having pleaded contributory negligence, which is a plea in confession and avoidance, has thereby admitted its negligence, and shifted the burden of proof in that regard. In reply to this, the learned counsel for defendant say that the answer does not contain a plea of contributory negligence, but that, on the contrary, it expressly alleges that the injury of plaintiff was due entirely to her own negligence; that she was the sole cause of it.

It is true the answer reads in that way, but it must be taken to mean that the plaintiff contributed to the accident, not that she was the sole cause of it. To say that she was the sole cause of it would mean that she had caused the bridge to collapse and the coach to be precipitated. This, evidently, was not the idea meant to be conveyed, and no one in the lower court so understood the answer. It was taken to be a plea of contributory negligence, and the case was tried on that theory. On any other theory, nine-tenths of the evidence offered by defendant would have been irrelevant, and the affidavit of its president to the materiality of the expected testimony of the four absent witnesses would have been untrue.

But the court does not agree with the contention that a plea of contributory negligence, when properly pleaded in the alternative (and it must be taken to have been so pleaded in this case, if at all), admits the negligence charged in the petition. Some courts have taken that view (*Ency. of Plead. & Prac.* vol. 5, p. 11), but no decision is cited where this court has done so, and we do not think that such a doctrine has any place in our liberal system of pleading. What the defendant says by such a plea, coupled with a general denial, as in this case, is that he is not guilty of the negligence charged; but that if he is, then that plaintiff by his or her own negligence contributed to the resulting injury, and for that reason cannot recover.

Before plaintiff can recover, she must show that her injury was caused by defendant's negligence. We copy verbatim her assignment of negligence, to-wit:

"That her said sufferings, injuries, and disabilities were caused by no fault or neglect of her own, but were proximately and directly caused by the imprudence, want of skill, care, and caution, and by the gross, willful, wanton, and cruel negligence of the said railway company, its managers and employees, in the following particulars, to-wit:

"First. In overcrowding its cars and coaches beyond their capacity, as aforesaid.

"Second. In bringing to bear upon its road and bridges, and especially upon bridge No. 26, a greater weight than they and it could bear.

"Third. In the old and rotten condition of the road and its bridges, and especially of bridge No. 26.

"Fourth. In the improper and faulty construction of its bridges, and especially of bridge No. 26.

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"Fifth. In the want of proper and timely inspection of its road and bridges, and especially of bridge No. 26.

"Sixth. In the want of proper and timely repairs to its road and bridges, and especially to bridge No. 26.

"Seventh. In the want of a proper equipment of its train with the necessary tools, instruments, and appliances needful and useful in case of an emergency or wreck. In the want of suitable, proper, and sufficient accommodations and facilities for passenger traffic.

"Eighth. In not carrying a proper and sufficient supply of water in the reservoir on its locomotive, or in negligently allowing same to leak out. In not providing a supply of water for its locomotives and engines at proper, convenient, and suitable places.

"Ninth. In not timely relieving petitioner from her perilous condition aforesaid.

"Tenth. In allowing petitioner to remain in the woods all night without proper surgical and medical treatment and attention.

"Eleventh. In not quickly and speedily conveying petitioner to Vidalia or Natchez, where she could have obtained the care and attention of skilled physicians, surgeons, and nurses.

"Twelfth. In not timely providing the means of conveying petitioner from the place of accident to Vidalia or Natchez. In the want of proper care, prudence, caution, and skill in the management of its train and the handling of its passengers."

A railroad bridge should be so constructed as to sustain the weight of any train that may have to pass over it, hence the two grounds of the overloading of the cars and of the deficiency of the bridge are in reality one and the same.

There can be no question whatever that the business of providing the excursionists with return transportation was most grossly and culpably mismanaged, but between that and the injury complained of there was no causal connection. It was the breaking down of the bridge that was the proximate cause of the injury. True, plaintiff would not have been injured if she had been provided with a seat, or even with standing room inside of the coach; but the failure to provide a seat, or even standing room, inside of the coach, on a cheap excursion, such as this one was, is not, as a matter of law, and is not shown as a matter of fact to be, negligence such as, of itself alone, without the co-operation of any other or further negligence of the railway company, will give rise to a cause of action in behalf of an excursionist who is compelled thereby to ride on the platform, and, as a result of being there, is injured by an accident occurring through no fault of the railway company.

The absence of the necessary tools for use in case of a wreck, and the faulty condition of the locomotive, did not contribute to the accident; but, as the event showed, the absence of the ax usually carried by railways for just such emergency use, or the absence of some other equivalent tool, contributed directly to the

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protraction of plaintiff's sufferings. Had there been such an ax or other equivalent tool, plaintiff would have been extricated promptly, and would have been spared the three hours of torture. Plaintiff was released within a few minutes after an ax had been procured. Whether responsible or not for the collapse of the bridge, defendant is certainly responsible for this easily avoidable protraction of plaintiff's sufferings.

The failure to carry this ax or other equivalent tool was not negligence simply, but negligence of the worst sort. Ordinary common foresight would have suggested the doing so, let alone the high degree of foresight to which a railway company is held for the safety of its passengers. For the additional sufferings which she thus endured, unnecessarily, through defendant's gross and unmitigated fault, plaintiff is entitled to judgment, regardless of what may be the issue of the suit on the question of negligence in connection with the bridge. The amount of this judgment we shall not fix at this time, preferring to leave it to be fixed by the jury when it comes to pass upon the case as a whole.

Whether the breaking down of the bridge was due to the negligence of the defendant company is left an open question by the record. Defendant sought to offer evidence on that subject, but the court ruled that the evidence was inadmissible, because the defense of contributory negligence admitted the negligence with regard to the bridge.

Logically it did. Without there be negligence, there cannot be contributory negligence. Nor shall we say that in the light of the authorities elsewhere on the subject, and in the absence of any announcement from this court, our learned Brother of the lower court did not rule aright from his standpoint; but, as indicated by what has already been said, the ruling cannot have the sanction of this court.

The two defenses, of denial of negligence and of allegation of contributory negligence, clash only in their verbal enunciation; in practice they do not. They depend upon two independent sets of facts; the one upon the conduct of defendant, and the other upon the conduct of plaintiff. On the trial of the case they do not cause confusion or complication, and do not embarrass the plaintiff in the presentation of his case; all he has to do is to produce before the court all the facts. Both are valid defenses, and there can be no good practical reason for compelling the defendant to elect between them. However logical it might be, there is in practice no good reason for it; and, in addition to being unnecessary, it might, in a large number of cases, prove downright mischievous. Even in the full light of all the facts as produced on the trial, it is not always easy, as this court, to its chagrin, knows but too well, to determine whether the law's judgment in the case should be founded upon absence of negligence on the part of defendant, or presence of contributory negligence on the part of plaintiff. To compel the defendant to make this election in the uncertain light of the early dawn of

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the case, would be to put aside practical utility and justice for the sake of mere abstract, superficial consistency.

The case will therefore have to be remanded for the reception of evidence on the question of the negligence vel non of defendant in connection with the bridge. But the taking of evidence will be restricted to that single point, and the burden will not be on plaintiff to show the negligence, but on defendant to show the absence of it (*Le Blanc v. Sweet*, 107 La. 355, 31 South. 766, 90 Am. St. Rep. 303); and the defendant will have to be held liable in connection with said bridge, unless it can show that the bridge as originally constructed was as safe as the highest degree of practical care and skill could make a bridge of that class, and that, to the fullest extent that the highest degree of care and foresight could suggest, it was inspected for discovering and remedying any defects that might have developed in it from the operation of the road or other causes, and, in case the defect was latent in the material, then that the material was tested before being put in position. 6 Cyc. 617-619; *Hutchinson on Carriers* (2d Ed.) § 512a, p. 581; section 501, p. 567; *Rapalje & Mack*, Dig. vol. 6, p. 255, No. 137 et seq.; Nos. 162, 171; *Louisville City Ry. Co. v. Weams*, 8 Am. & Eng. Ry. Cas. 401; *Ingalls v. Bills*, 43 Am. Dec. 355; *Bowen v. New York Cent. R. Co.*, 72 Am. Dec. 532. In other words, for rebutting the presumption of negligence, the defendant will have to show that the defective condition of this bridge was due to some cause which, by the exercise of the highest degree of care and skill and foresight, it could not have guarded against.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, and the case be remanded for further trial in accordance with the views herein expressed, with right to a jury; no further evidence to be taken, however, except on the sole point of the negligence vel non of the defendant in connection with the bridge; the damages, in the event defendant is found to have been negligent in that connection, to be for the entire case, but, in the contrary event, to be only for the additional sufferings and injury resulting to plaintiff from her not having been extricated from the wreckage as soon as might have been done had the train been equipped with the proper tools in prevision of such an emergency; the plaintiffs to pay the costs of this appeal.

FALKINS v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, May 18, 1905.)

[74 N. E. Rep. 338.]

Carriers—Street Railroads—Injuries to Passengers—Space between Cars—Negligence.—It was not negligence for an elevated railroad company to permit an open space in the passageway between the platforms of its cars, made necessary by sharp curves in its lines, and to impliedly invite passengers to use passageway at stations in going between the cars without informing them in words of the existence of such open space.

Falkins v. Boston Elevated Ry. Co

Exceptions from Superior Court, Suffolk County; Lemuel Le B Holmes, Judge.

Action by one Falkins against the Boston Elevated Railway Company. From a judgment for plaintiff, defendant brings exceptions. Sustained.

Stebbins, Storer & Burbank, for plaintiff.

Russell A. Sears and Hugh Bancroft, for defendant.

KNOWLTON, C. J. Since the trial in this case before a jury, the exceptions in *Welch v. Boston Elevated Railway Co.*, 187 Mass. 118, 72 N. E. 500, have been considered by this court, and a decision announced which covers substantially all the questions raised at this trial. The plaintiff was injured by stepping down in the space between two cars of a train on the elevated railway while passing from one car to another at a station. These cars run upon an elevated track through much of their course, and they also pass through the subway and run around sharp curves and on steep grades which were made necessary by the location and construction of the subway and the connecting roads. The cars were coupled together so that in the center of the passageway from car to car, there was an open space $7\frac{1}{2}$ inches wide, and the platforms of the cars curved away to permit the train to go around the curves, so that on the sides of the passageway the space between the cars was $10\frac{1}{2}$ inches wide. The uncontradicted evidence tended to show that it was necessary to have this space between the cars, because the grades of defendant's road were heavier and the curves sharper in portions of the subway than on any other elevated system. The defendant had no responsibility for the mode of construction of its subway, which was built under legislative authority, as a great public work, by the city of Boston, and afterwards leased to the defendant. There was no evidence tending to show that there was any other practicable mode of construction of the cars which would have been safer and better.

The jury were rightly instructed that there was no evidence of negligence on the part of the defendant in the construction of its cars and car platforms, but they were allowed to find that it was negligence for the defendant to permit passengers to pass from one car to another without warning them of the danger of stepping into the open space. This subject was covered by the decision in *Welch v. Boston Elevated Railway Co.*, *ubi supra*. In that case, as in this, it appeared that the chains which were kept up at the end of each car while the train was in motion were taken down at the station, thereby extending an invitation to passengers to pass from one car to another if there was occasion so to do; and in the earlier case it appeared that the plaintiff, a woman, after taking a step or two into a car, discovered that it was a smoking car, and turned to pass across the platforms into the next car, and stepped down between the cars. Neither she nor the plaintiff in the present case was given any warning. The only difference between that case and this, as the present

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plaintiff presents it, is that in that the plaintiff herself discovered that she had entered the smoking car, and started to pass into the other; while the present plaintiff says that the guard on the platform called out, "This is a smoker; pass through." This difference is immaterial, for the open passageway with the chains down was as much an invitation to a lady who found herself at the door of the smoking car to pass across into the other car as were the words of the guard. The real question is the same in both cases—whether it was the duty of the defendant to have a man who should warn every passenger who was about to step from one car to another of the danger of stepping into the opening. We are of opinion that the law does not impose this duty on the defendant. No one who observes a train of these cars as it enters or leaves a station can fail to see that there is a space between the cars. In passing from one car to another, a person who looks to see where he is stepping must discover the same fact, if he did not know it before. The percentage in number of all the passengers that ride upon these trains who would pass from one car to another without knowing that there was such a space between them in time to prevent an accident of this kind is exceedingly small. The practical difficulty of giving to every passenger who is about to pass from car to car an express notice of the opening, which would be any better than the information gained by the use of his eyes, would be great. The annoyance and disturbance that would be caused by speaking to every such passenger would be very objectionable. A majority of the court remain satisfied with the decision in *Welch v. Boston Elevated Railway Co.* that there was no negligence on the part of the defendant in arranging its passageway for passengers and impliedly inviting them to use it at stations, whenever there is occasion so to do, without informing them in words that there is an open space between the platforms.

Exceptions sustained.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Petitioner, v.
WEST COAST NAVAL STORES COMPANY.

(Submitted April 25, 1905. Decided May 29, 1905.)

[25 Sup. Ct. Rep. 745.]

Wharves—Right of Public Use.—A wharf in the harbor of a city, at the foot of a public street, built by a railway company under authority from the city, in addition to adequate terminal facilities, for the purpose of more conveniently procuring the transportation of freight beyond its own line by such carriers as it might select, is not a public wharf, whose use can be demanded by a shipper on payment of reasonable hire, for the purpose of employing vessels of his own selection for the further carriage of his goods.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern Dis-

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trict of Florida in favor of plaintiff in an action to recover damages from the railway company for its refusal to permit a shipper to use its wharf for the further carriage of his goods. Reversed and remanded to the Circuit Court for further proceedings.

. See same case below, 62 C. C. A. 681, 128 Fed. 1020.

Statement by MR. JUSTICE PECKHAM:

Certiorari to the circuit court of appeals for the fifth circuit to review a judgment of that court affirming one in favor of the West Coast Naval Stores Company (hereinafter called the plaintiff), against the railroad company (hereinafter called the defendant), for damages for refusing to permit the plaintiff to use the wharf of defendant at Pensacola for the transportation of plaintiff's property, as stated in the declaration.

The action was brought in the circuit court of the United States for the northern district of Florida.

The plaintiff's declaration contains two counts, which are substantially the same, and it is therein averred that the plaintiff is a citizen of Florida and the defendant is a citizen of Kentucky, and that the latter is a common carrier, and carries goods into Pensacola over its railroad, and, among them, the goods of the plaintiff. The course of business between the two companies has been for the plaintiff to obtain transportation of its turpentine and rosin from its yard near Pensacola, and its warehouse in that city, by means of a switch, built for that purpose by the defendant, to defendant's main line, and thence to the wharf of defendant (which plaintiff alleged was a public wharf), by means of the cars and upon the railroad of the defendant. The wharf extended into the bay of Pensacola, and was used by defendant (and by persons bringing goods over the defendant's railway to and into Pensacola) for the purpose of shipping such goods from the wharf to vessels destined for other ports. After defendant had transported the goods of the plaintiff to the wharf of defendant, the plaintiff had been accustomed to ship to other ports by vessels, with the managers of which plaintiff had contracts of carriage; that in the midst of the prosecution of such business defendant had notified plaintiff that it would thereafter refuse, and it did thereafter refuse, to allow plaintiff to transport its goods to the wharf for the purpose of there loading them on such vessels as above mentioned, and refused to permit the wharf and railway of defendant to be used in the prosecution of plaintiff's business, in so far as the prosecution would involve the use of the vessels chosen by the plaintiff for the shipment of the goods from Pensacola, to the damage of the plaintiff, as set forth in the declaration.

The defendant filed several pleas to this declaration, and the plaintiff demurred to them, which demurrer was overruled by the circuit court. Upon writ of error the circuit court of appeals reversed that judgment (57 C. C. A. 671, 121 Fed. 645), and when the case came down the defendant withdrew all former pleas and filed in the circuit court another plea, as follows:

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"The defendant, withdrawing all former pleas, pleads to the first and second counts of the declaration as follows:

"1. That the defendant has adequate depots and yards in the city of Pensacola for the receipt and delivery of all merchandise committed to it for transportation to, and delivery at, Pensacola. That neither its charter nor any statutory law has compelled or required, or compels or requires, it to construct or maintain the wharf mentioned in the declaration, but that it constructed the same at an expense to it of tens of thousands of dollars, for the purpose of providing facilities for the transaction of its business with such vessels as it might permit to come to and lie at said wharf to take cargo. That no business has ever been done at said wharf except the transportation by the defendant, in cars or its railroad over said wharf, to and from vessels lying at the said wharf, of goods brought, or to be transported, by said vessels, and the loading and unloading thereof of such vessels. That, in accordance with such purpose, it made and promulgated, upon the construction of said wharf, and more than five years prior to the bringing of this suit, rules and regulations, by which it limited the use of its wharves, including the wharf mentioned in the declaration, 'to traffic handled by vessels in regular lines running in connection with the Louisville & Nashville Railroad, and vessels belonging to, or consigned to, Gulf Transit Company' (an agency of defendant), and making the use of said wharves 'for traffic in connection with vessels other than herein referred to,' 'subject to special arrangement.' The said rules and regulations were in operation and enforced by defendant from the time of their promulgation, as aforesaid, up to, and at the time of, the refusal of the defendant to permit the naval stores of the plaintiff to be loaded from its wharf into the 'certain vessels' mentioned in the declaration, and still are in force and operation. That the said 'certain vessels' were not regular lines running in connection with the Louisville & Nashville Railroad, nor were they belonging to, or consigned to, Gulf Transit Company, nor had they made any special arrangements with the defendant for the use of the said wharf; but that said vessels constituted an independent line between New York and Pensacola, and New York and Mobile, Alabama, carrying merchandise between the said points, and would have come in competition with a line of steamers with which the defendant was then negotiating for regular service in the transportation of merchandise to and from New York and Pensacola, in connection, and under traffic arrangements, with defendant, and such service has since been established, and a line of steamers is now regularly transporting merchandise between said points, in such connection, and under such traffic arrangements; and was also in competition with the defendant itself, which was, at said time, and had been for a long time prior thereto, engaged in a like business between said points, carrying goods by its line of railroad from Pensacola and Mobile to River Junction, Florida, Cincinnati, Ohio, and Montgomery, Alabama, and there deliver-

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ing the same to a connecting carrier and other carriers connecting therewith, transporting goods to the city of New York, and receiving from said connecting carriers at the points aforesaid, and transporting to Pensacola and Mobile, goods shipped from New York to Pensacola and Mobile.

"That the defendant has not either notified plaintiff that it would not carry plaintiff's naval stores, nor refused to transport plaintiff's naval stores, over its railway mentioned in the declaration, to and on its wharf, also mentioned in the declaration; that it has at all times so transported them when requested so to do by the plaintiff; that the defendant has refused to permit the certain vessels mentioned in the declaration to take goods and merchandise from its said wharf, to be transported by them to the port of New York, as aforesaid, but that such refusal was solely because the said vessels were not of either of the classes provided for by the rules aforesaid, nor had made special arrangements with the defendant, and would have been, as aforesaid, in competition with the lines of vessels connecting with the defendant, running to and from New York, and was, as aforesaid, in competition with the defendant itself in its rail transportation aforesaid, to and from New York city; and that the defendant was then, and at all times had been, ready and willing to give, and did give, to the plaintiff the same facilities for shipping naval stores to New York, or any other port, over defendant's said wharf, as it gave to any and all other shippers; that the unloading by the plaintiff of its said goods into said vessels necessarily involves the lying at, attachment to, and use of, the said wharf, one of the terminals of the defendant, by the said vessels; that the said wharf was not, at the time mentioned in the declaration, and has never been, a public wharf, unless the facts set forth hereinbefore in this plea constituted it such."

This plea was in substance the same as the third plea which defendant had theretofore interposed, and which the circuit court of appeals had held bad. The plaintiff again demurred. The circuit court sustained the demurrer, in accordance with the decision of the circuit court of appeals, and gave leave to the defendant to amend as it might be advised. The defendant refused to amend. Judgment was then entered against it by default, and direction given to proceed with the case for the purpose of having plaintiff's damages assessed. A trial by jury upon the question of damages was had, and the jury found a verdict for the plaintiff for \$1,000, upon which judgment was duly entered.

The defendant then sued out a writ of error to the circuit court of appeals for the fifth circuit, which court, adhering to the views expressed by it on the former appeal, affirmed the judgment (62 C. C. A. 681, 128 Fed. 1020), and the defendant thereupon applied to this court for a writ of certiorari, which was granted, and the case is now here.

Messrs. William A. Blount, and A. C. Blount, Jr., for petitioner.

Mr. John C. Avery, for respondent.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court:

When this case was first before the circuit court of appeals, it was stated in the opinion which was then delivered that the case showed that the railroad company was in possession of a large wharf, built at its own expense, "on the extension of a public street in the city of Pensacola, into the deep waters of the harbor of the city." On looking at the record before us, we find in the pleadings no averment that the wharf in question was in fact built as such an extension. The statement of facts preceding the opinion of the circuit court of appeals shows, however, that there were replications filed to the various pleas, one of which replications contained the averment that the wharf was an extension of a street of the city of Pensacola, into the bay of Pensacola, for a distance of more than 500 yards, all within the limits of the city of Pensacola, and maintained by the defendant by authority of the city. Hence the statement in the opinion was perfectly correct. Subsequently to the decision of the circuit court of appeals, and after the case was remanded to the circuit court, it appears by the record before us that the defendant withdrew all its former pleas, and filed the single plea set forth in the foregoing statement of facts. To this plea no replication was filed. Counsel for the plaintiff admits that neither the declaration nor the plea contains any averment that the wharf in question was an extension of a public street. If we assume, what is without doubt the fact, that the wharf was built at the foot of a public street in the city of Pensacola, and was carried out into the deep water of the bay some hundreds of yards, we must also assume the fact mentioned in the brief of the defendant, and substantially set forth in the former replication, that the building and maintaining of the wharf were authorized by authority from the city of Pensacola, and also from the state of Florida. These facts will therefore be taken as admitted, in order that the case may be discussed upon the facts as they really exist.

Counsel for plaintiff now asserts, and we assume, that the gravamen of plaintiff's complaint is not that the defendant would not transport plaintiff's goods, or any part of them, on defendant's lines, from the wharf in question, "but only that defendant would not permit plaintiff's goods to be at, from, or by means of defendant's wharf loaded upon, or delivered to, the said vessels," with the managers of which plaintiff had contracted to have its goods transported to other ports. This means of transportation, by such vessels as plaintiff should choose, is asserted by it as a right, because it contends that the wharf of defendant, under the averment to that effect in the declaration, and not denied, in terms, in the plea, taken in connection with the facts stated in such plea, was a public wharf, or that, at least, the defendant had devoted it to a public use. The defendant in its plea sets up facts which it avers show the wharf was not a public one. The plaintiff insists that the plea shows that the defendant built

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and used the wharf itself and permitted a large part of the public to use it, including, at any rate, those who were engaged in traffic handled by vessels belonging to regular lines running in connection with the defendant, and also including vessels belonging or consigned to the Gulf Transit Company, an agent of defendant, together with those who were using the wharf under some special arrangements between them and the defendant. All this, the plaintiff contends, amounted to making the wharf a public one, or at least that it thereby became a facility, to the use of which the public as a public had a right on payment of reasonable compensation. If plaintiff chose to employ, for the further transportation of its goods, the vessels with the managers of which the defendant had some business arrangement or contract, it is not denied that the defendant would and did permit such transportation. In this respect there is no allegation that the plaintiff did not have equal facilities with all other shippers. Defendant's plea avers that it did give to plaintiff the same facilities for shipping its goods over defendant's wharf that it gave to any or all shippers. In brief, the fact seems to be that the only complaint of the plaintiff is that defendant will not permit competing vessels to make use of its wharf for the purpose of such competition.

We do not see that the fact that the wharf was erected under authority from the city, at the foot of a public street of the city, makes any material difference in the character of the wharf, or that the right of plaintiff to select its own vessels to continue from that wharf the transportation of its goods is, on that ground, enhanced, or the right of defendant to control the wharf for its own use when erected is thereby diminished. The right to erect the wharf was granted by the proper authorities, and, so far as the record shows, it was granted without imposing any conditions as to its use by the public. We think the plaintiff had no right of access to the wharf founded simply upon the fact that it was erected under proper authority, in the harbor of Pensacola, and at the foot of one of the public streets of that city. The question of the rights of plaintiff must really turn upon the character of the use of the wharf, whether it is public or private.

The argument upon the part of plaintiff is, in substance, this: True, defendant has erected a wharf, which is not in fact intended or used as the terminus of its road at Pensacola, adequate yards and depots having been furnished by the defendant for all goods and passengers destined to Pensacola only; but the wharf has been erected to enable defendant to more conveniently carry out contracts for transportation beyond its own line, which it was not compelled to make, and which it could carry out by such agencies as it chose; but the plaintiff, having goods destined for points outside of Florida, insists upon its right to use the road of defendant, not to carry these goods to Pensacola, but to defendant's wharf, so that plaintiff may there transfer them into vessels which it has arranged to take them; in order to do this

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it is necessary that defendant be compelled to share its possession of its own wharf with the managers of these other vessels; for this possession plaintiff is prepared to make reasonable compensation. The right on the part of the plaintiff is urged as the result of the action of defendant in permitting the use of the wharf as stated in the plea. By such use it is contended that the defendant in effect dedicated the wharf to the public; or, at least, has granted to the public an interest in the use of the wharf.

We are of opinion that the wharf was not a public one, but that it was a mere facility, erected by and belonging to defendant, and used by it, in connection with that part of its road forming an extension from its regular depot and yards in Pensacola, to the wharf, for the purpose of more conveniently procuring the transportation of goods beyond its own line, and that defendant need not share such facility with the public or with any carriers other than those it chose for the purpose of effecting such further transportation.

Neither the public nor the plaintiff had such an interest in the wharf as would give to either the right to demand its use on payment of reasonable hire. Nor was the wharf a depot or place of storage of the defendant for goods to be delivered at or taken from the city of Pensacola for transportation by rail. The defendant had adequate depots and yards in that city for the proper storage of all merchandise committed to it for delivery at Pensacola, or there received, to be transported therefrom by defendant. All consignees of goods at Pensacola had equal facilities for obtaining them there. Although not bound originally to carry goods beyond its own terminus at Pensacola, yet the defendant might agree to do so, and it had the right, when duly authorized by the proper authorities, to construct facilities to enable it to continue such transportation beyond the line of its railroad, by such other carriers as it might agree with. The city or state authorities, in granting the right to erect such facilities, might, of course, have attached such conditions as they thought wise; but, in their absence, neither the public nor this plaintiff, as the owner of goods, would have the right, on this state of facts, to go to the wharf with vessels for the purpose of continuing transportation of goods in competition with the defendant. The defendant never became a common carrier, as to this wharf, in the sense that it was bound to accord to the public or to plaintiff a right to use it upon payment of compensation. We do not see that the plaintiff had any right even to demand that the defendant should carry plaintiff's goods on the rails defendant had laid down to reach the wharf from its depot or yards at Pensacola, the terminus of its road at that city. Those rails were only laid for the purpose of reaching the wharf, in order that defendant might carry goods to it which it had undertaken to forward, by itself or by vessels it had arranged with, beyond its line. Very likely it would be bound to carry plaintiff's goods on this part of its rails, for the same purpose and on the same terms it did for others, viz., in order that it might itself, or through

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others it had contracted with, forward the goods beyond its own line. But plaintiff demands more than this: it demands that defendant shall carry plaintiff's goods over its rails thus laid, in order that plaintiff may itself forward its goods by vessels of its own selection, and that defendant shall surrender possession of enough of its wharf to enable plaintiff to do so.

That the defendant had the right to choose its own agencies, and grant to them the exclusive privilege of access to its own wharf, which it built only for the purpose of continuing the transportation of goods which it had transported to the end of its line, has in effect been decided by this court. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 28 L. Ed. 291, 4 Sup. Ct. Rep. 185. In that case it was held that, although at common law the common carrier was not bound to carry beyond its own lines, yet it might contract to do so, and, in the absence of statutory regulations prohibiting it, the carrier might determine for itself what agencies it would employ to continue the transportation, and it was not bound to enter into agreements for such transportation with another because it had done so with one common carrier. Having the right, as the authorities prove, to decide what agencies it would employ for the purpose of transporting goods beyond its own line, and not being bound to enter into any contracts or arrangements with one person or carrier because it had so contracted or arranged with another, we think it follows that defendant was not obliged to permit the public to have access to its wharf, built for the purpose stated, simply because it granted such permission to those with whom it made arrangements of the kind set forth in the plea. While refusing to make any agreement with defendant for the further transportation of plaintiff's goods beyond Pensacola, plaintiff nevertheless claims a right to use the wharf erected by defendant for its own purpose, as already stated. This cannot be sustained. The principle stated in the above case is, in substance, recognized in *Gulf, C. & S. F. R. Co. v. Miami S. S. Co.*, 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407; *Little Rock & M. R. Co. v. St. Louis S. W. R. Co.*, 26 L. R. A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775, affirming same case in 4 Inters. Com. Rep. 537, 59 Fed. 400. The two last cases involved the construction of the Interstate Commerce Act, but they affirm the principle that a common carrier may agree with such other carrier as it may choose, to forward beyond its own line the goods which it had transported to its own terminus. See also, *Central Stock Yards Co. v. Louisville & N. R. Co.*, 192 U. S. 568-571, 48 L. Ed. 565-569, 24 Sup. Ct. Rep. 339; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 2 L. R. A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; *Oregon Short Line & U. N. R. Co. v. Northern P. R. Co.*, 4 Inters. Com. Rep. 249, 51 Fed. 465; *Ilwaco R. & Nav. Co. v. Oregon Short Line & U. N. R. Co.*, 5 Inters. Com. Rep. 627, 6 C. C. A. 495, 15 U. S. App. 173, 57 Fed. 673.

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The cases cited did not involve rights of parties to a wharf situated in a harbor, but we think that the right of one carrier to enter into arrangements with another carrier to forward its goods, and to refuse to do so with others, or to permit such others to avail themselves of the facilities constructed by the original carrier for that purpose, is not altered because the facility so constructed by it happens to be a wharf in the harbor of a city instead of some structure on land. The wharf may be a private one, and its owner may permit those only to have access to it that it may choose. A private wharf may exist on the shores of a navigable river or lake, or in a harbor of a city from which access is obtained directly to the sea. *Dutton v. Strong*, 1 Black, 23, 32, 17 L. Ed. 29, 32.

It is to be remembered that the wharf was not, in strictness, the terminus of defendant for unloading its goods for Pensacola. The defendant had other depots and yards for that purpose. The main use of the wharf was only for the purpose of sending the goods brought by defendant, to other ports as a continuation of their carriage beyond the line of the defendant's road. How much space, if any, it might devote to other vessels, with the managers of which it might make special arrangements, would naturally be for the defendant to decide, as also the particular terms of such arrangements. The conveniences of the wharf are, of course, necessarily limited.

It is well said by counsel for defendant in their brief that "the very nature of a wharf, and its inadequacy to meet the demands of every incoming vessel, necessitates that its use should be exclusively for those with whom the carrier enters into arrangements. The carrier has a right to select a strong connection instead of a weak one,—one that will give assurance of permanent business, instead of one that can offer only occasional shipment. If the free use is incompatible with the certain regular use by the steamer, or lines of steamers, with which the carrier is aligned, it is too clear for further reasoning that such carrier has the right to accept the latter and thereby exclude the former."

The reasons for permitting such use of the wharf are manifold. Without it the commerce of the country in the large cities would be cramped, if not very greatly damaged, by the uncertainty of finding quarters for the regular and swift unloading and loading of the vessels. But the capacity of a wharf is necessarily limited, and if the wharf were open to all comers in their turn there could be no certainty as to any particular vessels being able to reach the wharf at any definite time, and consequently there would be a like uncertainty as to when such vessel would be able to depart with its load. One unexpected so-called tramp vessel might, by arriving a few hours in advance, take possession of all that was left of the wharf for the purpose of loading, and thus prevent the regular steamer, arriving a little later, from coming to the dock, unloading its cargo, and then loading with goods from the railroad. In this way there would

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be confusion in time and in the possession of the wharf by the different vessels, and its value for the purpose for which it was erected would be greatly reduced, if not wholly destroyed.

The principle herein recognized has also been affirmed by this court in what are known as the Express Cases, 117 U. S. 1, 29 L. Ed. 791, 6 Sup. Ct. Rep. 542, 628, where it was held (because the facilities were necessarily limited) that railroad companies had the right to contract with particular express companies for the transportation of the traffic of the latter over the lines of their railroads, and that the railroad company was not bound to transport the traffic of independent express companies over its lines in the same manner in which it transported the traffic of the particular companies contracted with; in other words, that the railroad companies were not bound to furnish, in the absence of a statute, to all independent express companies, equal facilities for doing an express business upon their passenger trains.

These observations answer the contention of plaintiff that defendant, by erecting the wharf and using it in the way it does, has thereby devoted its property to a public use, and that it has thereby granted to the public an interest in such use, within the principle laid down in *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77. It has not devoted its wharf to the use of the public in so far as to thereby grant to every vessel the right to occupy its private property upon making compensation to defendant for the exercise of such right. The reasons we have already endeavored to give.

The judgments of the Circuit Court of Appeals and of the Circuit Court for the Northern District of Florida are reversed, and the case remanded to the latter court for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE HARLAN dissents.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appt.,
v. UNITED STATES.

(Submitted April 16, 1905. Decided May 15, 1905.)

[25 Sup. Ct. Rep. 665.]

Postoffice—Railway Mail Route—Compensation—Adjustment.—The adjustment of compensation to a railway company for carrying the mails, made by the Postmaster General in the exercise of his authority under U. S. Rev. Stat. § 4002, U. S. Comp. Stat. 1901, p. 2719, to arrange the railway routes upon which the mail is to be carried, and to adjust and readjust compensation, may be confined, where an extension is made beyond the terminal of an established mailroute, to the extension alone, without readjusting the compensation for the whole route as extended.

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Appeal from the Court of Claims to review the dismissal of a petition by a railway company to recover compensation for carrying the mails. Affirmed.

The facts are stated in the opinion.

Messrs. George R. Peck, W. W. Dudley, and L. T. Michener, for appellant.

Assistant Attorney General Pradt and Mr. John Q. Thompson, for appellee.

MR. JUSTICE McKENNA delivered the opinion of the court:

The appellant, a Wisconsin corporation, filed a petition in the court of claims, August 25, 1896, which it amended July 19, 1900, and by which it sought recovery from the United States of the sum of \$9,101.08, for compensation for carrying the mails from Milwaukee, Wisconsin, to Republic, Michigan, and thence to Champion, Michigan.

The services were rendered by the Milwaukee & Northern Railroad Company. Appellant's ownership was derived from that company, as alleged in the petition, as follows:

"Your petitioner further avers that on the 30th day of September, 1890, it became the purchaser, and thereupon it became the lawful owner, by assignment and transfer, of all of the capital stock of the said Milwaukee & Northern Railroad Company; that on the 1st day of October, 1890, the board of directors of the Milwaukee & Northern Railroad Company was reorganized by the election of persons who were either directors or officers of the petitioner, and the offices were filled by the election of persons who were officers of its company, with the solitary exception of the president of the Milwaukee & Northern Railroad Company; that from the 30th day of September, 1890, until the 26th day of June, 1893, that company operated the railroad as a separate organization and in the name of the Milwaukee & Northern Railroad Company; that on the 26th day of June, 1893, pursuant to a vote of the stockholders of the Milwaukee & Northern Railroad Company, the latter company executed a deed to the petitioner, whereby it conveyed to petitioner all its railroads, railways, rights of way, depot grants, tracks, bridges, etc., and also all other property and choses in action whatsoever, both real and personal, of the said Milwaukee & Northern Railroad Company, and all its rights, privileges, and corporate franchises connected with or relating to such railroad, or to the construction, maintenance, use, or operation of the same. And that thereafter, to wit, August 28, 1893, the Milwaukee & Northern Railroad Company held its last stockholders' meeting and its last directors' meeting, and since that time it has not exercised any corporate functions or powers, nor has it pretended to do anything of the sort."

The United States demurred to the petition on the grounds that (1) "The claim came to the claimant, if at all, by a pretended assignment, which, as to the United States, was void; (2) the allegations of the amended petition did not state facts

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sufficient to constitute a claim against the United States." The demurrer was sustained and the petition dismissed, whereupon this appeal was taken.

The demurrer presented the questions of the validity of the assignment and the merits of the claim. We rest our decision on the latter. We express no opinion of the validity of the assignment.

The Milwaukee & Northern Railroad ran from Milwaukee, Wisconsin, to Republic, Michigan, a distance of 255.37 miles. Under the authority given him by law, "to arrange the railway routes on which mail is carried" (§ 3997 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 2717), the Postmaster General designated the road from Milwaukee to Republic as postal route No. 139,016, and compensation was fixed for carrying the mails thereon. On February 4, 1890, the road was extended to Champion, Michigan, a distance of 8.89 miles. Provision was made for the extension by an order dated February 4, 1890, which directed that service should be extended from Republic to Champion, increasing distance 9.16 miles, less .27 miles, making a net increase of 8.89 miles, "in accordance with distance circular, and with the understanding that the rate of compensation on this extension will be adjusted in a subsequent order, in accordance with law."

On December 1, 1890, the following order was made and directed to the general manager of the railroad:

Sir: The compensation for the transportation of mails, etc., on route No. 139,016, between Milwaukee, Wisconsin, and Champion, Michigan, has been fixed from September 23, 1890, to June 30, 1891 (unless otherwise ordered), under acts of March 3, 1873 [17 Stat. at L. 556, chap. 231], July 12, 1876 [19 Stat. at L. 78, chap. 179], and June 17, 1878 [20 Stat. at L. 140, chap. 259], upon returns showing the amount and character of the service for thirty successive working days, commencing September 23, 1890, at the rate of \$35,022.37 per annum, being \$132.53 per mile for 264.26 miles.

From February 24 to September 22, 1890, pay is allowed at the rate of \$1,178.19 per annum, being \$132.53 per mile for 8.89 miles extension between Republic and Champion, Michigan.

This adjustment is subject to future orders and to fines and deductions.

It will be observed that this order purports to fix the compensation on route 139,016 between Milwaukee and Champion.

The dates designated are somewhat confusing. However, in two days another order was issued and directed to the company, which reads as follows:

Sir: The compensation for the transportation of mails, etc., on route No. 139,016, between Republic and Champion, Michigan, has been fixed from February 24, 1890, to June 30th, 1891 (unless otherwise ordered), under acts of March 3, 1873, July 12, 1876, and June 17, 1878, upon returns showing the amount and character of the service for thirty successive working days, com-

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encing September 23, 1890, at the rate of \$1,178.19 per annum, being \$132.53 per mile for 8.89 miles extension.

This adjustment is subject to future orders and to fines and deductions.

The first order revoked the compensation for carrying the mails from Milwaukee to Republic, which had been fixed, and was manifestly a mistake. The second order was intended to correct the mistake, and confine the adjustment to the extension from Republic to Champion.

The contention of appellant is that the Postmaster General had no power to issue the second order, but was required by § 4002 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 2719) to fix compensation for the whole route as extended. The appellant urges in support of the contention not only the provision of the section, but the practice and usage of the Post Office Department. Section 4002 is as follows:

"The Postmaster General is authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned:

"First. That the mails shall be conveyed with due frequency and speed; and that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails.

"Second. That the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

The section does not sustain the appellant's contention. The Postmaster General is given the power to arrange the railway routes upon which the mail is to be carried, and to adjust and readjust compensation. The orders of December 1 and December 3, respectively, reserved this power, and the only limitations on its exercise, expressed in § 4002, is as to the manner of ascertaining the rate, which is to be by the average weight of the mails. There is nothing in the section which requires the abrogation of prior contracts when an extension is made beyond the terminal of an established route, or precludes provision for the extension

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alone. A contract may not be forced upon a railway. It may accept, however, and become bound by the action of the Post Office Department. *Eastern R. Co. v. United States*, 129 U. S. 391, 32 L. Ed. 730, 9 Sup. Ct. Rep. 320. The record does not show any protest against the order of December 3. Its terms were unmistakable, and, as counsel for the government observes, "it may be justly inferred" that the railroad company "viewed the order of December 3 in the same light, and as having the same force and effect, as intended by the postal authorities."

Judgment affirmed.

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(Supreme Court of Texas, June 19, 1905.)

[87 S. W. Rep. 1144.]

Railroads—Negligence—Allowing Johnson Grass on Right of Way—Communication to Land—Recovery.—Laws 1901, p. 283, c. 117, provides that one owning, leasing, etc., land contiguous to the right of way of a railroad, which has permitted any Johnson grass or Russian thistle to mature or go to seed on its right of way, shall be entitled to recover damages occasioned by reason of such grass, provided that any owner, etc., who permits any such grass or thistle to mature or go to seed upon the land shall have no right to recover. Held, that where Johnson grass was communicated to land from a railroad right of way, but the owner permits it to mature and go to seed thereon, he cannot recover from the railroad.

Certified Questions from Court of Civil Appeals of First Supreme Judicial District.

Action by Arthur Burns and others against the San Antonio & Arkansas Pass Railway Company. Plaintiffs recovered a judgment, and defendant appealed to the Court of Civil Appeals, which certifies questions to the Supreme Court.

Proctors, for appellant.

Davidson & Bailey, for appellees.

BROWN, J. Certified questions from the Court of Civil Appeals for the First Supreme Judicial District. The statement and questions are as follows:

"Appellees brought this suit, alleging that they were owners of land lying on each side of the defendant railway company's right of way; that the defendant company had permitted Johnson grass to go to seed upon its right of way, and had negligently permitted it to be communicated to plaintiffs' land, to their damage, for which they prayed, as well as for the penalty prescribed in the act of the Legislature of April 18, 1901, commonly known as the 'Johnson Grass Statute.' At the trial plaintiffs, in open court, abandoned their action under the statute, and sought to sustain a recovery under the rules of the common law, but they made no change in their pleading. They recovered a judgment,

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and the defendant company has appealed to this court. The case is now pending before us on rehearing.

"The facts are that plaintiff is the owner of cultivated land lying on each side of defendant's right of way. The defendant is a railway corporation. It has for years permitted Johnson grass to mature and go to seed on its right of way. It was not placed on the right of way by the company's procurement, and, though it has been communicated to appellees' lands, to their damage, this has not been due to the actionable negligence of the company, unless the statute be applied. The appellees have passively permitted the grass so communicated to their land to mature and go to seed thereon, and defendant pleaded and urged that fact as a defense to the suit. We reversed the judgment of the trial court on the ground that the undisputed proof showed that appellees had no action at common law. We remanded the cause, however, on the ground that the facts would sustain the statutory action for damages. In view of another trial, we construed the statute relating to the defense to such a suit, and held that, if the appellees had simply allowed to go to seed upon their land the grass communicated by the wrong of defendant, it would constitute no defense to the action under the statute.

"We respectfully certify for your decision the following questions:

"First. Plaintiffs having pleaded and proved a case which would have justified a judgment under the statute, but for some reason having waived their rights thereunder, and induced the court to render a judgment in their favor upon another theory, and the undisputed proof showing no right to a judgment except under the statute, should this court have reversed and rendered the judgment, instead of reversing and remanding?

"Second. Did this court err in holding that appellees might recover, under the provisions of the statute, notwithstanding proof that Johnson grass communicated to their land from seed from the company's right of way had been permitted to mature upon their premises?"

To both questions we answer that the facts stated show that appellees have no right of action under the statute referred to, and the Court of Civil Appeals should have rendered judgment for the appellant.

The first section of the act declares it to be unlawful for a railroad company to permit Johnson grass to mature or go to seed on its right of way. The appellees' claim is based upon the following section of that act: "Sec. 2. If it shall appear upon the suit of any person owning, leasing or controlling land contiguous to the right of way of any such railroad or railway company, or corporation, that said railroad or railway company, or corporation has permitted any Johnson grass or Russian thistle to mature or go to seed upon their right of way, such person so suing shall recover from such railroad or railway company or corporation, the sum of twenty-five dollars, and any such additional sum as he may have been damaged by reason of such railroad or railway

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company or corporation permitting Johnson grass or Russian thistle to mature or go to seed upon their right of way. Provided, any owner of land, or any person controlling land contiguous to the right of way of any such railroad or railway company, who permits any Johnson grass or Russian thistle to mature, or go to seed upon said land, shall have no right to recover from such railroad or railway company as provided for in this act." Laws 1901, p. 283, c. 117. The facts show that the appellees are owners of land contiguous to appellant's right of way, on which Johnson grass was permitted to mature or go to seed, and are entitled to maintain this action under the above provision of that statute, unless they are embraced in the terms of the proviso. The language, "any owner of land * * * contiguous to the right of way," etc., used in the proviso, is broad enough to embrace all persons who own land contiguous to the right of way, and who permit Johnson grass to go to seed thereon, without regard to the means by which the grass was communicated to the land. The policy of the state in enacting the law was to prevent the spread of Johnson grass, and, in support of that policy, it saw fit to deny an action under that law to any one who should permit the pest to be propagated on his premises. We are unable to see any sound reason for limiting the terms of the law.

An inspection of the act suggests to our minds a serious question as to the constitutionality of that portion of the law which gives a right of action for damages to the owner of contiguous land, because the subject of damages is not mentioned in the caption of the act. The question is not submitted by the Court of Civil Appeals, and we do not pass upon it, although it might be regarded as embraced in the second question propounded.

CHESAPEAKE & O. RY. CO. v. DEEPWATER RY. CO. et al.

(Supreme Court of Appeals of West Virginia, April 25, 1905.)

[50 S. E. Rep. 890.]

Eminent Domain—Power to Condemn Land of Another Railroad—Earlier Location of Road.*—Land covered by a location for the purposes of its road, made by a railroad company, and acquired by it by purchase from the landowner, may be taken, under the power of eminent domain, by another railroad company which has made an earlier location of its road on the same land, but the company owning the land by purchase may defeat the condemnation proceeding by showing that its location upon the same was first made.

Same—Same—Same.—As between rival railroad companies claiming the same location, priority of location in point of time gives superiority of right to the use of the land, covered by the location, for railroad purposes.

*For the authorities in this series on the subject of the right to condemn railroad property, see foot-note appended to *Chicago, etc., Ry. Co. v. Chicago, etc., R. Co.* (Ill.), 14 R. R. R. 722, 37 Am. & Eng. R. Cas., N. S., 722.

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Same—Prior Location of Railroad—Effect of.—Location of a railroad, within the legal definition of the terms, is a proceeding in the exercise of the power of eminent domain, amounting to an appropriation of the particular place selected for the site of the road, as against all persons except the owner of the land, and a person who may have perfected a prior location thereon; and, as to the landowner, it gives a right to acquire his title by purchase, or the further exercise of the power of eminent domain, paramount to that of a company claiming under a subsequent location.

Same—Same—What Constitutes.—Neither the filing of a map and profile of the proposed road, nor the commencement of condemnation proceedings, is an essential step in making such location. Both may be deferred until after the location is perfected.

Same—Same—Same.—A mere survey made by the engineers of a company, not adopted or determined upon by the corporation itself, by an act of its board of directors, as the location of its road, is not an appropriation or location, giving priority of right as against third persons.

Same—Same—Sufficiency of Location.—A survey staked out upon the ground, as a center line, a preliminary line, or an actual location, whether delineated on paper or not, if adopted by the corporation as aforesaid, is a sufficient location.

Same—Same—Same.—A location, as between rival companies, need not be exact as to the width of the right of way claimed or other matters of mere detail. If the site intended to be held is substantially shown, the location is sufficient.

Same—Same—Adoption of Survey.—A survey made by promoters of a railroad corporation, for its purposes, before the company is incorporated, or by an existing railroad company, for an extension of its road, before filing, in the office of the Secretary of State, a certificate of extension, as required by section 53 of chapter 54 of the Code of 1899, may be adopted as a location after incorporation or the filing of the certificate, as the case may be.

Same—Same—Necessity of Making Survey of Entire Road.—If, acting in good faith and diligently prosecuting the enterprise, it professes to have undertaken the construction of its road, a railroad corporation may seize and hold, as against a rival company, by location thereon, land on any part of its proposed route, without having made a survey of its entire road.

Same—Same—Adoption of Survey.—Though not the only mode of adopting a survey, so as to make it a location, the filing of a map of it in the office of the Secretary of State by order of the board of directors of the company is prima facie proof of such adoption.

Same—Same—Same.—The mere filing of such plat in such office, without proof that it was authorized by the corporation, is not evidence of an adoption of the survey shown by it.

Same—Location of Railroad—How Made by Corporation.—A location can be made only by act of the corporation through its board of directors, but acts done by agents, under the orders of the board of directors, for the purpose of claiming and holding a location designated by the board as such, are evidence of intent on the part of the board of directors to claim and hold such location.

Corporations—Directors' Resolution—Construction.—To aid in ascertaining the true meaning and purpose of a resolution passed by the board of directors of a corporation, the terms of which are not certain and definite, resort may be had to the circumstances under which it was passed, the situation of the company, the object of the resolution and the meeting at which it was passed, and the contemporaneous and subsequent conduct of the corporate authorities in respect to it, and parol evidence is admissible in applying descriptive terms used to the subject-matter.

Location of Railroad by Corporation—Adoption of Survey—Proof.—A railroad company, having caused to be surveyed a portion of the

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route of a contemplated extension, the right to make which had not been obtained by compliance with the statutory regulations, and perceiving the intention of a rival company to seize part of the location so surveyed, hastily held a meeting of the stockholders, at which maps of the surveys, not as yet filed as required by law, were produced and examined, and which, after an examination of the maps, passed a resolution authorizing the extension, directing it "to be located on the most practical route as shown on the maps and profiles filed as required by law," and ordering certain persons "to make the necessary filings as required by law as fast as the same may be prepared." On the same day, and immediately afterwards, the directors held a meeting, and, with the said resolution of the stockholders and the maps before them, passed a resolution, authorizing and directing the chief engineer of the company "to carry out the surveys and extensions of same as authorized by the stockholders in their meeting of this date, and to do all things further that may be necessary for carrying out said resolution," and directing filings to be made "as fast as the same may be prepared." At the earliest possible moment after the adjournment of the meeting of the directors, and on the same day, the resolution of extension, and the maps as far as made, were filed in the office of the Secretary of State. Held, that the references in the resolutions to maps included those already made, and that the act of ordering them filed is prima facie proof of adoption of the surveys shown on them.

Evidence—Corporate Records.—Books and records of a private corporation are not admissible evidence in its favor, in a controversy between it and a stranger respecting title to property or other right directly in issue between them, to prove that the acts therein recited were performed at the time and in the manner therein stated, except as memoranda in connection with the oral evidence of witnesses who testify from their personal knowledge as to such transactions.

Same—Same.—After proof in such case, by competent evidence, that certain corporate acts were performed and written memorials thereof made in the form of resolutions or otherwise, the books and records of the corporation are admissible to identify and prove the character and terms of such instruments.

Eminent Domain—Railroad—Priority of Location—Evidence—Corporate Records.—A claim of priority or location by one railroad company against another, set up in a condemnation proceeding, is the assertion of a right against a stranger to such corporation, and the records of the respective litigating corporations are not evidence in their favor, except to the extent and for the purpose above stated.

Same—Damages—Prior Railroad Improvements.—A railroad company is not entitled to compensation for improvements made by it on property upon which it has entered, pending its proceeding to condemn the same, upon the reversal of the final judgment in its favor, subsequently obtained in the action, and as adjudication against its right to condemn the land.

Same—Reversal of Judgment—Restoration of Possession.—In such case, upon reversing the judgment and ascertaining that the action cannot be maintained, the appellate court will order restitution to the landowner of the possession of the premises, and remanded the case, with leave to the plaintiff in error to sue out a writ of possession, and a direction to dismiss the action with costs, after the effectuation of such restitution.

Same—Same—Same—Supersedeas.—Quære: When one internal improvement company has been erroneously adjudged to have the right to condemn and take land belonging to another such company, may the plaintiff be stayed from taking possession thereof by an order of supersedeas or other process?

(Syllabus by the Court.)

Brannon, P., dissenting in part.

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Error from Circuit Court, Raleigh County.

Action by the Chesapeake & Ohio Railway Company against John L. Trail and others. Judgment for plaintiff, and the Deepwater Railway Company brings error. Reversed.

A. N. Campbell and Brown, Jackson & Knight, for plaintiff in error.

Simms & Enslow and W. P. Hubbard, for defendant in error.

POFFENBARGER, J. Although, in form, a proceeding by one railroad company to condemn, for its roadbed, a strip of land owned by another railroad company, which purchased said land for its roadbed, this case is in reality a controversy between said railroad companies over the question of priority of right to appropriate the strip of land in question, and calls for the settlement of principles governing the rights of rival companies contending for the same location for their respective roads.

The conflict is between a branch line of the Chesapeake & Ohio Railroad, called the "Piney Creek Extension," commencing at Prince Station on the main line, and on New river, and running for several miles up Piney Creek and its branches, and thence across the divide to the waters of the Guyandotte river, and an extension of the Deepwater Railway, commencing at Glen Jean on Loup Creek, another branch of the New river, and not far from Piney creek, and running across the divide to the waters of the Guyandotte river, and thence across the mountains to the Bluestone river. The point of conflict is a place called Jenny's Gap, on the ridge between the waters of New river tributaries and those of Guyandotte river branches. There is a space for two locations through the gap, but the one in question is preferable to the other.

The main line of the Chesapeake & Ohio Railway Company from Richmond, Va., to the Ohio River, was completed in the year 1873, and, since that time, branch lines, as feeders to it, running up many of the tributaries of the Kanawha and New rivers into the rich coal and timber regions of that section of the state, have been built. Few, if any, of these branch or lateral roads exceed 50 miles in length, and most, if not all, of them have been constructed and operated under the original articles of incorporation, by authority conferred by section 69 of chapter 54 of the Code of 1899, which provides that "Any railroad company organized under this chapter, may build and construct lateral and branch roads, or tramways, and of any gauge whatever, not exceeding fifty miles in length," etc. In the exercise of the privilege conferred by this statute, the Piney branch of the road was surveyed in the years 1898 and 1899, and in the following year about 14 miles of it, reaching a place called Raleigh Station, about three miles from Raleigh Court House, was completed. From this point the survey of 1899 followed Piney Creek in a southwesterly direction to the mouth of Soak creek, then this branch of it in the same direction for a short distance, and then crossed a dividing ridge to the Winding Gulf, a tributary of

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the Guyandotte river, which it followed to its mouth, and then the Guyandotte, in the same general direction, almost, or quite, to Pineville. Afterwards, but in the same year, another survey, preliminary in character, of part of this route, was run on a different location. Instead of crossing the divide from Soak creek to Winding Gulf, it followed Soak creek to its head in a more westerly direction, and crossed the dividing ridge to Slab Fork of Guyandotte, and followed it in a southwesterly direction for some distance, and then in a southerly direction until it connected with the first line at the Guyandotte. This last line was much nearer to Jenny's Gap than the first one. The Slab Fork survey seems to have been merely preliminary, without projection of location or recordation of plat, but the Winding Gulf location was projected, and that part of it which crosses the divide from Soak creek to Winding Gulf, a distance of about four miles, was actually located; that is, the proposed right of way was staked off on the ground as well as delineated on a map. The map of this projected Winding Gulf location was filed in the office of the Secretary of State.

The original certificate of incorporation of the Deepwater Railway Company, bearing date January 28, 1898, calls for a route from Deepwater, on the Kanawha river, up Lower Loup creek, thence across the divide and down White Oak creek to its mouth on Dunloup creek at or near the village of Glen Jean. Early in the year 1902, conceiving the idea of an extension of this line in a southerly direction through the coal fields of West Virginia and thence to the seaboard, preliminary surveys for such extension were ordered. The engineer first commenced at Glen Jean, and crossed the divide to Piney creek, which he followed to its source in the Flat Top Mountain, and then crossed the mountain to the waters of Camp creek, which he followed to Bluestone river. About the 1st of April, 1902, he was ordered to make another survey by a different route farther west, through Jenny's Gap and Clark's Gap, in order to reach better coal territory. The route first examined was east of the Chesapeake & Ohio Winding Gulf route. The other is west of it. Instead of going back to Glen Jean and making the examination of this last route from that point, the engineer commenced at Clark's Gap, near the southern end of the route, on the 30th day of July, and ran about a mile toward the Bluestone river down Widemouth creek. Then going back to Clark's Gap he started north, down Barker's creek, to the Guyandotte river, thence up the Guyandotte river to the mouth of Slab Fork, thence up Slab Fork to the mouth of Low Gap Branch toward Jenny's Gap. At a point about seven miles from Jenny's Gap he stopped, and went up into the gap and ran his preliminary line back to where he had left off. This connection was made on the 30th day of August. On the same day a party of surveyors of the Chesapeake & Ohio Railway Company made their appearance in Jenny's Gap, but the Deepwater Railway party projected their location through the gap, and on the 1st and 2d days of September the latter staked

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off their line through it. At that time the north end of the line, namely, the part between Jenny's Gap and Glen Jean, had not been surveyed at all; nor, at the time, had the Deepwater Railway Company ordered, or agreed to make, an extension of its road beyond either of the termini fixed by its articles of incorporation. By section 53 of chapter 54 of the Code of 1899 a railroad company, with the consent of the stockholders, owning a majority of the stock, present at any general or special meeting, may so extend its road, subject to the proviso "that such incorporation before commencing any such extension in this state, shall file in the office of the Secretary of State, a certificate stating the point at or near which such extension in this state shall commence and terminate." Upon discovering the purpose of the Chesapeake & Ohio Company to occupy Jenny's Gap, the Deepwater Company hurriedly called and held a stockholders' meeting, which adopted a resolution of extension on the 2d day of September, 1902, while the work of staking off its location through the gap was in progress. On the same day a meeting of the directors was held, at which the following resolution was adopted: "On motion, Wm. N. Page, chief engineer and attorney in fact for the Deepwater Railway Company, is authorized and directed to carry out the surveys and extensions of same as authorized by the stockholders in their meeting of this date, and to do all things further that may be necessary for carrying out said resolution. On motion, C. P. Howard and M. Curtis, or either of them, were directed to make the necessary filings, as required by law, as fast as the same may be prepared." A certified copy of the stockholders' resolution of extension and maps of the projected location through Jenny's, down Low Gap Branch, Slab Fork, and Guyandotte river to the mouth of Barker creek, and thence up that creek to within a few miles of the Wyoming and Mercer county line, except a space of six or seven miles immediately south of the gap, were on said 2d day of September, 1902, filed in the office of the Secretary of State. The map of its actual staked location through Jenny's Gap, about 6,000 feet in length, was filed in said office on the 8th day of September, 1902. On the same day a map of the projected location over the space just south of Jenny's Gap was filed, and a map of the residue of that space was filed on September 11th. These maps were filed in the proper county court clerk's offices on the same or about the same dates as those on which they were filed in the office of the Secretary of State. From the date of contract with the Chesapeake & Ohio engineers, the Deepwater Railway engineers and officials pressed the work of location of their entire line, and completed the same February 27, 1903, filing the maps as fast as the data for them could be procured and they could be prepared from it.

When the Chesapeake & Ohio engineers were met in Jenny's Gap, they were prosecuting a survey which they had commenced at Raleigh Station on July 7, 1902, and carried to within six or seven miles of the gap, and then gone to the summit to

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run back and make connection, as is usual in locating a road to the summit of a ridge or hill. They afterwards completed their preliminary survey through the gap and down Low Gap Branch to Slab Fork, and connected it with their old survey made in 1889, and a map of their projected location by this route was completed and filed in the Secretary of State's office September 11, 1902. On the same day they filed a map of the old 1899 survey down Slab Fork from the mouth of Low Gap Branch to the Guyandotte river, where the new route tied on to the old Winding Gulf survey, a map of which had been filed in 1899. Whether, on the date of the filing of the maps of the new route, it had been adopted by any corporate action is a question much debated, and a statement of the facts bearing upon it will be given in connection with the discussion when reached. The Chesapeake & Ohio Company, after filing these maps, went on and made actual location of its new route, completing the same about November 1, 1902. In the month of October, 1902, the Chesapeake & Ohio Company caused a second survey through Jenny's Gap to be made so as not to conflict with the Deepwater Company location, and it was ascertained by this survey that such other route was practicable, though less desirable than the one first selected. However, this second survey was actually located, staked off on the ground, but whether a map of it was ever filed seems not to appear from the record.

On the 2d day of October, 1902, the Deepwater Company acquired, by deeds from John L. Rail and wife and Isaac N. Cook and wife, the fee-simple title to the land in Jenny's Gap on which its location was made, and about the 30th of December, 1902, it commenced the work of construction on the disputed strip of land, and prosecuted the same at a cost of about \$8,500, until some time in June, 1903, when the trial court decided in this case that the Chesapeake & Ohio Company had paramount right of appropriation. Early in January, 1903, the Chesapeake & Ohio Company caused to be served upon the Deepwater Company, Trail, and Cook notices of its intention to apply in the circuit court of Raleigh county for the appointment of commissioners to ascertain compensation to them for the lands proposed to be taken, including parts of the Deepwater Company location and purchase. Upon the pleadings and evidence adduced, the court decided, as already stated, that the applicant had prior right, and was entitled to take the lands it sought to condemn on payment of just compensation, the parties having waived a trial by jury as to that question. Such proceedings were afterwards had that the compensation was fixed by a jury at \$11,538, and the court overruled a motion by the defendant company to set aside the verdict. To the two judgments aforesaid, the one of June 8, 1903, giving priority of right to the applicant, and the one awarding compensation, the Deepwater Company has obtained a writ of error.

The first question, whether the applicant has the superior right, as against the Deepwater Railway Company, to the loca-

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tion in question, is separate and distinct from the right claimed to take the lands in controversy for the purpose of its road. The determination of that question against the applicant would end the whole controversy, for, if the Deepwater Company's right to appropriate the land for the purpose of its road is prior and paramount to that of the Chesapeake & Ohio Company, the latter company cannot condemn the land at all, and the matter of compensation does not enter into the case. As to what constitutes a location of priority of location between rival railroad companies, there has been no decision by this court. Some observations on that subject were made, in both of what may be termed the majority and minority opinions delivered in the case of the Kanawha, etc., Co. v. Glen Jean, etc., Co., 45 W. Va. 119, 30 S. E. 86, but the court held that, before the plaintiff could enjoin the rival company, it must establish its right and title at law, and, on that ground, the injunction was dissolved and the bill dismissed. Point 8 of the syllabus holds that, "as between rival railroad companies, priority of location gives priority of title, which is perfected by after condemnation," but as to what amounts to priority of location the court expressed no opinion. In the dissenting opinion it is suggested that priority of right is with the party who first begins condemnation proceedings for the land. Whether that position is sound arises in this case; for, if it be so, the Deepwater Railway Company, having acquired the land by a deed, in consequence of which no condemnation proceeding is necessary, would clearly have a better right to the location than the applicant. In the two opinions, nearly all the decisions of other states and of the federal courts on this subject are cited, and to some extent analyzed and applied. Judge Brannon very properly suggested the necessity and propriety of examining those decisions in the light of the statutes under which the companies contending for the disputed locations endeavored to obtain them, for the courts rendering the decisions undoubtedly kept the judicial eye on the statutes governing the rights of the parties. All the powers vested in railroad companies to construct and operate their lines, enter upon such lands and make surveys, and acquire their rights of way in the exercise of the power of eminent domain, are of statutory creation. Until recent years such companies were not organized under general laws, and the privileges were conferred upon them by special acts of the Legislature, designating their routes, and empowering them to construct and operate roads; and some of the decisions referred to determine the question of right between railroad companies so chartered and organized. The rights and powers of the contending companies in this case have been acquired under general statutes governing all railroad companies of the state.

Both sides seem to rely upon the filing of maps and profiles in the office of the Secretary of State and in the offices of the clerks of the county courts as an important, if not decisive, step in the acquisition of the location. When it was apparent that there

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would be conflict over the location through Jenny's Gap, each company hastened the filing of its maps and profiles. In view of this, and of the suggestion that priority of right is with him who first institutes condemnation proceedings, section 65 of chapter 54 of the Code of 1899 is quoted, and attention to its terms invited. It says: "Every such corporation shall within a reasonable time after its railroad is located, cause to be made a map and profile thereof, with the names of the owners of the lands through which it runs, and of the noted places along the same stated thereon, and file the same in the office of the Secretary of State, and in the office of the clerk of the county court of each county in which any part of said road is located." By its very terms the statute contemplates a location, an adopted location, of the railroad before the filing of the map and profile. This being true, the filing of the map and profile cannot be considered an essential step in the progress of location, nor a necessary act in the process of it. Such was undoubtedly the conclusion of this court in *Wheeling, etc., Co. v. Camden, etc., Co.*, 35 W. Va. 205, 13 S. E. 369, holding that the filing of a map and profile is not a condition precedent to the prosecution of condemnation proceedings. Surely a location must be made before the land can be taken, unless the taking is part of the act of location; and that it is not is now about to be determined. Whether the filing of a map is an evidential fact bearing on the question of diligence in following up and securing a right of location, or showing an intent to choose a certain location, is a separate and distinct question, to be discussed later on.

As to the relation of condemnation proceedings to the subject of location of route, the statute, under the rules of interpretation and construction, must be viewed, read, and applied in the light of what is known to be the universal practice in the location and construction of railroads. It would be a most violent presumption to say that the Legislature intended to prescribe and enforce a rule of law compelling a departure from the known practice. According to it, location is a mere matter of selection of the ground upon which the company desires to construct its road, and is effected by the action of the corporate authorities of the company, based upon what are known among railroad people, and especially railroad civil engineers, as preliminary, projected, and actual surveys or locations, of which the first is a mere line with angles, marking the changes of direction, which forms a basis from which to work out on paper a diagram of the right of way, turning the angles into curves. This diagram is called the projected location, and from it, and by it, the right of way is staked out on the ground along the course of the preliminary survey, just as the boundaries of a tract of land are located on the ground by the deed calling for courses, distances, and monuments. All this must be done before there can be any certainty as to the particular ground upon which the road is to be built. After it is done, and adopted by the board of directors, the location is made, and is completed. What follows is not location,

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but construction. Of course, the word "location" has two meanings. It means either to place or set a thing or one's self in a particular spot or position, or to designate the site or place of a thing. The former may include the latter, perhaps, but the Legislature certainly did not intend to use it in both senses. It would be absurd to say that the railroad should be actually placed—that is, constructed—in a certain place in order to be located. That is not the sense in which the term is used among railroad people, or among the people generally, as applied to railroad building. The other sense and meaning is fully satisfied without acquisition of title to the land or actual construction of the road. By surveying and staking off the right of way adopted as aforesaid, the designation is complete, and the acquisition of a title to the land and construction of the road thereon are clearly acts in the nature of execution of the purpose to place the road upon the ground designated and selected for it.

The character of our legislation authorizing the construction of railroads, in its early stages, with the modifications thereof, down to the present time, perfecting it or formulating it into its present condition, tends strongly to support the views here taken. Prior to the act of March 11, 1837 (chapter 118, p. 101, Acts Va. 1836-37), the rights and powers conferred upon every railroad company were found in the special act creating it. Upon some, greater powers were conferred than upon others. There was lack of uniformity, each company possessing and exercising its own special powers. The act of March 11, 1837, was passed for the purpose of establishing certain general regulations, to apply to all railroad companies which might thereafter be chartered by the General Assembly, as effectually as if they were expressly re-enacted in the act creating the company, except so far as the act itself might not otherwise expressly provide. It may well be assumed that these general regulations were such as, up to that time, had been usually inserted in the special acts granting charters to railroads. That act conferred upon railroad companies the right "to enter upon all lands and tenements through which they may desire to conduct their railroad, and lay out the same according to their pleasure, * * * and if they think the interest of said company requires it, to take possession thereof for the purpose of the company," previously to the institution, and during the pendency, of proceedings for ascertaining the damages to the proprietor for the land taken for the use of the company. Section 9, c. 118, p. 104, Acts Va. 1836-37. In such case, the president and directors were required to describe by certain limits the land which they desired to occupy, and were given the right to purchase it or any part of it. In case of failure to agree with the owner, condemnation proceedings were authorized, but section 13 (page 107) of that act further provided that, "In the meantime, no order shall be made and no injunction shall be awarded by any court or judge, to stay the proceedings of the company in the prosecution of their works, unless it be manifest that they, their officers, agents or servants, are tran-

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scending the authority given them by this act, and that the interposition by the court is necessary to prevent injury that cannot be adequately compensated in damages." Under these provisions, entry upon and laying off of the land desired amounted to a complete appropriation of the same. That, without payment of compensation, evidently amounted to a location, for it gave the company the right to take possession immediately, the right to purchase, the right to institute condemnation proceedings, and gave to the landowner also the right to have commissioners appointed, and his compensation ascertained, in case of failure of the company for an unreasonable time to apply for the appointment of commissioners, and made the compensation a lien upon the land taken. The Code of 1849 (chapter 56, § 4) provided that: "Any company incorporated for a work of internal improvement, may, by its officers, agents, or servants, enter upon any lands for the purpose of examining the same and surveying and laying out such as may seem fit to any officer or agent authorized by it, provided no injury be done to the owner or possessor of the land. But no company shall, under the authority of this section, throw open any fences or enclosures on any land, or construct its works through the same, or in any way injure the property of the owner or possessor, without his consent." Other sections provided for condemnation proceedings in the event of failure to agree, and section 13 provided for entry upon the land, and construction of the work thereon, on paying into court the sum ascertained by the commissioners, and then repeated the provisions of section 13 of the act of March 11, 1837. Chapter 56 of the Code of 1860 contained substantially the same provisions. The language of section 4 of chapter 56 of the Code of 1849 is found in section 5 of chapter 52 of the present Code (1899), and there is added to so much of it as has been quoted this clause: "Or until the same may have been legally appropriated to the use of the company, as provided by the laws of the state of West Virginia, relating to the condemnation and appropriation of private property for the use of companies incorporated for internal improvements." This section provides for entering upon lands for the purpose of examining the same and surveying and laying out such as may seem fit to any officer or agent authorized by it. This, as has been shown, under the act of March 11, 1837, amounted to an appropriation of the land. The powers conferred upon railroad companies by that act, respecting appropriation for their purposes, have been limited to the extent of preventing them from taking possession and constructing their work on the land until after the ascertainment and payment of compensation due to the owner. An examination of all the provisions leads irresistibly to the conclusion that the acquisition of title is not necessary to the perfecting of a location.

This is the view taken by the courts of other states in which the statutes are in substance like ours. In Pennsylvania there can be no entry upon land before payment of, or security given for, compensation to the landowner; but there, as here, entry

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may be made for the purposes of examination and laying out of the location of the road. *Williamsport, etc., R. R. Co. v. Philadelphia, etc., R. R. Co.*, 141 Pa. 407, 21 Atl. 645, 12 L. R. A. 220; *Railway Co. v. Harvey*, 107 Pa. 319; *Gilmore v. Railway Co.*, 104 Pa. 275; *Dimmick v. Brodhead*, 75 Pa. 464; *McClinton v. Railway Co.*, 66 Pa. 404; *Levering v. Railway Co.*, 8 Watts & S. (Pa.) 459. As the relation of the railroad company to the landowner is the same in the two states, and there is no statute in either state expressly defining the rights of railroad companies contending for the same location as to each other, nor any statute requiring a map to be filed until after the location, the Pennsylvania statute not requiring any to be filed at all, their relations must be determined by the same principles and the same process of reasoning. The conclusion of the Pennsylvania court on the question as to whether condemnation, or the beginning of condemnation proceedings, is a part of the act of location, is exactly in accord with the one here given. In *Williamsport, etc., Company v. Philadelphia, etc., Co.*, cited, the court holds: "In the taking of land for the construction of a railroad, the appropriation, as against the landowner, is valid and effective when compensation for the taking and the injury thereby is made or secured. But, as against a rival corporation, the act of locating a route for a railroad is the appropriation of the land covered by the line to the purposes of the construction and operation of the railroad by virtue of the power of eminent domain, and there can be no appropriation prior to the location of such line." The court then proceeds to define what is a location as between rival railroad companies, and holds that survey and staking out of the center line, when adopted by some corporate action, is such a location and appropriation. The act of location is clearly shown by the opinion in that case to be, in a proceeding between the railroad company and third persons, but an *ex parte* proceeding, an act on its part which shows that it has determined, elected, or signified its intention to build its road on a particular survey. Mr. Justice Williams says, on the subject of the adoption of the line: "This is done by the corporation, and it requires the action, in some form, of the board of directors. This makes what was before experimental and open a fixed and definite location. It fastens a servitude upon the property affected thereby, and so takes from the owner and appropriates to the use of the corporation." He then shows that the owner's title is not divested, nor any right to enter upon the land conferred upon the railroad company, until after payment, and proceeds as follows: "As to third persons and rival corporations, however, the action of the company adopting a definite location is enough to give title." The choice of a location by laying it out by survey, and the passage of the resolution by the board of directors adopting it as the location on which the road will be built, is itself the exercise of delegated legislative power conferred upon the company. It is exercise of the power of eminent domain to that extent. As to all persons except the landowner it is a complete appropria-

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tion. All that remains to be done is the extinguishment of his title by payment of compensation, either under agreement with him as to the amount, or, upon ascertainment of it, in the manner prescribed by law. As to the landowner and all others, it fixes a sort of lien upon the property. In *Pittsburgh, V. & C. R. R. Co. v. Pittsburgh, C. & S. L. R. R. Co.*, 159 Pa. 331, 28 Atl. 155, the court defines a location, as between rival corporations claiming the right to the same land under the power of eminent domain, as follows: "The requisites of a valid location of a railroad, as to third persons and rival corporations, are (1) a preliminary entry by engineers and surveyors who run and mark out lines, map them, and report them to the company, and (2) the adoption of such a line by the board of directors." *Sioux City, etc., R. R. Co. v. Chicago, etc., R. R. Co.* (C. C.) 27 Fed. 770, determines what a location is under the Iowa statute. There no plat is required to be filed, and payment of compensation must be made or secured before the railroad can be constructed upon the land selected. Shiras, J., said in that case: "The company does not perfect its right to the use of the land, as against the owner thereof, until he has paid the damages; but, as against a railroad company, it may have a prior right and better equity. The right to the use of the right of way is a public, not a private, right. It is, in fact, a grant from the state, and, although the payment of the damages to the owner is a necessary prerequisite, the state may define who shall have the prior right to pay the damages to the owner, and thereby acquire a perfected right to the easement." It is true that he adverts, in the course of his opinion, that the fact that condemnation proceedings had been commenced, and says, "Whether such right may not, at least in some cases, antedate the time of the application to the sheriff, is open to question;" but he does not say his conclusion would have been different had no such application been made. He decided the case upon the facts, without laying down a general principle applicable alike to the case in hand and others presenting different states of facts.

In those states in which statutes declare that a map of the location must be filed before the company acquires any right to take the land, the courts holding that, upon making the survey, adopting it, and filing the map, the appropriation as to third persons is complete. *Barre R. R. Co. v. Granite R. R. Co.*, 61 Vt. 1, 17 Atl. 923, 4 L. R. A. 785; *Rochester, etc., Co. v. New York, etc., Co.* (N. Y.) 17 N. E. 680. In the latter of these cases the court says: "When, therefore, a corporation has made and filed a map and survey of the line of route it intends to adopt for the construction of its road, and has given the required notice to all persons affected by such construction, and no change of route is made as the result of any proceedings instituted by the landowner or occupant, in our judgment it has acquired the right to construct and operate a railroad upon such line, exclusive in that respect as to all other railroad corporations, and free from the interference of any party. By its proceedings it has

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impressed upon the lands a lien in favor of its right to construct, which ripens into title through purchase or condemnation proceedings." The statement in that case says: "The plaintiff had not yet purchased the right of way across Babcock's land, nor had it instituted proceedings to condemn the same." The Vermont case cited approves the New York case, adopts it, and applies its conclusions. In *Morris, etc., Co. v. Blair*, 9 N. J. Eq. 635, the two railroad companies were proceeding under special acts of the Legislature, conferring upon them, respectively, the right to enter upon the land after determining their routes and depositing surveys thereof in the office of the Secretary of State, and the court held as follows: "The mere experimental surveying of a route will not confer any vested or legal right until it shall have been adopted. By adopting and filing a survey of their route, a company acquires the right to obtain the lands over which it passes; and they cannot be deprived of that right by another company purchasing and taking deeds for those lands, even if made without notice." In *Railway Co. v. Alling*, 99 U. S. 463, 25 L. Ed. 438, the controversy arose under acts of Congress granting rights of way, to be selected by the railroad companies, through the public domain, and no question of private ownership of the land entered into it. Location took title as well as paramount right of way. The Denver Company had caused a preliminary survey to be made through the Grand Canon of the Arkansas river in 1871-72. The Canon City Company caused a survey to be made in the same place in 1877. Nothing further was done until the 19th day of April, 1878, when the engineers of the Denver Company went back and occupied the pass again. At 4 o'clock in the morning of the 20th of April the engineers of the rival company occupied the same ground, and later brought in a superior force and took forcible possession of the ground, and the court held that the Denver Company's preliminary survey made in 1871-72, followed by its subsequent actual occupancy in 1878, gave it the better right. Mr. Justice Harlan stated the conclusion as follows: "Its surveys of 1871-72, followed by an occupancy of the canon on the 19th of April, 1878, in advance of the Canon City Company, for the purpose of constructing its road through that defile, was, in our judgment, a final appropriation of the way granted by Congress. The Denver Company then, if not before, came into the enjoyment of the present beneficial easement conferred by the act of June 8, 1872, and was entitled to have secured, against all intruders, whatever privileges or advantages belonged to that position." This conclusion seems to rest upon the adoption in 1878 of the survey made in 1871-72, for it does not appear that the Denver Company's engineers had time to make a new survey before they were driven away by the engineers of the other company. In another part of the opinion he says: "Those who made the survey in 1877 undoubtedly knew when, by whom, and for what purpose those stakes had been there placed. Nor had they sufficient reason to suppose that the

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Denver Company had finally abandoned its purpose of constructing a road through the canon."

Having concluded that a survey adopted by corporate action as and for the location constitutes appropriation as against third persons, the next inquiry is what kind of a survey so adopted is sufficient. In *Railway Company v. Alling*, cited, Mr. Justice Harlan says the engineer described the survey of 1871-72 "as a 'close preliminary'; that is, a line very near the location, without an actual location of the curves." He then says: "But the location of the curves, he testifies, could have been made in the office, away from the canon. With that exception, he pronounces it to have been a complete survey. The line thus surveyed was marked by stakes every hundred feet, numbered consecutively, and, at points where it seemed necessary, a plus or stake between the hundred feet was added. Of the work then done, a map and profile were made and returned to the chief engineer of the company, and estimates sent to its general manager. Upon the occasion of that survey, or shortly thereafter, employees of the company, under the direction of its engineer, removed several hundred yards of material, graded several hundred feet at the upper outlet of the canon, and put up a retaining wall ten to fifteen feet high, and about one hundred yards in length." It having been suggested that this, without further action, give prior right of occupation, the court said, "To this proposition we cannot yield our assent." It was necessary to actually occupy the pass with intent to build the entire line of road. However, when the act of occupation with such intent, evidenced by all the circumstances shown, was added, the survey was held sufficient. In *New Brighton, etc., R. R. Co. v. Pittsburgh, etc., R. R. Co.* 105 Pa. 13, a preliminary survey, followed by actual possession of the ground, was declared sufficient. In *Pittsburgh, V. & C. Ry. Co. v. Pittsburgh, C. & S. L. R. R. Co.*, 159 Pa. 331, 28 Atl. 155, the survey held good was only preliminary, for the court says of the work done by the engineer: "He marked the line on the ground by pine at regular distances, indicating the center line of the railroad, the curves being run in and marked, but the cuts and fills not being indicated in any way, nor the width of the right of way to be appropriated." In *Morris, etc., Co. v. Blair*, 9 N. J. Eq. 635, the court, speaking of the survey held good, said: "In this connection may be mentioned another objection urged against the survey of the Warren Company—that it is uncertain and indefinite, being described by radii and curves, instead of a succession of angles of course and distance. Perhaps the former of these modes, if carefully done, is more accurate than the latter. Either would enable the engineer to run the survey on the ground, and either mode, therefore, is sufficient." In that case, the court expressed the further opinion that an unplatted survey could be effectually adopted as a location, and the plat made afterwards. Why not? Marking the location on the ground is certainly as much of a designation and identification of it as platting it on paper, and

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the field notes furnished the necessary data for preparation of the map.

A mixed question of survey and adoption, to be now considered, is whether, before the entire route is surveyed, a location of part of it can be made; the Deepwater Company, at the time of its alleged adoption on September 2, 1904, not having made even its preliminary survey between Jenny's Gap and Glen Jean, and this being the ground of a strongly urged objection to its claim of adoption on that day, as well as on later dates. For this position, *Railway Co. v. Alling*, cited, is relied upon. There the court did say: "The grant was an entirety as to the right of way over all the lands lying on the route designated in the charter of the company, and it would be unreasonable to say that, as to a particular part of that route, a mere preliminary survey was in itself equivalent to a fixed location of the road and an appropriation of the way granted, while as to another part of the general route a similar survey would not be an appropriation of the way granted, unless followed by actual occupation and use for railroad purposes. Any such construction of the statute must be held altogether inadmissible." But the statement of facts shows that the survey then extended through the canon, and only four or five miles beyond it toward the west. While the court held that the surveys of 1871 and 1872 through the canon, unconnected at either end with any other survey of the balance of the line, was not alone a sufficient location, it upheld the claim of the Denver Company to the location, not on the ground of a subsequent survey and location of the whole line, connecting with the fragment in the canon, but on the ground of diligence on the part of the company in prosecuting, in a general way and at great expense, the enterprise it had undertaken, which included the ultimate construction of its road through the Grand Canon. Upon ascertaining that the company, in the short space of six years, had built its road from Denver to Pueblo, from Pueblo to Canon City, from Pueblo to Cucharas, a distance of 50 miles, from Cucharas to Garland, a distance of 10 miles, and from Garland into the Rio Grande Valley, and had ceased its work of construction only temporarily, owing to adverse general financial conditions in 1875 which rendered it difficult to obtain funds, the court held the claim of location through the canon good although unconnected at either end with any survey of the balance of the line, and despite the facts that the road had not been located from the canon to either its eastern or western terminus, and that the survey through the canon was made prior to the passage of, and not under, the act of Congress which conferred upon the Company its only shadow of legal right to use the canon at all for railroad purposes. The decision is a distinct and positive adjudication of the right of a railroad company to seize, adopt, and hold a mere section or fragment of the right of way of its proposed line. In the opinion, attention is directed to the incalculable value of the Grand Canon to railway companies as a gate or way of passage through the mountains, and,

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after showing diligent pursuit by the Denver Company of the rights offered by the act of Congress, and to be acquired by construction of the proposed road, in the course of which this important pass had been occupied in good faith, in anticipation of its contemplated seizure by rival companies, born and unborn, the court declared that as to it, as a part of the entire grant, the company had come into the enjoyment of the beneficial easement conferred by the act of Congress, "and was entitled to have secured, against all intruders, whatever privileges or advantages belonged to that position." *Railway Co. v. Alling* is the only case found thus far that seems to deal directly with the question propounded. General principles announced in other somewhat analogous cases, however, give support to the position here taken. In *Doughty v. Railroad Co.*, 21 N. J. Law, 442, in which a railroad company operating under a special charter sought condemnation of a right of way over a certain tract of land, a defense was incompleteness of location of the route. The special act provided (section 6) that "when the route or routes of such road, or lateral and branch roads, shall have been determined upon, and a survey of such route or routes deposited in the office of the Secretary of State, then it shall be lawful for the company," etc., "to enter upon," etc. (Act Feb. 26, 1847 [P. L. p. 130]), but the court held (one judge dissenting) that: "The charter of the Somerville & Easton Railroad Company does not require the location of the whole route to be filed before application can be made to assess the value of lands on any part; it is sufficient if the location through such lands is filed." Afterward, the same landowner brought a suit in equity to enjoin the proceeding at law on the same ground, and the chancellor refused the injunction because the bill failed to show irreparable injury, but, in the opinion, he approved the views of the dissenting judge of the law court. *Doughty v. Railroad Co.*, 7 N. J. Eq. 51. His opinion, therefore, on the subject of sufficiency of location, is mere obiter. Having no power to grant relief, he had no occasion to say whether a partial location could be made. A Kansas statute required every railway corporation, before constructing any part of its road into or through any county named in its charter, to file in the clerk's office of the county court of the county a map and profile of the route intended to be adopted by such company in such county, but the Supreme Court of the state held, in two cases, that the filing of such map and profile was not a prerequisite to condemnation proceedings. *Hunt v. Smith*, 9 Kan. 137; *Railroad Co. v. Shepherd*, Id. 647.

The position here taken is not inconsistent with the principles of entirety in railroad construction. It only recognizes, in connection with that idea and design, the physical fact of impossibility of complete location of an entire road by a single instantaneous act, and gives to every railroad company the benefit of its enterprise, energy, and outlay in partial execution of the work of location, as long as it prosecutes in good faith the work it has undertaken. The equity and justice of this

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principle is not only beyond successful contradiction, but is plainly countenanced by the spirit and terms of our legislation, which saves to every railroad company that has completed and put into operation any part of its road, within prescribed periods of limitation, the benefit of its work and its corporate powers and franchises as to the part so completed and operated, while losing by forfeiture all its rights and powers as to the part not completed. Section 66, c. 54, Code 1899. Whether the right to build and operate only a part of the road contemplated implies the right to locate only a part, and stop, need not be determined. All we decide here is that a company seizing certain land in the progress of its work of location makes a location pro tanto, which cannot be disturbed while such company continues, in good faith and with due diligence, to prosecute the work it has undertaken. A grant of the right to make a location of an entire line carries with it, by necessary implication, the right to do whatever is reasonably necessary to the effectuation of a location. There must be a commencement of the work; it must progress to completion; the law is silent as to the place of commencement, and as to what shall amount to completion of the work. If no right can vest until the entire line is located, then a 300-mile road, having been surveyed and staked out from one terminus to within 20 miles of the other, may be defeated by the location of a 10-mile branch or new road through an indispensable defile before the remaining 20 miles of the long road can be located, and, in such case, thousands of dollars expended in surveying and construction on the located part would be lost. How many times the location of a long line might have to be changed before completion to accommodate short ones and branches would depend upon the number of short roads and branches that could be projected along its line. These continual interruptions would delay and obstruct final and complete location. When could it ever be said that a long line of road is located? What company could afford to expend money in construction until after having located its whole line? Can it be assumed that the Legislature ever intended such results? Is it possible that the lawmakers ever suspected their liberal statutes providing for railroad construction would be loaded down by the courts with an interpretation imposing such uncertainty, inconvenience, and hazard in the case of every attempt to operate under them? To the suggestion that this construction may in some instances prevent the construction of any road while seeking to make possible the building of two through a mountain pass, the reply is the lack of a satisfactory indication of such a possibility, as well as inability to perceive it. In case of occupancy by one company of a defile not wide enough to accommodate two roads, locations up to the defile on each side by another company would not necessarily result in a deadlock. Outside of the defile there would be room for both, in consequence of which the company having prior occupancy of the defile could build its road. If, however, under peculiar condi-

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tions, such a deadlock should occur, it would necessitate legislative action or judicial consideration of elements entering into the question of priority of right, incident to and growing out of the peculiar situation and circumstances characterizing the controversy.

The principle enunciated in *Railway Co. v. Alling* seems to be not only equitably and legally sound, but also accordant with the spirit of our legislation, as well as that of other states. It enables a railway company to take the benefit of its labor and expenditures, and to hold, as the first taker, the land surveyed, if it desires to do so, until it shall have surveyed and located its entire line. Without this power, location of a long line would be a difficult feat to perform if rival companies were disposed to obstruct the work by the location of short lines along the same route. Hence it is an implied power, accompanying the grant of the right to locate, necessary to the convenient and effectual performance of the thing authorized by the grant. The seizure of a partial location, however, must be made in good faith, and the test of its bona fides laid down in *Railway Co. v. Alling* is undoubtedly the best the nature of the subject affords. On the whole, the principle is well adapted to conditions in this state, and in harmony with the liberal character of our railroad legislation.

As long as such a company prosecutes the main enterprise it has undertaken with reasonable diligence, the right must be accorded it to seize and hold any point on any part of its intended route. To deny this right would deprive it of a most potent and essential means of advancing its work. It would, in every instance, give the short railroad an immense advantage over the long one. The ease and facility with which an existing road may throw projected branches into the mountain passes in advance of the work of surveying a long rival trunk line, and thus impede, delay, and even prevent the prosecution of such great enterprises, so necessary to the development of the natural resources of the state and to the welfare of the people, makes the construction contended for inconsistent with the spirit of our legislation on the subject of railroads. It is illiberal, technical, and discriminative, and, if admitted and applied, would discourage and retard the work of providing cheap and adequate transportation facilities for the people, opening our rich mines, marketing the timber of our great forests, and populating our vast areas of unoccupied territory. The court cannot defeat legislative intent and state policy, and set its hand against progress, by adopting a construction so narrow and so palpably inimical to the public interests. Therefore we adhere to the position announced by Judge Holt in *Wheeling, etc., Ry. Co. v. Camden, etc., Co.*, 35 W. Va. 205, 13 S. E. 369, and reiterate and apply between rival companies, as well as between the company and the landowner, the principle that partial locations of the route may be made and held as long as the company making them prosecutes its work in good faith and with reasonable diligence.

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Closely allied to this is the contention that a survey made, before articles of incorporation are taken out, by persons intending to incorporate for the purpose of building the road for which the survey is so made, is a nullity, and cannot be adopted by the corporation, without having been retraced and the stakes reset after organization. It is founded upon the failure of the Deepwater Company to file a certificate of extension before making its survey of the disputed location. This rule was enunciated in *New Brighton, etc., Co. v. Pittsburgh, etc., Co.*, 105 Pa. 13, but it is founded upon a pure technicality, destitute of the semblance of equity, and incapable of working out any meritorious result. The substantial office of the survey is to supply information and descriptive matter, without which a location cannot be made. It is not necessarily a part of the act of location. If the company has the data to enable it to accurately describe the location of its road, what boots it whence it came or when procured, unless fraudulently or inequitably acquired? The case relied upon is contrary to the earlier case of *Morris, etc., Co. v. Blair*, 9 N. J. Eq. 635, in which the opinion is expressed that "it is of little importance whether the survey of the route was before or after the organization, or by whom or under whose direction it was made." Whatever doubt the argument of the question may leave is resolved in favor of the plaintiff in error by a well-settled rule of law to which the question may be referred by a close analogy. The unauthorized survey was, at its worst, an act in the nature of promotion. "The great weight of authority, however, recognizes the power and the right of a corporation, when formed, to adopt or ratify the precorporate contracts of its promoters. The more modern cases claim to see no difference between the corporation making a contract by adopting an agreement originally made in advance for it by promoters, and the making of an entirely new contract." 23 Am. & Eng. Ency. Law, 242. See, also, 10 Cyc. 1071. The Supreme Court of the United States so declares in *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050. By causing these surveys at its own expense, the Deepwater Company was simply making preparation to do that which the statute gave it the right to do upon complying with certain regulations, formal and wholly ex parte in their nature, namely, the making of a certificate of extension, and filing it in the office of the Secretary of State.

This review of the authorities clearly establishes the following principles: First. When the statute does not make the filing of a map or plat of a railroad location a prerequisite to the adoption of it, an appropriation of it may be made without the filing of such maps. Second. The beginning of condemnation proceedings against the landowner is not a prerequisite to the acquisition of a right of way against third persons and rival companies. Third. A mere survey made by the engineers of a railroad company, not adopted or determined upon by the corporation itself, through its board of directors or otherwise, as the location of the route, does not amount to an appropriation, giving priority of

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right as against third persons. Fourth. A survey staked out upon the ground as a center line, a preliminary line, or as an actual location, whether delineated on paper or not, if adopted by the corporation as aforesaid, is a location within the meaning of the statute, and the company first making such location has a right to it superior to that of any other company. Fifth. A survey made by promoters of a railroad corporation for its purposes before the company is organized, or by an existing corporation for an extension of its road, before filing in the office of the Secretary of State a certificate of extension, may be adopted after incorporation or the filing of the certificate, as the case may be. Sixth. A location of a line, contemplated by original articles of incorporation, cannot be made before incorporation, nor can the location of a line contemplated by an extension be made before the certificate of extension has been filed as required by law. Seventh. A railway company may begin the work of location on any part of its contemplated route, and a location of a part only of its road may be held against a rival company, seeking the same location, as long as such locating company manifests good faith by the diligent prosecution of the work contemplated by its organization.

The application of these principles to the facts must determine whether the applicant is entitled to the right of way through Jenny's Gap. The work done in Jenny's Gap by the engineers of the Deepwater Company prior to September 2, 1902, although platted and shown by stakes on the ground, did not constitute a location. The engineers alone could not make a legal location. It could be made only by act of the board of directors. For want of the consent of a majority of the stockholders and the filing of a certificate of extension, required by section 53 of chapter 54 of the Code of 1899, the board of directors were themselves powerless to make a location through Jenny's Gap. If, however, the board of directors, after having obtained authority to do so, adopted, as the location of the road, the survey previously made, it was immaterial, as has been determined, that the surveying and platting had been done before the acquisition of such authority. The stockholders met and passed the resolution of extension early in the morning of September 2d. Immediately afterwards, the directors met and passed the resolution hereinbefore quoted. Later in the same day, the certificate of extension and a plat of the location through Jenny's Gap were filed in the office of the Secretary of State. If the resolution passed by the board of directors was a resolution of location, or if, together with the resolution passed by the stockholders, the circumstances under which both were passed, and the prior and subsequent acts of the board, it amounted to a location, the undisputed fact remains that the act of its passage preceded the filing of the certificate of extension in the office of the Secretary of State. This, it is urged, constitutes an insuperable obstacle to its being treated as an adoption of the location, however clearly the resolution may have expressed the intent to so adopt, because the statute says

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"such corporation before commencing any such extension in this state, shall file in the office of the Secretary of State, a certificate," etc. But all these transactions occurred on the same day, and within the space of six or seven hours. Can they not have effect according to the intent of the parties performing them? As the stockholders had consented to the extension, the directors knew the certificate would be immediately filed. They had full authority to file it themselves, and intended to do so. They desired to file, at the earliest possible moment, their map of the location through Jenny's Gap. In order to make one trip to Charleston subserve both purposes, they held their meeting and ordered the filing of the map along with the certificate of extension. To say they could not do this, but were bound to delay the act signifying adoption until after the filing of the certificate, would subordinate substance to mere form. Moreover, the board, although having no power to delegate to its engineers the selection of a location, could undoubtedly direct its engineers to claim and hold a location determined upon by themselves. If, therefore, they did, on the 2d day of September, 1902, order their agents to do certain acts with reference to the survey through Jenny's Gap, on that day and afterwards, which clearly signified their intention to claim and hold it as a location, the acts of the engineers, done in pursuance of such direction, were the acts of the board. These engineers did on the 3d day of September, 1902, file the projected map of that survey in the clerk's office of the county court of Raleigh county. On the 9th day of the same month they filed in said office a map of their actual location through the gap, prepared in the meantime. On September 8th they filed a second map of the same location in the office of the Secretary of State. Whether these subsequent acts were ordered by the board depends upon the true interpretation of the resolutions passed on the 2d day of September.

At the time of the passage by the stockholders of the resolution of extension, they had before them plats of the surveys made up to that time, including the survey through Jenny's Gap; but it is contended that that resolution makes no reference to them. It does say, "said extension to be located on the most practicable route, as shown on the maps and profiles filed as required by law," but at that time none had been filed as required by law. They were filed on the same day, but after the adoption of the resolution. As has been shown, prior to that date the engineers had made two surveys, one through Jenny's Gap and Clark's Gap, and the other over an entirely different route, by way of Piney creek and Camp creek. Whether the Piney creek and Camp creek survey was ever platted is not shown. That it was, cannot be assumed. There is no evidence that any plat of it was made or placed before the stockholders or the directors. If, therefore, the resolution referred to maps then in existence, they were the maps of the Clark's Gap and Jenny's Gap survey. In view of these facts, and the further fact that the stockholders'

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meeting was held for the express purpose, as shown by all the circumstances pertaining to the transaction and the situation of the parties, of claiming the Jenny's Gap location, as shown on the plat then in the hands of the stockholders and officers of the company, against the Chesapeake & Ohio Company, and, to that end, of making an immediate filing of those maps, and that the resolution passed by the stockholders and the one passed by the board of directors had been prepared on the day before with a view to adopting them early on the morning of the 2d of September, and of filing the certificate of extension and the maps as far as made, at the earliest possible moment after the passage of the resolution, can we say that those maps, together with such others of the same route as might thereafter be made, are the maps referred to in the resolution? The resolution says, "to be located on the most practicable route as shown on maps and profiles filed"; but it is urged that it must be read and applied as if it said "on the maps and profiles hereafter filed as required by law," or "on maps and profiles to be filed," etc. Being so read, to what does it refer? Part of the maps to be filed were undoubtedly those already made and in hand, and the hasty meeting of the stockholders was held for the express purpose of putting the company in position to file them. As to so much of the route as had been surveyed and delineated upon the maps, they knew its location and intended to adopt it, and endeavored to do so by this resolution. That is part of what is meant by the language, "said extension to be located on the most practicable route as shown on the maps and profiles, filed as required by law." So far as the survey had been made, the most practicable route had been ascertained, and was then shown on the maps. As to that part of it which had not been surveyed, the engineers were to proceed with their work and make the filings as fast as the maps could be prepared.

The two principal objections to this construction, based upon language found in the resolution itself, are, first, that it was designated by the stockholders themselves as their certificate of extension, and not as a description of a specific location; and, second, that it directed certain persons by name "to make the necessary filings as required by law, as fast as the same may be prepared." The direction to file the resolution as the certificate of extension would preclude its use, or an intent in passing it, for any other purpose inconsistent with the office of such certificate; but a location is perfectly consistent with an extension, and the resolution might well subserve both purposes. A fact fully proved is that the stockholders had before them at the meeting, and had previously examined, maps of the survey through Jenny's Gap, and of the survey of the route from the mouth of Barker's creek to within four or five miles of Jenny's Gap, a distance of 10 or 12 miles. Does the direction to make filings "as fast as the same may be prepared" exclude these maps, or the theory that they were filings already prepared, and therefore not within the description? Such is the contention. It does

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not appear that they were then fully prepared. They had been prepared as maps, but what was deemed a preparation thereof for filing does not appear, nor is it apparent from the record that any certificate had been attached to them. In the absence of evidence that they were fully prepared for filing, we cannot see that they are excluded by the descriptive terms quoted.

Here it is suggested that the adoption of this resolution by the stockholders did not make a location, because the statute says the corporate powers of a railroad corporation shall be in the board of directors. The point is well taken. This did not amount to a location, but it is an important transaction to be considered upon the inquiry as to whether the directors made a location. If the foregoing construction of the resolution is correct, it was adopted by the directors and made their resolution. Immediately after the adjournment of the stockholders' meeting, and before any papers were sent away, the directors, fresh from the stockholders' meeting, fully cognizant of all that had been done there, and imbued with the spirit and purpose of that meeting, met and passed the resolution hereinbefore set out, directing the chief engineer and attorney in fact of the Deepwater Company "to carry out the surveys and extensions of same as authorized by the stockholders in their meeting of this state, and to do all things further that may be necessary for carrying out said resolution." If we are correct about the reference to maps and profiles in the resolution passed by the stockholders, they were the maps of the surveys mentioned in the resolution passed by the directors, and this resolution of the directors ordered the doing of all things necessary for carrying out the resolution, and among these was the extension of the railroad upon the location shown by the maps and profiles. This meeting was held at an early hour to insure the filing of the maps on that day, and they were sent away immediately for that purpose, and actually filed by the person appointed for that purpose at that meeting. They, as well as the maps subsequently filed in the office of the clerk of the county court of Raleigh county on the 3d and 9th days of September, 1902, and in the office of the Secretary of State, on the 8th day of September, 1902, were filed by order of the board of directors. For what purpose? Could it have been any other than to claim the location shown by them? Though not an indispensable step in the act of location, does not the act of filing maps by order of the board of directors clearly indicate their election and determination to take the location shown by the maps for the purposes of the road? They were the acts of the corporation. They were done under the resolution, and to give notice of the location claimed by the company. That these acts were done with intent to make a present selection of the location in question is a necessary inference from their nature, the manner in which they were done, the surrounding circumstances, and the contemporaneous and subsequent conduct of the corporate authorities. And several of them were subsequent to the date of the filing of the certificate of extension.

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Is any rule violated by thus reading the resolutions in the light of the surrounding circumstances, the situation of the parties, and their conduct? Certainly not. They are instruments of much less solemnity than deeds, wills, and contracts, and all such instruments may be so read when the intent of the parties is not made plain by the terms used. "The circumstances connected with the transaction, and the situation of the parties, may be considered in arriving at the intent of the parties." Devlin on Deeds, § 839, citing a long list of cases. The rule, as applied to contract is tersely and accurately stated in 9 Cyc. 587, as follows: "To determine the intention of the parties, if the meaning is not clear, it is necessary that regard shall be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view, for which purpose parol evidence is admissible." In the law of wills the same rule obtains. "To aid in the true construction of the will, evidence may be received, and should be sought, of any facts known to the testator, which may reasonably be supposed to have influenced him in the disposition of his property, and all the surrounding circumstances at the time of making the will." *Magers v. Edwards' Adm'r*, 13 W. Va. 822. Another rule, applicable to contracts and deeds that are uncertain in their terms, is stated in 9 Cyc. 588, as follows: "Where the parties to a contract have given it a particular construction, such construction will generally be adopted by the court in giving effect to its provisions. And the subsequent acts of the parties, showing the construction they have put upon the agreement themselves, are to be looked to by the court, and in some cases may be controlling." See, also, *Kidwell v. Baltimore, etc., Co.*, 11 Grat. 676; *Clark v. Nunn*, 25 Grat. 287; *Caperton's Adm'r's v. Caperton's Heirs*, 36 W. Va. 479, 15 S. E. 257; *Scraggs v. Hill*, 37 W. Va. 706, 17 S. E. 185; *Shrewsbury v. Tufts*, 41 W. Va. 212, 23 S. E. 692. Surely there must be equal latitude of inquiry in seeking the true meaning and application of a written declaration made in an ex parte proceeding. Still another principle of wide application is that parol evidence is admissible to aid in making application of the descriptions in written instruments to the subject-matter thereof. *Snooks v. Wingfield*, 52 W. Va. 441, 44 S. E. 277; *Jones, Real Prop. Conv.* § 339; *Furbee v. Furbee*, 49 W. Va. 191, 195, 38 S. E. 511.

The suggestion that the resolutions are certain and definite in terms, founded upon the designation of the resolution as a certificate of extension, and the direction to make filings "as fast as they may be prepared," has been disposed of. The fact that they had maps before them, and contemplated the making of others, makes the resolution uncertain as to whether the reference is to both classes of maps or to only one, and opens the way for parol evidence on the question of intent. Another objection to this method of interpretation is that the resolution, like a statute, must speak for itself, and cannot be aided by extrinsic circumstances, and is not therefore to be classed with such in-

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struments as deeds, wills, and contracts. This position is clearly untenable. Though the power to make a location may be legislative in its nature, no form or mode by which its exercise shall be evidenced has been provided by law. No reason is perceived why corporate action in the selection of a railroad location should be evidenced in a manner different from any other corporate act. The nature of the power and the mode of its exercise are obviously distinct. But if these were not so, statutes form no exception to the rules of interpretation and construction above referred to. In *Railway Co. v. Alling*, 99 U. S. 463, 474, 25 L. Ed. 438, Mr. Justice Harlan applied the principle, saying: "Of what the company had done, prior to the passage of the act of 1872 [Act June 8, 1872, c. 354, 17 Stat. 339], towards effecting the objects of its incorporation, Congress, it is fairly to be presumed, was not uninformed. It was aware, we must also presume, of the routes designated in the charter of the company for the main road and its several branches, all so connected as to constitute, when completed, an extended railway system for that entire region. That Congress was so informed is quite clearly indicated by the terms employed in the act of 1872. That act must therefore receive the same construction which would be adopted had it contained a full or detailed description of the routes of the main line and branches. In this view, and having due regard to all the circumstances and conditions of the company when the act was passed, we do not doubt that the intention of Congress was to grant to the company a present beneficial easement in the particular way over which the designated routes lay, capable, however, of enjoyment only when the way granted was actually located and in good faith appropriated for the purposes contemplated by the charter of the company and the act of Congress." Can the prior and subsequent conduct of the Legislature be considered? Yes. All acts in *pari materia*, repealed or unrepealed, are to be considered. *Forqueran v. Donnelly*, 7 W. Va. 114; *Vane v. Newcombe*, 132 U. S. 220, 10 Sup. Ct. 60, 33 L. Ed. 310; *Viterbo v. Friedlander*, 120 U. S. 707, 7 Sup. Ct. 962, 30 L. Ed. 776; *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690. Can the surrounding circumstances be considered? Yes, and also the history of the times, and the purpose sought to be accomplished by the act. *Smith v. Townsend*, 148 U. S. 490, 13 Sup. Ct. 634, 37 L. Ed. 533; *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690. If a hasty and precipitate meeting of the Legislature had taken place by reason of some threatened peril to the commonwealth, for the aversion of which a crude act had been passed, which, read in the light of all the circumstances, clearly disclosed its purpose, I have no doubt that the manner in which the Legislature had assembled, and what was done and ordered before and at the session, might be considered, along with all other attendant circumstances.

Nor, in reaching this conclusion by the application of the foregoing principles, have we lost sight of the status of the case in this court. The plaintiff in error is regarded as a demurrant to

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evidence, admitting all the facts which the evidence of the defendant in error fairly tends to prove, and all fair inferences arising therefrom, and waiving all its own conflicting and impeached evidence, and all inferences from its own evidence not necessarily arising therefrom. *Harrison v. Bank*, 6 W. Va. 1; *Nutter v. Sydenstricker*, 11 W. Va. 535; *State v. Seabright*, 15 W. Va. 590; *Abrahams v. Swann*, 18 W. Va. 274, 41 Am. Rep. 692; *State v. Miller*, 26 W. Va. 106; *Laidley v. Smith*, 32 W. Va. 387, 9 S. E. 209, 25 Am. St. Rep. 825; *State v. Denoon*, 34 W. Va. 139, 11 S. E. 1003; *Mercantile Co. v. Truax*, 44 W. Va. 531, 29 S. E. 1006; *Rohrbaugh v. Express Co.*, 50 W. Va. 148, 40 S. E. 398, 88 Am. St. Rep. 849; *Miller v. Insurance Co.*, 8 W. Va. 515; *Ware v. Stephenson*, 10 Leigh, 161; *Muhleman v. Ins. Co.*, 6 W. Va. 508. But the record here presents the three distinct issues of (1) a location by the Deepwater Company before September 11, 1902, (2) a location by the Chesapeake & Ohio Company, September 11, 1902, and (3) a location by the Deepwater Company, September 26, 1902. Settlement of the first in favor of the Deepwater Company is decisive of the case. That only we are now considering, for the evidence relating to the others does not bear perceptibly upon it. All the material evidence applicable to it was adduced by the demurrant, and whatever conflict there is in the evidence relating to this issue is found in the demurrant's own evidence. Most, if not all, of the inconsistency in it has been eliminated by the determination of a purely legal question—the construction of the resolutions. That never was a matter of inference to be left to a jury. As to what was done in obedience to the resolution of the board of directors, there is no dispute, at least no question having any reasonable basis in the evidence. Far more was done than a resolution of extension and a mere exploration of the route under it required. Unless it be held that this evidence, on the whole, points certainly, unerringly, and necessarily to a location by corporate authority before the 11th day of September, 1902, much of it must be taken for naught and put out of the case, and the court has no right to discard it.

The Deepwater Company made a location by another and later act of adoption. The directors of that company, on the 26th day of September, 1902, passed a resolution reciting that the engineer had located the company's proposed railroad from Glen Jean up the Dunloup creek to the mouth of Sugar creek, and up Sugar creek, crossing the divide, to Pack's Branch of Paint Creek, down that branch and up Paint creek, crossing the divide, to Miller's Camp Branch of the Marsh Fork of Coal river, down that branch to the junction of the same with Surveyor's Fork, up that fork to Jenny's Gap, and through that gap to the waters of Slab Fork, and then on to the Bluestone river as hereinbefore described; approving and adopting the whole of that location and such maps of it as had then been filed in the office of the Secretary of State and in the clerks' offices of the county courts of Fayette, Raleigh, Wyoming, and Mercer counties, and direct-

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ing the engineer in charge to file as speedily as practicable in the proper offices maps and profiles of the remaining parts of said location. Prior to that time, the map and profile of the location through Jenny's Gap had been filed. This was a formal, specific, and a deliberate adoption of that location by the corporate authorities of the Deepwater Railway Company. This is undisputed, except that it was not an adoption of a location of the entire line according to complete surveys then made. That objection has been disposed of.

If, prior to the 26th day of September, 1902, the Chesapeake & Ohio Company had not, by corporate action, adopted the same location through Jenny's Gap, the right of the Deepwater Company to that location, by force of the action of its directors on September 26, 1902, is beyond dispute. The defendant in error claims to have adopted the location on the 11th day of September by a resolution passed by its board of directors at a meeting held on that day in the city of New York. For proof of this, it introduced, over the objection of plaintiff in error, what purports to be a record of the minutes of such meeting, including the adoption of such a resolution. This record is in the form of typewritten sheets, pasted in a regular book of the company kept at Richmond, Va., by the secretary of the company, who testified that he had not attended the meeting, and knew nothing of it or what had been done thereat, other than what was disclosed by the typewritten matter. This typewritten record on sheets of paper, signed by the president of the company and the assistant secretary, had been received by him and pasted in the minute book, but he did not even say when they had been received. Neither the president, assistant secretary, nor any other person who appears to have attended the meeting was called to testify that such meeting was held and such resolution passed, and nothing was shown by way of excuse for not calling them. Furthermore, it was admitted that both the president and assistant secretary were living, and residing, respectively, in Richmond and Philadelphia. The defendant in error attempts to use this record as evidence to prove its own act in its own favor against a total stranger to it. It is not used for the purpose of establishing any contractual relation between it and the plaintiff in error. It makes no charge against the plaintiff in error. It does, however, make use of this resolution to prove title in itself to a thing which the plaintiff in error says it has not acquired, and to which the plaintiff in error is entitled, unless, by prior acquisition, it has become the property of the defendant in error. In support of the admissibility of the record for this purpose, upon showing that it was entered in the book by one having authority to do so, it is contended that the records of a private corporation are admissible evidence against all persons to prove its corporate acts. The able counsel for defendant in error say the following is deducible from the authorities as a rule on the subject: "The records of a corporation are admissible to establish a right in it which grows out of its own proceedings, although

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they may not be admissible to fasten the liability on others." In testing the soundness of this proposition, it is necessary to bear in mind that the decisions relating to the admissibility of such evidence present many distinctions in respect to the subject-matter of the controversy, the relation of the parties to it, and to one another, and the nature of the fact sought to be proved by such evidence. That the records of a corporation are always admissible against it is perfectly apparent. They are admissions and declarations against its interest, and may be used as such, just as the books, memoranda, letters, and declarations of an individual may be used against him, although not admissible in his favor. Jones, Ev. § 530; Townsend v. Church, 6 Cush. 279. The cases illustrating this use of corporation records and books can have no possible bearing on the question presented here. Hence no time need be spent in collecting and analyzing them.

When the controversy is between stockholders, concerning their interests in the corporation, and involves the consideration of the acts of the corporation as affecting directly its status and indirectly their interests, the records and books are admissible if authenticated by showing that they are the records and books of the corporation and have been regularly kept as such. This is done by calling as a witness the secretary or other recording officer, if he can be had. This rule rests upon considerations of convenience, and also upon sound legal principle. By becoming a stockholder in a corporation, a person creates between himself and all other stockholders of the corporation, and between himself and the corporation, a contractual relation, which is affected and controlled, in some degree, by every proper act of the corporation, whether done by its board of directors, its officers, or its mere employees. He is bound by its past acts, and has consented to be bound by all its future acts. If they result in gains, he shares in them, and, if losses, he suffers his proportionate part thereof. The business of the corporation is his business. Though, in a direct and primary sense, the directors and officers are the agents of the corporation, and not subject to his individual control, they are, in a substantial way, his agents and employees, and he, along with the corporation, is privy to their acts and may be deemed to have authorized every book entry and every record of corporate meetings and acts that the officers and agents may lawfully make. He is deemed to have known, when he established his relationship of stockholder, that such records and entries would be made, and that they would indirectly relate to and affect his interest. Having access to the books and constructive knowledge of their contents, there is ground for a presumption that he would not have suffered an improper entry to have remained in them without objection. Moreover, a relationship closely allied to that of partnership exists between the stockholders of a corporation. Because of the relation of agency existing between copartners, and the right of inspection of the books relating to the partnership business and affairs, the books of a copartnership are admissible evidence in

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controversies between the members thereof. "Although the book of an individual is not evidence in his favor against others, yet, from the very nature of the case, the books of a partnership must be evidence between the partners themselves. Their situation is one of confidence. They agree to unite, and, as to others, to become one person, and the books of the firm are to speak their language and record their joint transactions; and there is an understanding that these books are to be appealed to, to tell their true situation. To admit them as evidence, then, is only effectuating their agreement, and using their own criterion and test to ascertain the truth. Such books, therefore, kept subject to the inspection of each, must be admitted as correct until the contrary is shown." Mills, J., in *Simms v. Kirtley*, 1 T. B. Mon. 80. This doctrine has been enunciated and applied in early Virginia cases, binding upon this court. *Fletcher v. Polard*, 2 Hen. & M. 544; *Brickhouse v. Hunter*, 4 Hen. & M. 363, 4 Am. Dec. 528. See, also, *Heartt v. Corning*, 3 Paige (N. Y.) 566.

Though, according to good authority, there is no legal principle upon which the action can be justified, courts almost everywhere hold that the records and proceedings of a corporation are admissible to prove, *prima facie*, against an individual, his membership in it as a stockholder. This rule is stated in *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437, as follows: "A person is presumed to be the owner of stock when his name appears upon the books of the company as a stockholder, and, when he is sued as such, the burden of disproving that presumption is cast upon him." It was adopted by this court in *Railway v. Applegate*, 21 W. Va. 172, without any reference to other authorities for a verification of its soundness. The federal decision just mentioned predicated the rule upon the following decisions as authority therefor: *Coffin v. Collins*, 17 Me. 440; *Merrill v. Walker*, 24 Me. 237; *Plank Road v. Rice*, 7 Barb. (N. Y.) 162; *Hoagland v. Bell*, 36 Barb. (N. Y.) 57; *Turnpike Road v. Van Ness*, 2 Cranch, C. C. 451, Fed. Cas. No. 11,986; *Mudgett v. Horrell*, 33 Cal. 25. The oldest of these is *Coffins v. Collins*, an action of replevin against a sheriff for certain logs seized under an execution against a certain corporation. The defendant endeavored to prove that the property which he took out of the possession of the plaintiffs belonged to a certain individual who was a member of the corporation, in consequence of which said individual's property was liable to be taken under the execution. In order to establish the existence of the corporation, he introduced the act incorporating it, and then offered to prove by oral testimony the organization of the company and user of the corporate franchises conferred by the act, and the court held this evidence inadmissible to prove the fact of corporate existence, on the ground that the records were the best evidence, and not to be supplanted by oral testimony without having shown that they could not be obtained. Just here it is to be observed that the case was not an action by the corporation against a stock-

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holder, but the issue was whether or not the relation of stockholder existed. In the next case, *Plank Road Co. v. Rice*, there was neither a declaration of such a rule nor any necessity for it. The subscription paper of the defendant was produced, and there was oral proof of his acceptance of a certificate of stock in the corporation without objection. He did not deny his connection with the corporation, nor the acts which it was alleged he had done by way of subscription and participation, but did deny the legal sufficiency of those acts to make him a stockholder. *Hoagland v. Bell* lays down the rule as declared in *Turnbull v. Payson*, but without the citation of a single authority to support it, and without any reference to any legal principle as a basis for it. The opinion is about a dozen lines in length. *Merrill v. Walker* has no relation whatever to a corporation or the stockholders thereof. The citation of it is a manifest error. Presumably the case intended to be referred to is *Whitman v. Granite Church*, 24 Me. 236, on the opposite page of the same book from *Merrill v. Walker*. That was an action against a corporation by an individual, a stranger, for money had and received, and the records were not offered in its favor, but against it as its admission of the indebtedness to him, and not in reference to any relation as stockholder. Hence it is wholly inapplicable. *Mudgett v. Horrell* expressly decides that the stockbook of a corporation is not admissible against one who is alleged to be a stockholder, for the purpose of proving that he is a stockholder. Commenting upon this rule, *Morawetz on Corporations*, § 76, says: "While the rule stated in the preceding section appears to be well established by authority, it is difficult to support it by any principle of the common law. The stockbooks of a corporation are undoubtedly evidence against it as admissions, but they cannot be admitted on this ground, for the company, against a person who denies that he is a shareholder." In this the author is supported by *Wheeler v. Walker*, 45 N. H. 355, and *Chase v. Railroad Co.*, 38 Ill. 215. Though denouncing the rule as indefensible in principle, the Alabama court enforced it in *Semple v. Glenn*, 91 Ala. 245, 6 South. 46, 9 South. 265, 24 Am. St. Rep. 894.

A review of the cases will show that, except in a few instances, there was evidence other than the mere appearance of the defendant's name upon the stockbook to show his connection with the company as a stockholder. In *Railway Co. v. Applegate*, 21 W. Va. 172, the defendants were shown, by the oral testimony of two witnesses, to have been connected with the company as subscribers. Witnesses testified to having been present at the meetings, the records of the transactions of which were shown by the books. It was proved by one witness that the defendants had paid to him, for the company, part of their subscriptions. Others had seen the signatures of the defendants on the subscription list. What this court meant, therefore, seems to have been, not that the appearance of the defendant's name on the stockbook was alone sufficient to make him a subscriber *prima facie*, but that his subscription having been shown, as well as the presence of his

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name on the stockbooks, the burden was upon him to prove a release. So in the Glenn Cases—91 Ala. 245, 6 South. 46, 9 South. 265, 24 Am. St. Rep. 894; (Va.) 6 S. E. 806; 96 N. C. 413, 2 S. E. 538—the subscriptions do not seem to have been contested, but it was claimed that the defendants had been released by a change in the name of the corporation and in the amount of its capital stock. As that corporation had been insolvent and inactive for about 20 years when the suits were brought against the stockholders, the admission of its books, records, and papers might have been justified on the ground of necessity, owing to the death or absence of those who made the entries in them, although that is not stated as the reason for admitting them. In *Semple v. Glenn*, 91 Ala. 245, 6 South. 46, 9 South. 265, 24 Am. St. Rep. 894, there was not even an authentication of the books, but the court said, in view of the absence of any objection to their introduction, "We must assume that this ground of objection was waived." The issue in that case was not whether certain things had been done, but the legal effect of what had admittedly been done. In *Brewer v. Stone*, 11 Gray (Mass.) 228, the subscription of the defendant was admitted, and the admission of the books to prove his connection with the corporation by way of subscription to its stock, was unnecessary, and they were only admitted for the purpose of showing acceptance by the corporation, of which the defendant was admittedly a member, of a conveyance to it. The identity and legal effect of acts done were the only issues in the case, and that they had been done was uncontroverted. *Railroad Co. v. Eakins*, 30 Iowa, 279, did not involve any controversy as to whether there had been a subscription, the fact of signing the subscription was admitted, and the technical objection set up was that the subscription paper had not been properly stamped nor the stamps properly canceled. The other issues were that certain conditions on which the subscription had been made had not been complied with. These were conditions subsequent. The subscriber had connected himself with the corporation, and the question was whether he had been released by failure to perform conditions, subsequent to his subscription, but precedent to the right to require payment of the amount subscribed. In the similar case of *Railway Co. v. Dunn*, 39 Me. 587, there was no controversy about the fact of the original subscription. The subscription papers, signed by the defendant, were put in evidence, and he resisted payment on the ground that he had been released by failure, on the part of the company, to obtain a subscription to its capital stock in a certain amount and to comply with other conditions. In *Grays v. Turnpike Co.*, 4 Rand. 578, the original subscription book was produced, and one defendant admitted his signature, while that of the other was proved by a competent witness. Judge Carr said there was "abundant evidence to prove the defendants subscribers." *Railroad Co. v. White*, 41 Me. 512, 66 Am. Dec. 257; *Railroad Co. v. Sherman*, 8 R. I. 564; *Vawter v. Franklin College*, 53 Ind. 88; *Stuart v. Railway Co.*, 32

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Grat. 146; and *Turnpike Co. v. McKean*, 10 Johns. 154, 6 Am. Dec. 324—all belong to the class of cases just examined. Very few, if any, of these cases, may be regarded as having enunciated the proposition that, in the absence of proof of a subscription, or other substantial connection of the defendant with the corporation, so as to make him a participant in the enterprise, the presence of his name alone on the books of the company, written there by one of its agents, is *prima facie* proof of membership. If, however, such doctrine is established, it affords no reason for extending the departure to any other class of cases. It has been denounced as unsound in principle by both courts and text-writers.

A very numerous class of cases in which corporations have been permitted to introduce their records and books for the purpose of proving their acts is that in which it is necessary to establish only *de facto* corporate existence, and not existence *de jure*. For instance, a bank sues on a note, or a railroad company on a contract, and the plea of *nul tiel* record is interposed, denying that the plaintiff is a corporation. Here proof of corporate existence is required, but it need not be full, nor need the evidence be such as is necessary to prove many kinds of specific corporate acts. Many decisions say that for this purpose it suffices to introduce the charter, act of incorporation, or articles of incorporation, and then proof that the plaintiff has acted as such corporation—carried on a banking business or railroad business. The issue is collateral in its nature. The plea simply requires the plaintiff to establish a status—show that it is what it claims to be. In that question, the other party has no direct, but only an incidental, interest. The fact thus put in issue is distinct from, and practically independent of, the real controversy between the parties. See *Way v. Billings*, 2 Mich. 397; *Insurance Co. v. Allis*, 24 Minn. 75; *Henderson v. Bank*, 14 Miss. 314; *Bank v. Harrison*, 39 Mo. 433, 93 Am. Dec. 285; *Insurance Co. v. Cadwell*, 3 Wend 296; *Jones v. Dana*, 24 Barb. 395; *M. E. U. Church v. Picket*, 23 Barb. 436; *Bank v. Bank*, 21 N. Y. 542; *State v. Murphy*, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550; *Turnpike v. Cutler*, 6 Vt. 323; *Bank v. Allen*, 11 Vt. 302; *Bank v. Lee*, 112 Mass. 521; *Bank v. Glendon*, 120 Mass. 97; *Mix v. Bank*, 91 Ill. 20, 33 Am. Rep. 44. Some of the earlier cases required a great deal more proof than the courts now exact. To this class belong the following cases, relied upon by counsel for defendant in error as authority for the position they have taken here: *Wood v. Bank*, 9 Cow. (N. Y.) 194, an action against an indorser on a note; *McFarlan v. Ins. Co.*, 4 Denio (N. Y.) 392, an action by the insurance company on a bond conditioned for the payment of money; *Grant v. Coal Co.*, 80 Pa. 208, an action of *assumpsit* by a coal company on an account for coal sold to defendant; *Duke v. Navigation Co.*, 10 Ala. 82, 44 Am. Dec. 472, an action by a corporation, having the right to collect tolls on a navigable river, against an individual, for tolls alleged to be due from him. In none of these cases did the

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question of corporate existence enter into the real merits of the issue. But be this as it may, the cases do not support the position assumed. In *Wood v. Bank* no objection was made to the introduction of the records. The contention was that, granting the truth of all they contained, the things shown to have been done did not amount to a compliance with the requirements of law. In *McFarlan v. Ins. Co.* the court said: "The books of the corporation, in connection with other evidence, were properly received for the purpose of showing how the company was organized, and that it acted under the charter." In *Grant v. Coal Co.* the secretary of the plaintiff company produced the minute book and testified to all the acts shown by the book, and said that he had been the original secretary of the company and that the minutes were in his handwriting. He was subjected to a rigid cross-examination as to what had been done under the articles of incorporation. In *Duke v. Navigation Co.* two witnesses testified to the acts of organization, and the records were admitted in connection with their testimony. The clear import of these four cases is that the corporate records were used to prove what the things were which it was shown by oral evidence had been done. It appeared from the latter kind of evidence that meetings had been held and transactions reduced to writing, and then the writings themselves were used as the best evidence of the identity, nature, and character of what had been done.

Practically all the cases found in which it has been held that the books and records of private corporations are evidence of their acts and proceedings, as against strangers, belong to this last class. This accounts for the oft-repeated proposition, that, for such purposes, such records are admissible in controversies with strangers to the corporation. To say that the same rule must be applied to the determination of a question of vital interest between the corporation and a stranger would ignore the distinction which ought to be made between the cases in which the issue is one in which the stranger has no direct and substantial interest and the case in which the records are offered to prove the very fact which is directly in controversy between them. A corporation may be permitted to appeal to its records to establish a collateral issue without permitting it to introduce self-made and self-serving entries upon its books to prove that which is directly in issue between it and a stranger. That they cannot do so to prove title and claims against strangers has been decided in a number of cases. *Jones v. University*, 46 Ala. 626; *Railroad Co. v. Cunningham*, 39 Ohio St. 327; *Railroad Co. v. Noel*, 77 Ind. 110; *Coosaw Mining Co. v. Mining Co.* (C. C.) 75 Fed. 860; *London v. Lynn*, 1 H. Bl. 205, 214. A case offered as one establishing the contrary is *Blake v. Griswold*, 103 N. Y. 429, 9 N. E. 434. It was an action by a creditor of a corporation against its trustee to recover his claim from him on the ground of an alleged false statement in an annual report signed by the defendant as such trustee, on the faith of which credit had been extended. The defendant had been connected with a second cor-

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poration, as trustee or director, between which and the first certain transactions had taken place, and the records of the two corporations clearly disclosed the falsehood of the statement which the defendant had signed. The defendant made such admissions in his answer and also in his testimony as showed his actual knowledge of the conditions disclosed by the corporate books and misrepresented by him. Whether he had had such knowledge was the vital issue. It was in connection with these admissions that the records were admitted. Moreover, as he was a stockholder and director in the corporations, the records were in a sense his own acts. Hence the case fails to sustain the proposition asserted. *People v. Bank*, 1 Doug. (Mich.) 282, was an information in the nature of a quo warranto to forfeit the charter of a bank, and the principal issue was whether or not the incorporators had paid in the necessary amount of capital within the time limited by the act of incorporation. The records were admitted without objection, and relied upon by both parties as evidence. It was contended by the Attorney General that this money, although paid in, was shown by entries in the books to have been immediately withdrawn. Hence the question was not the admissibility of the records, but whether or not, upon a fair construction of the entries, they showed that there had been only a pretense of contribution of the capital required. *Barcello v. Hapgood* (N. C.) 24 S. E. 124, is relied upon. It was a suit brought for the purpose of rescinding a contract for the sale of land on the ground of defect of title. A number of objections were made to the title, some of which grew out of the fact that it had passed through the hands of a foreign corporation. It was objected that such a corporation could not acquire and dispose of real estate, and that a deed made by an agent, acting under a resolution recorded in the minutes of the corporation, could not make a good conveyance of the property. Here the controversy was not between the corporation and a stranger, but between persons who were strangers to the corporation. The resolution and the deed made under it were not self-serving, but self-disserving, as to the corporation. *North River Co. v. Church*, 22 N. J. Law, 424, 53 Am. Rep. 258, an action to recover assessments upon the defendant's land, is also relied upon. The admission of the books containing the assessment and the minutes of the company was objected to, but the court said the act of incorporation had expressly declared that the assessment should be admissible evidence. The minutes of the corporation were also admitted, on the authority of *Owings v. Speed*, 5 Wheat. 420, 5 L. Ed. 124, and *Wood v. Bank*, 9 Cow. 194. The defendant seems to have been a stranger to the corporation, but the matters to prove which the minutes were introduced must have been collateral in their nature. *Schell v. Bank*, 14 Minn. 43 (Gil. 34), goes further, holding an entry on the books of a corporation, authenticated by proof by the secretary of the character of the book and the fact that it had been kept by him, to be admissible against a stranger, in connection with oral evidence

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showing that certain acts had been done in pursuance of the resolution constituting the entry. It is to be noticed, however, that the objection to the entry was based on immateriality and irrelevancy, and not on insufficiency of the evidence offered to show that the resolution had been adopted. The court said a general objection to the introduction of the evidence was not good, if the matter offered in evidence was competent for any purpose. The resolution was clearly competent to show what sort of resolution it was. Another case not cited, but yielding some support to the proposition contended for, is *Rayburn v. Elrod*, 43 Ala. 700, holding, in an action of ejectment, that a record of the minutes of a quarterly conference of the Methodist Episcopal Church, South, was admissible to prove who were the trustees of a church building within the circuit of the conference. The court, in passing upon the admissibility of this evidence, referred to no principle justifying its admission. It simply said: "From the minutes it appeared that the plaintiffs had been, at a time prior to the trial, elected trustees. This was the best evidence that could have been given of their being such. No higher or more conclusive evidence existed. If the defendant knew of any better, he should have suggested it." *Owings v. Speed*, 5 Wheat. 420, 5 L. Ed. 124, is relied upon, but that was a case in which the records of a public corporation were held admissible. It affords no precedent for the admission of records of private corporations. All authorities admit this distinction. *Jones on Ev.* § 526; *Wigm. Ev.* § 1661. Even the records of public corporations are not admissible to prove anything but acts of a public nature. Thus, in *Attorney General v. Warwicke*, 4 Russell, 222, it was said: "Private entries in the books of a corporation, which are under their own control, and to which none but the members of the corporation have access, cannot be made use of to establish rights of the corporation against third parties." So, in *Marriage v. Lawrence*, 3 B. & A. 142, the court held that "an entry in the public books of a corporation is not evidence for them, unless it be an entry of a public nature."

Counsel for defendant in error base their contention largely upon an observation made in *Railroad Co. v. Eastman*, 34 N. H. 137, quoted in 2 *Thomp. Corp.* § 1921. But as no question calling for such principle arose in that case, the declaration is obiter. Mr. Thompson also says, in volume 6 of his work on *Corporations*, § 7740, that "the general rule is believed to be that, except for the purpose of proving what the corporation did, or what action its corporators took in effecting the organization, its books and records are not evidence as against a stranger." Then, in the same section, he states the converse of the proposition as follows: "They are evidence, in any form of proceeding and against any party, for the purpose of showing that the corporation passed the vote recited, adopted the resolution recorded, or enacted the by-laws spread out upon its minutes, whenever, under the frame of the issues, it becomes material or relevant to show that fact, and always subject to contradiction by proving

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that the record is a false one." In a subsequent portion of the same section he says: "But where it is sought to use the records of a private corporation as evidence of the facts which they recite, for the purpose of concluding, or even influencing, the rights of third parties who are strangers to the record, then such records are not admissible, on the same principle which operates to exclude the records of legal judgments, when offered for a similar purpose, on the principle that they are *res inter alios acta*." His conclusion reads as follows: "The sound rule, then, is that the records of a private corporation cannot be used in evidence for the purpose of sustaining a claim of the corporation against persons who are not members of it, or to defeat a claim of such a person against the corporation, or to affect strangers any way." There is, at least, an apparent contradiction in the language quoted, but this may be due to mere inaccuracy of expression. If it be shown by competent evidence that a resolution was passed, that a meeting was held, that an organization was effected, then the record made of the resolution, the by-law, or the organization would undoubtedly be at least admissible evidence for the purpose of sustaining a claim of the corporation adopted, and the character of the organization effected; but this is a very different matter from admitting these records to show that they were made. Proof of the creation of a thing differs widely from proof of the identity or character of a thing after it has been made. One of the authorities cited by Mr. Thompson in support of his text (section 7736, referred to in section 7740) is *Ryder v. Railroad Co.*, 13 Ill. 516. From an examination of the report of that case it will appear that the action was *assumpsit* to recover from a subscriber assessments on the stock which he had bound himself to take. He did not deny the subscription, but claimed to have been released. Being *prima facie* a stockholder, mere authentication of the books made them admissible. Then the question was the identity and legal character of what had been done. The case is no authority for the position that such records are admissible under the circumstances of this case. Another case is *Semple v. Glenn*, 91 Ala. 245, 6 South. 46, 9 South. 265, 24 Am. St. Rep. 894, in which one question was whether the character of the corporation, to the stock of which the defendant had subscribed, had been changed, in the alteration of its name and increase of its capital, so as to release him. The records of the two corporations were compared for the purpose of determining this question. In the opinion it is said: "It does not appear from the record that the identification or correctness of the copies, or that the minutes were made by any person authorized to make them, was shown. But as no objection on this ground seems to have been made in the trial court, nor made here, we must assume that this ground of objection was waived." As there had been no objection to their introduction as evidence, it was impliedly admitted that the transactions embodied in the records introduced had taken place, and the issue was made, not on the question of their admissibility,

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but on the question of the identity of the corporation as the one to the stock of which subscription had been made. The question determined from these records was not whether certain things had been done, but the character of what admittedly had been done. This is evidently what the court meant in *Coffin v. Collins*, 17 Me. 440, and also what is meant in *Clarke on Corp.* § 650, by the declaration that the minutes of a corporate meeting are the best evidence, within the rule excluding secondary evidence without an excuse therefor having been shown. The latest, and perhaps the most analytical, work on the subject of evidence, states the proposition in this language: "The records of the proceedings and acts of an ordinary private corporation are, according to one theory, the constitutive acts of the corporation; they are not the evidence of what is done, but they are what is done, since the proceedings must be in writing." *Wigmore on Ev.* vol. 3, § 1661. The author cites no cases illustrating what he means, but his view seems to be the idea above expressed. If so, expression in another form would be that they are not evidence that a thing was done, but are the evidence of the identity of the thing done; it being granted or proved that something was done, because whatever was done was put in writing, and the writing itself is the evidence of it. Proceeding, he says: "According to the other theory, they are merely entries of the oral doings, and are thus analogous to any ordinary person's contemporary entries of his doings." This makes them mere memoranda, to be considered as a part of the oral testimony of the clerk or officer who entered them, testifying as a witness that the things purporting to have been done were done. That this is the true interpretation of his language appears from the following: "The general practical difference between the two theories is as to their effect on the conclusiveness of the entries." Under the first theory, the written memorial of what was done could not be varied by parol evidence; under the second, it could. This shows that he does not mean to say the record is proof that it was made at the time, in the manner, and by the authority cited therein. Further proof of this is found in a subsequent paragraph of the same section, in which he says: "Books of entries of corporate proceedings are (as above quoted) ordinarily not receivable under the regular entries exception without calling the clerk or other entrant. But the records of a public officer are admissible under the present exception without calling the entrant, because he is a public officer; and therefore the books of a public corporation (that is, with us, usually a municipal governing body) are receivable without calling the official entrant."

Another light in which to view the text quoted from *Thomp. Cor.*, and found in *Elliott, Ev.* § 416, *Whart. Ev.* § 662, and *An. & Ames, Cor.* 573, is the difficulty of conceiving circumstances under which corporate existence can be directly and vitally in issue between the corporation and a stranger. No stranger, save the state, has any direct interest in that question. From the

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vast number of cases in which such records have been introduced to prove a mere de facto existence against strangers, the expression used by the text-writers and relied upon here has arisen. Generally speaking, they are evidence against strangers to prove the doings and proceedings necessary to show itself to be a corporation, for, generally, the stranger's interest in that question is but slight. As against him, mere user of the franchise claimed is about all that need be shown. So understood, this part of the text may be reconciled with the other part, which says corporation books cannot at common law be used to sustain a claim of the corporation against persons not members of the corporation, or defeat a claim of such persons against the corporation, or in any way to affect strangers. Whart. Ev. 662; Thomp. Cor. §§ 1921, 7740; Railroad Co. v. Eastman, 34 N. H. 124. The establishment of the existence of a corporation affects no right of a stranger to it. It neither adds to, nor takes from, his possessions.

The effort here is to prove title, not by purchase, recovery, or otherwise, from the adverse party, but to show title nevertheless. It is title by appropriation from the public. Shall it be proved by evidence different in character from what is required in other cases? Could title by purchase, in case of conflict between two corporations, be established by the exhibition of a resolution on the books of one of them, on the theory that, as to the other, it was a corporate act, and not a transaction with such other company? What is the difference between the two cases? A prior purchase by one company precludes title by purchase in the other. Here appropriation by one company at a certain time precludes title by appropriation in the other. If a self-serving, self-made, unsworn record can avail in the one case, there is not a shadow of reason why it should not in the other. This long and laborious search and analysis of the authorities has revealed but two or three cases which seem to countenance such use of corporate records. Against them stand several holding the contrary. Therefore the weight of authority, reason, and sound legal principles all assert the contrary. Escape from this conclusion is attempted on the theory that adoption of a route is an act in the process of organizing or constituting the corporation. The fallacy of this lies in the fact that a railroad corporation may be fully organized without having acquired a specific location or right of way for its road. Organization precedes location. Location is an act of acquisition, and not of organization or constitution. It is an act of preparation for building the road, just as is the purchase of a right of way and materials.

As this evidence must be discarded as inadmissible, nothing remains to support the claim of a location by the defendant in error on the 11th day of September, 1902. It is said that the certificate of the Secretary of State showing the filing of the plat of the right of way claimed in his office on that day is evidence. This plat was filed by an engineer of the company. His authority to do so is not shown even by his testimony, or in any

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other way, and the certificate of the Secretary of State is not evidence or proof that this plat was filed by authority of the company. It may be evidence of the filing of the certificate, but it is no evidence of the authority of the person by whom it was filed to make such filing. The statute merely authorizes the use of certified copies from his office as evidence in lieu of original papers; it does not say his certificate may have any other probative effect.

We are asked to reconsider, and recede from, the decision in *Deepwater R. Co. v. Lambert*, 54 W. Va. 387, 46 S. E. 144, construing the certificate of extension of the plaintiff in error and holding it sufficient. Having reconsidered it, we see no reason for changing the conclusion of the court in respect to the validity of the certificate. We think the objective point on the Virginia line is indicated with reasonable certainty, and nothing more is required. The preposition "to" has primary and pregnant significations, of which the former is adopted here, while in *Railway Co. v. Railway Co.*, 112 Ill. 589, the latter was adopted.

Failure of the plaintiff in error to allege in terms that the land in controversy is in its actual use and necessary to the proper exercise of its franchise is relied upon as ground for the appropriation thereof by the defendant in error, notwithstanding priority of location by its adversary. The answer avers that the lands in controversy form a portion of its right of way, and are part of the land on which it has located its right of way. A right of way—land upon which to build a road—is an absolute necessity of a railroad company. Is it possible that land so used or held for the purpose of such use, and not exceeding in quantity the amount necessary for such purpose, is not to be regarded as necessary for the purposes of the company? We do not understand counsel to assert the negative of this proposition, but only to say the necessity must be allowed in terms. This was not the defect in the pleas rejected in *B. & O. R. R. Co. v. P. W. & Ky. R. R. Co.*, 17 W. Va. 812. They failed to show that the land was in use by the defendant company. "Pleas Nos. 2 and 3 did not so much as aver that the lands were in present use"—Johnson, J., in said case. Plea No. 4, held good, merely averred that the land was in use by the defendant in its business. To this a replication to the effect that the use of the land by the defendant was not in good faith, but only for the purpose of preventing the applicant from taking it, was filed. Nothing is perceived in the case relied upon that requires a formal averment that the land is necessary to the exercise of the defendant's franchise, in addition to the averment that it is in use by the company, which shows how it is used. It is enough that the plea shows that it is devoted in good faith to a proper use in the exercise of the franchise.

Thus it appears that priority of right to the location in question is in the plaintiff in error, which renders it unnecessary to pass upon the rulings of the court in the proceedings for ascertaining the damages. Nothing remains but to reverse the judgments and dismiss the action.

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But the final contention is that the action ought not to be dismissed, for two reasons, the first of which is that the defendant in error ought to be permitted to prove the passage of the resolution of September 11, 1902, by competent evidence. Some authorities are presented which say that, under certain circumstances, a case reversed by an appellate court, after having been tried by the court below without a jury, should be remanded for a new trial. But none have been shown which hold such action proper when the court can see that no beneficial result could be attained by such action. As the Deepwater Company clearly has the prior and superior right to the location in question, regardless of any action that may have been taken by the Chesapeake & Ohio Company on the 11th day of September, 1902, proof of a location by that company on that day would avail nothing. Hence a new trial for letting in evidence on that question would be futile and idle.

The other ground of objection is the assertion that the defendant in error may have entered upon the lands in question since the date of the judgment in the court below, and commenced the construction of its road thereon. In fact, affidavits have been presented here showing that such is the fact, and it is earnestly insisted that the action should not, under any circumstances, be dismissed, and that it should be remanded for inquiry as to any rights that may have vested, pending the litigation in this court. The decision in *Railway Co. v. Alling*, 99 U. S. 463, 25 L. Ed. 438, is relied upon as an authority to sustain this position. We think this is a misapprehension of the meaning and effect of that decision. It was not in a condemnation proceeding. It was the final disposition of two chancery causes, instituted, respectively, by the two litigating companies against each other. In such proceedings, there is full latitude and ample process to work out the equities of the parties. This is a proceeding at law, in which only legal rights are cognizable, and in which the door cannot be opened to all the equities of the parties. Another important distinction is that the court, in *Railway Co. v. Alling*, was controlled and governed by a statute applicable to the peculiar situation in which the court found the two litigating companies. The canon was too narrow for two roads, and the statute provided that, in such case, the railroad company having prior right to the location through the pass should not prevent any other railroad company from the use and occupancy of such canon, pass, or defile for the purposes of its road in common with the road first located, and that the expenses should be equitably divided between any number of railroad companies occupying and using the same canon, pass, or defile. Accordingly, the Supreme Court, on reversing the decree of the circuit court, remanded the causes with the following directions: "By proper orders entered in each suit, the court below will recognize the prior right of that company to occupy and use the Grand Canon for the purpose of constructing its road therein, and will enjoin the Canon City & San Juan Railway Company, its officers, agents,

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servants, and employees, from interfering with or obstructing that company in such occupancy, use, and construction. It may be that, during the pendency of these causes in the court below, or since the rendition of the decrees appealed from the Canon City & San Juan Railway Company has, under the authority of the Circuit Court, constructed its roadbed and track in the Grand Canon, or in some portion thereof. In that event, the cost thus incurred in those portions of the canon which admit of only one roadbed and track for railroad purposes may be ascertained and provided for in such manner and upon such terms and conditions as the equities of the parties may require." All this was based directly upon the statutory provision, as will appear from an examination of the opinion.

Plaintiff in error having requested this court to enter an order directing a restoration to it of the possession of the premises in controversy and granting it leave to sue out a writ of possession therefor, the defendant in error resists on the ground that improvements may have been made on said premises by it, pending proceedings in the court below and in this court, since it obtained possession thereof under its writ of possession, for which compensation should be ascertained and made a lien on the property before it is deprived of its possession, as is provided in chapter 91 of the Code. Unless this case can be distinguished from others decided by this court involving claims for improvements, the grounds of resistance is untenable, for two reasons: The first is that the defendant in error is not a defendant within the meaning of the statute. It gives compensation, under certain circumstances, to "any defendant against whom a judgment or decree shall be rendered for land." The Chesapeake & Ohio Company's position here is that of plaintiff, it having instituted this action to take from its opponent the land in question. Though, for some purposes, some courts have said a writ of error to reverse a judgment is a new suit, it cannot be regarded as a new and separate action within the meaning of said statute or the law relating to improvements. *Hall v. Hall*, 30 W. Va. 779, 785, 5 S. E. 260, is authority for this position. That was a bill of review to reverse a decree of sale, a proceeding to correct error, bearing a greater resemblance to a new suit than does a writ of error or appeal in the same case. Judge Snyder said, "The present suit is a continuation of that suit," meaning *Lowther v. Hall*, in which the erroneous decrees had been made. The second reason is graver than the first. Under the decisions of this court, the defendant in error cannot possibly be a bona fide occupant, although it entered upon the land under an order of the court, believing its title to be good, because it had notice not only of all the facts, being ignorant of matter of law only, but also of the adverse claim of the plaintiff in error. The propriety of the application of the maxim, "*Ignorantia legis neminem excusat*," to occupants who, relying upon muniments of title, which none save lawyers and courts would condemn as defective, make improvements under an honest belief in the

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validity of their titles, was questioned by Judge Dent in *Bodkin v. Arnold*, 48 W. Va. 108, 35 S. E. 980, but he admitted that such application of it had become the settled law of this state. Point 2 of the syllabus in that case declares the law to be that "the defendant is not entitled to offset his improvements against the rent, if at the time they were made he had knowledge of the plaintiff's title, although he in good faith believed his own title to be the better in point of law." Judge Brannon so interpreted our earlier decisions in *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891, saying, "If Jones, by mistake of law, was led to believe that the court sale conferred good title, that will not serve him." And this statement was made in the discussion of Jones' claim for improvements. To the same effect, see *Hall v. Hall*, 30 W. Va. 779, 5 S. E. 260; *Dawson v. Grow*, 29 W. Va. 333, 1 S. E. 564; *Cain v. Cox*, 23 W. Va. 613. One who is not a bona fide occupant may recover for improvements made under such circumstances as would make it a fraud upon his rights to allow the owner to take them without compensation. *Hall v. Hall*, 30 W. Va. 785, 5 S. E. 260; *Dawson v. Grow*, 29 W. Va. 333; *Morris v. Terrell*, 2 Rand. 6. But in order to enable him to do so, the owner must have stood by and suffered the work to go on, with knowledge of it, or, by some inequitable conduct, have induced the occupant to make improvements, or have been guilty of laches in asserting his claim. Any such ground of recovery is precluded by the facts apparent on the face of this record. The defendant in error took possession, and presumably began work on the property, while the litigation was in progress, and its right to do so was being resisted most strenuously, and possibly by every means the law afforded.

It has been suggested that a right to such compensation may be predicated on the provisions of section 20 of chapter 42 of the Code of 1899, authorizing an entry upon the land by the applicant upon his paying into court the amount of compensation reported by the commissioners, and then providing that "no order shall be made, or any injunction awarded, by a court or judge, to stay him in so doing, unless it be manifest that the applicant is insolvent, or that he, or his officers, agents or servants are transcending the authority, or that such interposition is necessary to prevent injury which cannot be adequately compensated in damages." This only legalizes an entry before final judgment, and confers the right to use and improve the land pending further proceedings; it does not vest title in the applicant. Chapter 42, § 22. If he makes improvements at such stage, he makes them on the land of another, and, after final judgment, he is in no better situation than a successful plaintiff in ejectment would be, pending a writ of error to reverse. As the proceeding is purely statutory, it was necessary for the Legislature to provide specially for the acquisition of possession and title. Shall the court add further plausible, but unnecessary, reasons for the existence of these statutory provisions?

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We know of no rule or principle of construction which either requires or permits it. Reading into such a statute by mere unnecessary implication a right of such importance as that of compensation for improvements would require some legal principle, as well as consideration of the most weighty character, to justify it. In practically all condemnation proceedings the applicant has a certainty of ultimate acquisition of title, and the only matter to be determined is the amount of compensation. In such cases the question of compensation for improvements could hardly arise. It is this class that these statutory provisions seem to contemplate. We have here the exceptional case in which the title cannot be obtained because the land is already devoted to a public use, and the consequences of an erroneous decision of that question have given birth to the question now presented. In such case proceedings might be stayed under exceptions provided for in the statute, namely, when the applicant is transcending his authority, or such interposition is necessary to prevent injury which cannot be adequately compensated in damages. We do not so decide, but this view seems plausible, as well as accordant with law. Land already devoted to a public use, and the use of which is necessary to the enjoyment of the franchise of the internal improvement owning it, cannot be condemned. Code 1899, c. 52, § 7; *B. & O. R. R. Co. v. P., W. & Ky. Ry. Co.*, 17 W. Va. 812. A court may be prohibited from proceeding in an action to condemn property that cannot be taken. *McConiha v. Guthrie*, 21 W. Va. 134. Why may not its orders be superseded or otherwise properly stayed in such case? Do the statutory provisions authorizing entry before judgment, properly construed, apply to such case as this? If not, its status is the same as that of any other action to recover land.

Some authority for the position that restitution lies in the discretion of the court, and is not demandable of right, has been produced, but none to the effect that a court should arbitrarily refuse it and without a substantial reason. Like specific performance and rescission of contracts, it may be discretionary, but it will go as a matter of course when a proper case is made. *Brown v. Cunningham*, 23 W. Va. 109; *McCormick v. Short*, 49 W. Va. 1, 37 S. E. 769; *Keck v. Allender*, 42 W. Va. 420, 26 S. E. 437; *Stanard v. Brownlow*, 3 Munf. 229; *Branch v. Burnley*, 1 Call. 147; *Haebler v. Myers*, 132 N. Y. 366, 30 N. 963, 15 L. R. A. 588, 28 Am. St. Rep. 589.

The conclusions above stated require reversal of the two judgments complained of, setting aside of the verdict, restitution of the land in controversy to the plaintiff in error, and remanding of the case to the circuit court of Raleigh county, with leave to the plaintiff in error to sue out a writ of possession for said premises, and a direction to dismiss the action as to the lands of the plaintiff in error, with costs to it, after it shall have been restored to the possession thereof as aforesaid, all of which will be adjudged and ordered.

ST. LOUIS SOUTHWESTERN RY. CO. *v.* DAVIS.

(Supreme Court of Arkansas, May 6, 1905.)

[87 S. W. Rep. 445.]

Railroads—Title to Right of Way—Adverse Possession.*—A railroad which does not procure its right of way by grant from the owner, nor by the exercise of the right of eminent domain, nor by permission of the owner to use any more land than that covered by its tracks, acquires no title by prescription to any more land than it takes and holds by actual occupancy for a period sufficient to give it a prescriptive title thereto.

Appeal from Circuit Court, Columbia County, in Chancery; Charles W. Smith, Judge.

Suit by the St. Louis Southwestern Railway Company against W. T. Davis. From the decree rendered, plaintiff appeals. Affirmed.

This suit was brought by appellant in the circuit court of Columbia county, August 7, 1897, alleging that it was the owner of a right of way through and across the northwest quarter of the northeast quarter of section 15, township 16 south, range 23 west, 50 feet wide on either side from the center of its track, and that defendant had fenced up a part of said right of way on either side by fences parallel with the track, and claimed the same, and refused to give possession thereof. The complaint prayed for a judgment for possession of its right of way and for damages. Appellee answered, and denied the allegations of the complaint—particularly that plaintiff was the owner of any right of way across said tract—and alleged that when the track was built the land was owned by the Vicksburg & Meridian Railroad Company, and that the track was permissively built thereon, and that plaintiff had since that time permissively operated the road across said land, and that defendant is the owner of said land by conveyances from said Vicksburg & Meridian Railroad Company. Complainant filed its reply to said answer, denying the allegations therein, and particularly that it held said right of way permissively, and saying that the railroad had been built thereon, and was a valuable and lasting improvement thereon, and that defendant, in equity and good conscience, was estopped from trying to revoke the license, if it was a fact that such had been given; and plaintiff prayed that the cause be transferred to the equity docket. This cause was transferred to the chancery docket and tried. The court decreed to the complainant that part of the 100 feet right of way outside the fences of defendant; that is, such part of the 100 feet as he had inclosed by his fences running parallel with the railroad track on either side. The court made the following findings of fact, which appellant con-

*For the authorities in this series on the subject of the acquisition of right of way for railroads by prescription or adverse possession, see foot-note appended to Louisville & N. R. Co. *v.* Smith (C. C. A.), 13 R. R. R. 716, 36 Am. & Eng. R. Cas., N. S., 716.

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cedes were sustained by the proof: "That the railroad, on the line as at present located, was located and built in the year 1882 by the Texas & St. Louis Railway Company across the land in controversy, to wit, the northwest quarter of the northeast quarter of section 15, township 16 south, range 23 west, in Columbia county, Arkansas. That the plaintiff, the St. Louis Southwestern Railway Company, is the successor, by proper mesne conveyances, to all the rights, privileges, and property of the Texas & St. Louis Railway Company. That said railroad was located one hundred feet wide—fifty feet on either side of the center of the track of said road—through said county of Columbia and other counties in the state of Arkansas, and through the land in controversy, and possession taken of said strip. That said railway company, nor its successors, including the plaintiff, acquired any rights of way from this defendant by purchase and deed. That when said Texas & St. Louis Railway was located and built, the said land in controversy was owned by the Vicksburg & Meridian Railroad Company, and afterward bought by W. T. Davis & Co., of which firm the defendant was a member. That in the year 1893 the other members of said firm of W. T. Davis & Co. conveyed their interest in said land to this defendant by proper deed of conveyance. That none of said tract of land, save that cleared and occupied by said railroad company, was cleared or fenced when the same was purchased by W. T. Davis & Co. from the Vicksburg & Meridian Railroad Company, and none of the same was in cultivation. That in the year 1883 said W. T. Davis & Co. built a sawmill on this land, within one hundred and fifty feet of the track of said railroad company, and built its lumber piles and lumber trams and dryhouses within fifty feet of the center of the track of said railroad—some of the lumber sheds being within 20 or 25 feet of the main track—and that said W. T. Davis & Co. used some parts of said claimed right of way between said sawmill and the railroad track on the south side thereof. That soon afterwards, to wit, in the same year (1884), the said W. T. Davis & Co. built fences on either side of said railroad track, which fences were part of the way across said 40-acre tract, and which fences were in some places within fifty (50) feet of the center of the said railroad track. That said fences remained as then located until the year 1897, when they were reset, and placed generally nearer, and in some places considerably nearer, said railroad track, and there remained as then fixed at the date of the institution of this suit, to wit, August 7, 1897, and so remained in the year 1899. That the use of fencing of said land as used and fenced by the defendant was done without asking any questions of the plaintiff or its predecessors, and that such use did not interfere with its use by the plaintiff for the purpose of its railroad until the year 1897, just prior to the bringing of this suit, when it attempted to fence its right of way, when this controversy arose. That neither party gave the other any specific notice of adverse claim, and they only had such notice of the claim of the other as their use and possession indicated."

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S. H. West and Gaughan & Sifford, for appellant.
Stevens & Stevens, for appellee.

WOOD, J. (after stating the facts). The appellant does not show any title to the land in controversy by adverse possession. It did not enter upon the land by virtue of any grant from the owner, or under any right of eminent domain. It appears from the answer that the grantors of appellant "previously built the tracks" on the land. But there is nothing to show that the permission of the landowner extended to any portion of the land other than that covered by the track. There does not appear to be any verbal donation of a right of way 100 feet wide, as there was in the case of *Hargs v. Kansas City, C. & S. Ry. Co.*, 100 Mo. 210, 13 S. W. 680, cited by appellant. The findings of fact show that possession was taken of a strip of land 100 feet wide. But appellant actually occupied only that portion covered by its track for a period sufficient to give it title to the easement by prescription. The land in controversy was fenced by the grantors of appellee two years after appellants' grantors located their right of way, and the land has since been continuously held by appellee and his grantors. In the absence of a grant or verbal donation or appropriation under charter powers, a railroad company will not acquire title by prescription to any more land than it takes and holds by actual occupancy.

The railway company claims title to its easement by adverse possession. It has no color of title, and has not shown any right of eminent domain. It denies that it has any right to the lands by permission of the owner. It has the burden of proof, and, under such circumstances, no presumptions will be indulged. *Pedis possessio* for seven years must be shown. The authorities relied upon by appellant are not applicable to the facts found by the court, which appellant concedes to be correct.

Affirm.

BATTLE, J., not participating.

BENNETT v. LONG ISLAND R. CO.

(Court of Appeals of New York, May 30, 1905.)

[74 N. E. Rep. 418.]

Eminent Domain—Damages—Construction of Viaduct.*—Where a steam surface railroad company had acquired a right of way in fee, it was not liable to the abutting owner of a lot on a street, who had acquired title through mesne conveyances from the grantor of the railroad company after conveyance to it, because of damages to his easements by the construction of a viaduct to connect its trains with an elevated road.

*See generally, foot-note appended to *Little Rock, etc., R. Co. v. Newman* (Ark.), 14 R. R. R. 448, 37 Am. & Eng. R. Cas., N. S., 448; foot-notes appended to *Dean v. Ann Arbor R. R.* (Mich.), 13 R. R. R. 365, 36 Am. & Eng. R. Cas., N. S., 365; foot-notes appended to *Stockdale v. Rio Grande W. Ry. Co.* (Utah), 12 R. R. R. 527, 35 Am. & Eng. R. Cas., N. S., 527.

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Appeal from Supreme Court, Appellate Division, Second Department.

Action by Hannah Bennett against the Long Island Railroad Company. From an order of the Appellate Division (85 N. Y. Supp. 938, 89 App. Div. 379) reversing a judgment for plaintiff, she appeals. Affirmed.

The defendant operates a steam surface railroad, partly in the borough of Brooklyn, city of New York, and the plaintiff is the owner of a lot located on the south side of Atlantic avenue in that borough, on which she has built a two-story frame house, the lower part of which is occupied as a store. She commenced this action to restrain the defendant from maintaining an elevated railroad structure in front of her premises, and to recover damages for an alleged invasion of her easements as an abutting owner of land on a public street. The structure complained of is wholly upon land owned by the defendant in fee, except where it crosses Atlantic avenue at some distance west of the plaintiff's premises. The land thus owned and occupied by the defendant was formerly part of a farm situated in the town of Flatbush, Kings county (now within the limits of the borough of Brooklyn), then belonging to one Johannes Eldert, who is the common grantor of both plaintiff and defendant. In December, 1834, Eldert conveyed to the Brooklyn & Jamaica Railroad Company a strip of land $49\frac{1}{2}$ feet in width. This conveyance contained various covenants and stipulations. The strip conveyed was to be used and occupied for a steam surface railroad. The grantors and their heirs and assigns were to maintain a four-rail fence, or its equivalent, along each side of the railroad location; and the grantors, their heirs and assigns, were to have the perpetual right of crossing and recrossing the granted premises "in the same manner as if the same were a road or highway." By virtue of certain foreclosure proceedings and a lease, the defendant, the Long Island Railroad Company, has succeeded to all the rights of the Brooklyn & Jamaica Railroad Company in and to this strip of land. After the conveyance from Eldert to the Brooklyn & Jamaica Railroad Company, and probably about 1869 or 1870, Atlantic avenue was laid out on each side of this railroad strip, with crossings at intersecting streets. As fences separating it from the avenue, and thus laid out, Atlantic avenue has been opened and used as a public street. In 1891, through mesne conveyances from the said Eldert, the plaintiff became the owner of the premises in question, which are on the south side of Atlantic avenue, the front of her building being 38 feet and 11 inches from the strip of land owned by the defendant. In 1898 the defendant built the structure complained of. It is a viaduct beginning at a point about 278 feet easterly of the plaintiff's premises, and runs on an incline along the defendant's strip, and wholly within the boundaries thereof, until it reaches a point about 300 feet westerly of the plaintiff's property, where it turns northerly and crosses Atlantic avenue. For a distance of about 240 feet it is constructed of stone, and the rest is of steel or iron, with heavy

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boxed girders supported by columns of the same material. In front of plaintiff's premises the viaduct of the latter type of construction, 9 feet in height opposite plaintiff's easterly line, and 10 feet high opposite her westerly line. The purpose of its construction was to enable the defendant's trains to connect with trains of the elevated railroad system of the borough of Brooklyn.

The learned trial court found that "the streets intersecting and crossing Atlantic avenue are still maintained open, the said elevated structure not being built across them; * * * that the going up of the cars on this incline and turning the curve is at times accompanied with unusual and disturbing noises, and that the structure intercepts the view from plaintiff's premises to the opposite side of the street, and prevents people from seeing the lower portion of plaintiff's building, being that portion that is designed for and occupied as a store; * * * that the running of defendant's cars over such elevated structure is accompanied by unusual noise, smoke and casting of soot and cinders over and beyond that theretofore caused by operating the surface road, and that by reason thereof, together with the interference with the light and air and view of plaintiff's premises by reason of such elevated structure, the plaintiff has been damaged, and will continue to be so damaged, and the value of her said property materially depreciated; that said elevated structure and the operation thereof constitutes and is a nuisance, and the same has already damaged and depreciated the value of the plaintiff's property, and will continue to do so in the future." The court awarded damages to the plaintiff in the sum of \$1,200, and granted the usual injunction restraining the operation of the defendant's trains in front of plaintiff's premises unless such damages were paid. Upon appeal the Appellate Division reversed the judgment of the trial court and dismissed the complaint. The plaintiff now appeals to this court.

Robert Stewart, for appellant.

Joseph F. Keany, for respondent.

WERNER, J. (after stating the facts). Upon facts which are undisputed the trial court decided that the structure complained of, and the operation of trains thereon, constitute a nuisance as to the plaintiff. The order of the Appellate Division reversing the judgment of the trial court is silent as to the grounds upon which it was made, and we must therefore treat it as resting wholly upon questions of law. Code Civ. Proc. § 1338.

In this final analysis the controversy resolves itself into the single question whether, assuming all the facts as found, the defendant has the legal right to maintain the structure complained of, and to operate its trains thereon. As bearing upon that question, a few facts are of paramount importance. The grant to the Jamaica & Brooklyn Railroad Company, the defendant's predecessor, was made in 1834. It was a grant in fee, and made for the express purpose of enabling that corporation to construct and operate a steam surface railroad. Many years

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after such a railroad had been constructed and operated upon land thus owned in fee, Atlantic avenue was opened as a public street or highway on both sides of the railroad land. Not until long after Atlantic avenue had been thus opened did the plaintiff acquire title to the premises now owned and occupied by her. At the time of her purchase the southerly part of Atlantic avenue, about 29 feet wide, lay between her land and that of the railroad company. None of her rights in and to the highway itself have ever been encroached upon or impaired. Upon these facts the plaintiff concedes that the defendant has the right to maintain and operate a steam surface railroad upon its land, but contends that it has no right to impose upon her land the added burden of increased noise, smoke, soot, cinders, and interfere with her easements of light and view, caused by the construction, maintenance, and operation of an elevated structure or viaduct. This contention would be unanswerable if the defendant had undertaken to change its system so as to substitute an elevated railroad for a street surface railroad; but that is not this case. The viaduct opposite plaintiff's premises was only a few hundred feet long, and was constructed for the sole purpose of connecting defendant's surface railroad with the Long Island system of elevated railroads. Upon just such facts as these it has been held that an elevated viaduct, erected and operated by a steam surface railroad corporation, for the purpose of connecting its lines with an elevated railroad, is not inconsistent with the specified objects of its incorporation, and does not change its general character. *Beekman v. Brooklyn & B. B. R. R. Co.*, 89 Hun. 14, 35 N. Y. Supp. 84; *Gallagher v. Keating*, 27 Misc. Rep. 131, 58 N. Y. Supp. 366, affirmed 40 App. Div. 81, 57 N. Y. Supp. 632, 1123, and 171 N. Y. 657, 63 N. E. 1116. Counsel for the plaintiff seeks to differentiate these cases from the one at bar on the ground that in the former the municipal authorities had given their consent to the erection of the elevated structures, while in the latter no such consent has been shown. The record here is silent upon the subject of municipal consent. Nothing can be presumed for or against either party upon that score. The municipal authorities are not before us complaining of this structure, and the lack of municipal consent is of no importance in a case like this, except as its absence may make a nuisance per se of that which, with such consent, may be simply a legalized trespass upon individual rights. But in either event there must be an invasion of private rights to support an action by an individual for his own benefit. The learned trial court has found that the structure complained of and its operation constitute a nuisance as to the plaintiff. But do the facts warrant this conclusion? We think not. The learned justice who wrote for the Appellate Division stated the situation most forcibly and correctly when he said: "The defendant has done nothing except to construct and operate its railroad in accordance with the increasing demands of the time, and whatever injury is inflicted upon the plaintiff, being incidental to that increase, must be

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deemed to be within the terms of the conveyance of the defendant's property, to which her own conveyance is subject. Aside from the maintenance of the incline, every act complained of is a necessary incident to the running of cars propelled by steam. The rumble of trains, the clanging of bells, the shriek of whistles, the blowing off of steam, the discordant squeak of wheels in going around the curves, the emission of smoke, soot, and cinders, all of which accompany the operation of steam cars, are undoubtedly nuisances to the neighboring dwellings in the popular sense, but, as they are necessarily incident to the maintenance of the road, they do not constitute nuisances in the legal sense, but are regarded as protected by the legislative authority which created the corporation and legalized its corporate operations. Nor does the legal nature of such annoyances change as traffic increases them in volume and extent." Since the findings of fact herein embrace nothing that the defendant has not the right to do if done properly, and there is no finding that anything in the method of operation can be obviated without destroying the right, we concur in the conclusion of the Appellate Division that the plaintiff has no cause of action.

A few words will suffice to distinguish this case from two classes of cases referred to upon the argument. The conclusion we have reached is not at war with the decisions in the so-called "Fourth Avenue Cases" (*Lewis v. N. Y. & H. R. R. Co.*, 162 N. Y. 202, 56 N. E. 540; *Muhlker v. Same*, 197 U. S. —, 25 Sup. Ct. 522, 49 L. Ed. —). In those cases the highway (Fourth avenue) had been laid out, but not actually opened, for many years before the railroad was built. The abutting owners had acquired easements in the highway which antedated the rights of the railroad company, and the latter's interference with such easements was in the nature of an unlawful encroachment or trespass. As to some of the abutting owners the railroad company was held to have acquired certain rights by prescription or adverse possession, and in those cases it has been decided that there is a right of recovery for invasion of easements in excess of the rights thus acquired. In the case at bar it is different. Many years before Atlantic avenue was laid out or opened the defendant's predecessor had obtained an absolute title to its land under a deed giving it a right to operate a steam surface railroad thereon. When Atlantic avenue was laid out, such a railroad was in actual operation upon the land acquired for that purpose. It was this situation, no doubt, that led to the laying out of a double street, one section on either side of the railroad strip. Subsequent purchasers of lands abutting upon this highway took their titles from the same source as the defendant, and subject to its vested rights. That is the status of the plaintiff.

Neither is the case at bar in conflict with the decisions in *Garvey v. Long Island R. R. Co.*, 159 N. Y. 323, 54 N. E. 57, 70 Am. St. Rep. 550; *Cogswell v. N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; *Morton v. Mayor, etc.*, of N. Y., 140 N. Y. 207, 35 N. E. 490, 22 L. R. A. 241;

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Booth v. Rome, W. & O. T. R. R. Co., 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. Rep. 552, and *Bohan v. Port Jervis Gas Light Co.*, 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711. In none of those cases had the plaintiffs taken their lands expressly subject to the use which the defendants were making of their lands. In each of those cases the particular thing complained of was held to be unreasonable and unauthorized, and therefore an unwarrantable invasion of the rights of the complainants. If the lands used for the turntable in the Garvey Case, the pumping station in the Morton Case, or the gas retort in the Bohan Case, had been acquired for those very purposes from a grantor who subsequently conveyed adjoining lands to others, the respective situations and decisions would doubtless have been materially different. But underlying even these cogent considerations there is the basic distinction that when the Legislature authorizes the operation of a steam surface railroad it impliedly sanctions and legalizes those inconveniences and annoyances to others which are inseparable from the proper conduct of such an enterprise.

The order of the Appellate Division should be affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, and HAIGHT, JJ., concur.
BARTLETT and VANN, JJ., dissent.

Order affirmed.

SWAIN *et al.* v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, June 21, 1905.)

[74 N. E. Rep. 672.]

Appeal—Exceptions—Waiver.—Exceptions not argued will be considered waived.

Elevated Railways—Injuries to Property—Elements of Damages—Frightening Teams.*—In an action by a property owner for damages caused by the operation of an elevated railroad, fright of horses caused by the operation of the railroad is not an element of damage, where it was an inconvenience of a general character, and was not confined to the horses of those having occasion to trade with the tenants of petitioner's property.

Same—Same—Same—Same.—Where, in a proceeding to assess damages to complainant's property by the operation of an elevated railroad, the court charged that there was some testimony that sometimes the horses of customers of tenants of one of the buildings in question were frightened by the elevated trains, and that defendant was not liable for anything the horses did by reason of the running

*As to the damages recoverable by abutting owners for injuries from the construction and operation of railroads in streets, see foot-note appended to *Smith v. Southern Pac. R. Co.* (Cal.), 14 R. R. 457, 37 Am. & Eng. R. Cas., N. S., 457; foot-note appended to *Illinois Cent. R. Co. v. Trustees* (Ill.), 14 R. R. 117, 37 Am. & Eng. R. Cas., N. S., 117; foot-note appended to *Kansas City N. W. R. Co. v. Schwake* (Kan.), 14 R. R. 52, 37 Am. & Eng. R. Cas., N. S., 52.

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of such trains, defendant was not prejudiced by the refusal to charge that the fact that horses of customers of tenants might be or were frightened by elevated trains did not constitute an element of damages which could be considered by the jury as diminishing the value of petitioner's property.

Exceptions from Superior Court, Suffolk County; Elisha B. Maynard, Judge.

Petition by Mary L. Swain and others, as trustees, against the Boston Elevated Railway Company, for the assessment of damages caused to the petitioners' real estate by reason of the location, construction, maintenance, and operation of defendant's elevated railroad. A finding was entered in favor of petitioners, and defendant brings exceptions. Overruled.

Petitioners testified that most of the damage caused by the location, construction, and operation of the structure was caused by the noise made by the moving trains on the structure, and testified that horses of customers of the tenants or occupants of the property were at times frightened by the elevated trains upon the structure, both in front and in the rear of the premises, and that this was a damage to the property.

At the conclusion of the evidence, defendant submitted among other requests an instruction: "(4) The fact that horses of customers of the tenants or occupants of petitioners' property may be or are frightened by the elevated trains does not constitute an element of damage to the petitioners, and cannot be considered by the jury as diminishing the value of the petitioners' property." The court refused this instruction, but later charged: "There has been some testimony that so far as using the wooden building for storage is concerned, that sometimes the horses of customers are frightened, etc., by the elevated trains. So far as the horses are concerned, of course, they are not liable for anything the horses do, or anything the horses do by reason of the running of their trains. Anything which makes the petitioners' place less accessible on account of the railroad—why, that you would have a right to take into account."

Frank N. Nay and Wm. N. Swain, for petitioners.
Choate, Hall & Stewart, for respondent.

BRALEY, J. The exceptions of the respondent to the exclusion of certain questions asked one of the petitioners on cross-examination for the purpose of eliciting evidence that after the road was constructed the value of the estate was enhanced, because the wall of the brick building used before for the display of advertisements now would be observed by passengers on the trains, and to the instructions to the jury on this branch of the case, have not been argued, and they must be considered as waived.

This leaves as the only question for our determination whether the instruction requested, that the petitioners could not recover

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damages for any annoyance or injury suffered by the customers of tenants of the buildings from fright of their horses when driven to the premises, and caused by the operation of the road, should have been given. While one of the petitioners, without objection, testified that this had taken place, such an occurrence cannot be considered, upon the evidence in this case, as an element of damage for which they were entitled to recover. This inconvenience was general in character, and not confined to those having occasion to trade with the tenants, but was a condition common to all driving horses in that vicinity. *Quincy Canal Co. v. Newcomb*, 7 Metc. 276, 283, 39 Am. Dec. 778. An instruction that this circumstance did not diminish the commercial value of the petitioners' property, but was outside of the liability of the respondent, thus became applicable. If, however, the request properly could have been given as framed, the refusal to rule in the language requested, when followed by an instruction to the same effect, was all that the respondent could rightly ask, and it has no just ground of exception. *Norwood v. Somerville*, 159 Mass. 105, 112, 33 N. E. 1108; *Graham v. Middleby*, 185 Mass. 349, 354, 70 N. E. 416. Upon looking at the ruling given, it appears that the jury were clearly told that no recovery could be had for any injury suffered from this cause, and that the damages to be assessed must be confined strictly to acts which made the estate of the petitioners less accessible because of the elevated structure.

Exceptions overruled.

SAVANNAH, THUNDERBOLT, & ISLE OF HOPE RAILWAY OF SAVANNAH, GEORGIA, plaintiff in error, v. MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH.

(Argued April 28, May 1, 1905. Decided May 15, 1905.)

[25 Sup. Ct. Rep. 690.]

Taxation of Street Railways—Equal Protection of Laws—Discrimination.—A street railway company is not denied the equal protection of the laws by a municipal tax on its business at a rate of \$100 per mile or fraction of a mile of its trackage in the city streets because a steam railway, making an extra charge for local deliveries of freight brought over its road from outside the city, is not subjected to this tax.

Same—Exemptions—Contracts—Impairment of Obligation.—No exemption from the municipal taxation of the business of a street railway company results from provisions in its agreement with the municipality preserving its easements for railway purposes in land to be conveyed by it to the city, and granting it the right to lay down, construct, maintain, and operate its railway through certain streets, subject to the control and regulation of the mayor and aldermen.

In error to the Supreme Court of the State of Georgia to review a judgment which affirmed a judgment of the Superior

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Court of Chatham County, in that state, entered on a verdict of the jury in favor of defendant in a suit to restrain the collection of a municipal tax upon the business of a street railway company. Affirmed.

See same case below, 115 Ga. 137, 41 S. E. 592.

The facts are stated in the opinion.

Messrs. David C. Barrow and George A. King, for plaintiff in error.

Mr. William Garrard, for defendant in error.

MR. JUSTICES HOLMES delivered the opinion of the court :

This is a bill in equity, brought by the plaintiff in error to restrain the collection of a municipal tax by the defendants. The bill sets forth, among other grounds, that the tax impairs the obligation of a contract, and also is an attempt to take the plaintiff's property without due process of law, contrary to the Constitution of the United States. According to the bill and the fifth assignment of error there is no law of the state of Georgia which authorizes the imposition of the tax. Were this true, the foundation of our jurisdiction would be gone, and this writ of error should be dismissed. See *Barney v. New York*, 193 U. S. 430, 48 L. Ed. 737, 24 Sup. Ct. Rep. 502. But although the plaintiff has taken inconsistent positions, and has confused questions for the state court alone with those which may be brought here, still, since it has shown a clear intent to raise the Federal question from the beginning, since the bill, in another place, alleges that the tax is an authority exercised under the state of Georgia, and other assignments of error present the points, and since the state court has decided that the tax was authorized, we shall not stop the case at the outset. See *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. Ed. 963, 13 Sup. Ct. Rep. 90.

The tax imposed under an ordinance of March 22, 1899, providing, by way of amendment to one of the year before, that "street railway companies, whether under the control of another company or not, in lieu of the specific tax heretofore required, shall pay to the city of Savannah, for the privilege of doing business in the city, and for the use of the streets of the city, at the rate of \$100 per mile or fraction of a mile of track used in the city of Savannah by said railroad company." The plaintiff is a street railroad company, commonly known as such, and the great part of its business and revenue is due to the use of the streets of Savannah by its electric passenger street cars. One of its grounds of attack is that the Central of Georgia Railway Company, a steam railway, is not subjected to the tax, and yet that it also does business in the streets of the city by transporting freights from its regular station to various side tracks, and charges an additional or local price. The plaintiff contends that a classification which distinguishes between an ordinary street railway and a steam railroad making an extra charge for local deliveries of freight brought over its road from outside the city is contrary to the 14th Amendment, and void.

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The other ground on which the validity of the tax is denied is a contract made between the plaintiff and respondent on November 4, 1897, amended in April, 1898, and on July 27, 1898. It is contended that this contract implies that the plaintiff is to have the use of the streets without further charges than those which it imposes.

The trial court refused a preliminary injunction, and its decree was affirmed by the supreme court (112 Ga. 164, 37 S. E. 393), which decided that this was a business tax, lawfully imposed, and that the plaintiff did not stand like the Central of Georgia Railway, which, as was held in *Augusta v. Central R. Co.*, 78 Ga. 119, is subject to taxation by the state alone. On final hearing a verdict was directed for the defendant, and a decree was entered making the same the decree of the court. This also was affirmed by the supreme court. 115 Ga. 137, 41 S. E. 592. The case was then brought here.

The merits of the case are pretty nearly disposed of by the statement. The argument on the first point is really a somewhat disguised attempt to go behind the decision of the state court that the tax is a tax on business, and to make out that it is a charge for the privilege of using the streets. We see no ground on which we should criticise or refuse to be bound by the local adjudication. The difference between the two railroads is obvious, and warrants the diversity in the mode of taxation. The Central of Georgia Railway may be assumed to do the great and characteristic part of its work outside the city, while the plaintiff does its work within the city. If the former escapes city taxation, it does so only because its main business is not in the city, and the states reserves it for itself.

As to the contract, if the city had attempted to bargain away its right to tax, probably it would have been acting beyond its power. *Augusta Factory v. Augusta*, 83 Ga. 734, 743, 10 S. E. 359. However, it made no such attempt. It is enough to say that it uses no language to that effect, or words which even indirectly imply that exemption for the future was contemplated. *Wells v. Savannah*, 181 U. S. 531, 539, 540, 45 L. Ed. 986, 21 Sup. Ct. Rep. 697, 107 Ga. 1, 32 S. E. 669; *New Orleans City & Lake R. Co. v. New Orleans*, 143 U. S. 192, 36 L. Ed. 121, 12 Sup. Ct. Rep. 406. But we will go a little more into detail.

The contract was made on a petition of the plaintiff stating its desire to make changes in its line of track "for the purpose of operating its railroad more economically and to better advantage, and at the same time affording more adequate facilities to the public." Various changes were agreed on in the way of moving old tracks and laying down new ones. Among other particulars the railroad agreed to convey, or cause to be conveyed, certain lands in Bolton street and Whitaker street, "preserving, of course, the easement of the said street railway company over said land for its railway purposes." In the last amendment to the contract an extension is agreed to, "and the right to lay down, construct, maintain, and operate said railway through said streets,

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as before stated, is granted, subject to the control and regulation of the said mayor and aldermen, the same as other lines of railway, as provided in said contract of November 4th, 1897." It is said that these phrases exempt at least so much of the road as they cover, and that therefore the tax is void as a whole, because it does not appear what proportion of it is attributable to unexempted portions.

This kind of argument seems to assume that the tax is a tax on the right to use the streets, and not a tax on the business. But a sufficient answer is that none of the expressions quoted import any exemption from taxation whatever, if it was within the power of the city to grant it. See *New Orleans City & Lake R. Co. v. New Orleans*, 143 U. S. 192, 36 L. Ed. 121, 12 Sup. Ct. Rep. 406. We are of opinion that the plaintiff's case fails on every ground.

Decree affirmed.

PEOPLE OF THE STATE OF NEW YORK *ex rel.* METROPOLITAN STREET RAILWAY COMPANY, plaintiff in error, v. STATE BOARD OF TAX COMMISSIONERS.

(Argued April 17, 18, 19, 1905. Decided May 29, 1905.)

[25 Sup. Ct. Rep. 705.]

Street Railways—Validity of Special Franchise Tax—Contract between Company and City—Impairment of Obligation.—The special franchise tax imposed by N. Y. Laws 1899, chap. 712, does not impair the obligation of the contracts by which the state or municipality granted the right to construct, operate, and maintain street railways in the city of New York in consideration of the payment of a gross sum or of the annual payment of a fixed amount or fixed percentage of earnings, where such payments are nowhere declared to be in lieu of, or as the equivalent or substitute for, taxes.

Same—Same—Equal Protection of Laws—Due Process of Law.—The reduction, on account of annual payments "in the nature of a tax" covered by existing agreements, which is made by N. Y. Laws 1899, chap. 712, from the amount of the special franchise tax provided for by that statute, does not render the statute invalid, either as denying the equal protection of the laws to street railway companies who agreed to pay a lump sum for their franchises or as depriving such companies of their property without due process of law.

Same—Same—Same—Same.—The exemption of the subsurface street railway in New York city from the operation of the special franchise tax authorized by N. Y. Laws 1899, chap. 712, does not make that statute invalid, as denying the owners of the surface street railways in that city the equal protection of the laws, or as depriving them of their property without due process of law.

In error to the Supreme Court of the State of New York to review a judgment sustaining an assessment of a street railway franchise, entered pursuant to the mandate of the Court of Appeals of that state, which had reversed a judgment of the Appellate Division of the Supreme Court, for the Third Department, which had in turn reversed the judgment of the Supreme Court entered at a special term held in and for the county of

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Albany on a writ of certiorari to review the action of the state board of tax commissioners.

See same case below in Appellate Division of Supreme Court, 79 App. Div. 183, 80 N. Y. Supp. 85; in Court of Appeals, 174 N. Y. 417, 63 L. R. A. 884, 67 N. E. 69.

Statement by MR. JUSTICE BREWER: On May 26, 1899, the legislature of New York passed an act amending the tax law of the state. N. Y. Laws, 1899, chap. 712, p. 1589. The first section reads:

"Section 1. Subdivision 3 of § 2 of the tax law is hereby amended to read as follows:

"3. The terms 'land,' 'real estate,' and 'real property,' as used in this chapter, include the land itself above and under water, all buildings and other articles and structures, substructures and superstructures, erected upon, under, or above, or affixed to the same; all wharves and piers, including the value of the right to collect wharfage, crantage, or dockage thereon; all bridges, all telegraph lines, wires, poles, and appurtenances; all supports and inclosures for electrical conductors and other appurtenances upon, above, and under ground; all surface, underground, or elevated railroads, including the value of all franchises, rights, or permission to construct, maintain, or operate the same in, under, above, on, or through streets, highways, or public places; all railroad structures, substructures and superstructures, tracks and the iron thereon; branches, switches, and other fixtures permitted or authorized to be made, laid, or placed in, upon, above, or under any public or private road, street, or ground; all mains, pipes, and tanks laid or placed in, upon, above, or under any public or private street or place for conducting steam, heat, water, oil, electricity, or any property, substance, or product capable of transportation or conveyance therein or that is protected thereby, including the value of all franchises, rights, authority, or permission to construct, maintain, or operate, in, under, above, upon, or through any streets, highways, or public places, any mains, pipes, tanks, conduits, or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil, or other substance, or electricity for telegraphic, telephonic, or other purposes; all trees and underwood growing upon land, and all mines, minerals, quarries, and fossils in and under the same, except mines belonging to the state. A franchise, right, authority, or permission specified in this subdivision shall, for the purpose of taxation be known as a 'special franchise.' A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, association, or corporation situated in, upon, under, or above any street, highway, public place, or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise. No property of a municipal corporation shall be subject to a special franchise tax."

The portions in italics are the new matter introduced by the amendment. Other sections were added to the tax law, of which § 46 is as follows:

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"§ 46. *Deduction from special franchise tax for local purposes.*—If, when the tax assessed on any special franchise is due and payable under the provisions of law applicable to the city, town, or village in which the tangible property is located, it shall appear that the person, copartnership, association, or corporation affected has paid to such city, town, or village for its exclusive use within the next preceding year, under any agreement therefor, or under any statute requiring the same, any sum based upon a percentage of gross earnings, or any other income, or any license fee, or any sum of money on account of such special franchise, granted to or possessed by such person, copartnership, association, or corporation, which payment was in the nature of a tax, all amounts so paid for the exclusive use of such city, town, or village, except money paid or expended for paving or repairing of pavement of any street, highway, or public place, shall be deducted from any tax based on the assessment made by the state board of tax commissioners for city, town, or village purposes, but not otherwise; and the remainder shall be the tax on such special franchise payable for city, town, or village purposes. The chamberlain or treasurer of a city, the treasurer of a village, the supervisor of a town, or other officer to whom any sum is paid for which a person, copartnership, association, or corporation is entitled to credit as provided in this section, shall, not less than five nor more than twenty days before a tax on a special franchise is payable, make and deliver to the collector or receiver of taxes or other officer authorized to receive taxes for such city, town, or village, his certificate showing the several amounts which have been paid during the year ending on the day of the date of the certificate. On the receipt of such certificate the collector, receiver, or other officer shall immediately credit on the tax roll to the person, copartnership, association, or corporation affected the amount stated in such certificate, on any tax levied against any person, copartnership, association, or corporation on an assessment of a special franchise for city, town, or village purposes only, but no credit shall be given on account of such payment or certificate in any other year, nor for a greater sum than the amount of the special franchise tax for city, town, or village purposes, for the current year; and he shall collect and receive the balance, if any, of such tax, as required by law."

Other sections provide the machinery for assessment. This assessment was to be made by the state board of tax commissioners, and one section authorized certiorari to review their proceedings.

Under this law an assessment was made of the franchises belonging to the plaintiff in error, a corporation created by the consolidation of several corporations, having franchises for the maintenance and operation of street railroads in the city of New York. A certiorari to review this assessment was finally decided by the court of appeals of the state, which, on April 28, 1903 (174 N. Y. 417, 63 L. R. A. 884, 67 N. E. 69), sustained the assessment, and remanded the case to the special term of the

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supreme court, by which court a final judgment was entered, June 22, 1903. Thereupon this writ of error was sued out. Plaintiff in error makes three assignments of error:

"I. Error in declining to hold that the act of the legislature of the state of New York, approved May 26th, 1899 (chap. 712, Laws 1899), entitled 'An Act to Amend the Tax Law in Relation to the Taxation of Public Franchises as Real Property,' in so far as it authorizes the assessment imposed by the state board of tax commissioners on March 20, 1900, upon the franchises of the [plaintiff in error] relator above named, deprives said relator of its property without due process of law, in contravention of the 14th Amendment of the Constitution of the United States.

"II. Error in declining to hold that said legislative enactment, in so far as it authorizes the said assessment denies to said relator the equal protection of the laws, in contravention of the 14th Amendment to the Constitution of the United States.

"III. Error in declining to hold that said legislative enactment, in so far as it authorizes the said assessment, impairs the obligations of contracts, in contravention of § 10, article 1, of the Constitution of the United States."

Prior to 1874 the legislature of New York made direct grants of franchises, rights, or privileges to use the streets of the city of New York. In that year the following amendment to the Constitution was adopted (Constitution 1846, as amended, art. 3, § 18):

"The legislature shall not pass a private or local bill in any of the following cases: * * *

"Granting to any corporation, association, or individual the right to lay down railroad tracks. * * *

"But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of the street or highway upon which it is proposed to construct or operate such railroad, be first obtained, or, in case the consent of such property owners cannot be obtained, the general term of the supreme court, in the district in which it is proposed to be constructed, may, upon application, appoint three commissioners, who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners."

In 1884 an act was passed (Laws 1884, chap. 252, p. 309) giving to the local authorities power to grant franchises for street railroads. This act provided:

"Sec. 7. The local authorities of any incorporated city or village to whom application, under the provisions of this act, may be made for consent to the construction, maintenance, use, operation, or extension of a street surface railroad upon any street, road, avenue, or highway, may, at their option, provide for the sale of and sell at public auction the franchise, subject to all the

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provisions of this act, to so construct, maintain, use, operate, or extend such street surface railway. * * *

"Sec. 8. Every corporation incorporated under, or constructing or operating a railroad constructed or extended under, the provisions of this act, within the cities of the state having a population of two hundred and fifty thousand or more, as aforesaid, shall, for and during the first five years after the commencement of the operation of any portion of its railroad, annually, on the 1st day of November, pay into the treasury of said respective cities in which its road is located to the credit of the sinking fund thereof, 3 per cent. of its gross receipts for and during the year ending the next preceding 30th day of September, and after the expiration of said five years make a like annual payment into the treasury of said respective cities for the credit of said sinking funds of 5 per cent. instead of 3 per cent. of said gross receipts: Provided, however, That every corporation now existing and operating a street-surface railroad which shall extend its tracks or construct branches therefrom, and operate such extensions or branches under the provisions of this act, or the corporation operating such branches or extensions, shall pay such percentages as aforesaid only upon such portions of its gross receipts as shall bear the same proportion to the whole value thereof as the length of such extension and branches shall bear to the entire length of its tracks."

"Sec. 4. The consent of the local authorities shall, in all cases, be applied for in writing, and when granted shall be upon the express condition that the provisions of this act pertinent thereto shall be complied with, and shall be filed in the office of the county clerk of the county in which said railroad is located."

In 1886 an act amending a prior act of the same year was passed (Laws 1886, chap. 642, p. 919), which contained the following terms:

"Sec. 1. The local authorities of any incorporated city or village, to whom application may be made for consent to the construction, maintenance, use, operation, or extension of a street railroad, or a railroad or railway for the transportation of passengers, mails, or freight, over, upon, under, or through any of the streets, roads, avenues, parks, or public places in such city or village, must provide, as a condition of the said consent to the use of said street, road, avenue, park, or public place, that the right, franchise, and privilege of using the said street, road, avenue, park, or public place shall be sold at public auction to the bidder who will agree to give the largest percentage per annum of the gross receipts of said company or corporation, with adequate security, as hereinafter provided, for the fulfilment of said agreement, and for the commencement and completion of such road according to the plan or plans, and on the route or routes, fixed for its construction, within the time or times hereinafter designated and prescribed therefor; but this agreement shall not release any such road from the percentages required to be paid by chapter 252 of the Laws of 1884. The legislature expressly

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reserves the right to regulate and reduce the rate of fare on such railroad or railway. * * *

"And in the event of the failure or refusal of the party or corporation operating or using the railroad to be constructed as aforesaid, to pay the rental or percentage of gross earnings agreed upon, then, upon notice to the said party or corporation,—of not less than sixty days,—the said consent and right to operate such railroad may be declared to be forfeited, and the same may be resold to the highest bidder in the manner above provided."

The special acts passed before the amendment of 1874, which are claimed to constitute contracts, the obligations of which are impaired by this tax legislation, are found, first, in chap. 625 of the Laws of 1868, which granted to certain persons the right to construct, maintain, and operate and use a street railroad, with a provision that "the said persons, or their assigns, shall pay to the sinking fund commissioners of the city of New York the sum of \$1,000 per annum, to be applied by them in the same manner as moneys received on account of rentals and leases;" second, in chap. 19 of the Laws of 1871, which, granting the privilege of occupying certain streets with street railroad tracks, provided that the company should "make compensation to the mayor, aldermen, and commonalty of the said city of New York for the value of the rights and privileges herein granted or authorized," and also prescribed the mode of ascertaining that compensation by three commissioners, whose decision should be final and conclusive as to the company and the mayor, aldermen, and commonalty of said city; adding "the amount so fixed and determined shall be paid to the commissioners of the sinking fund of said city, by the said company, within thirty days after the same becomes payable, according to the decision aforesaid, and applied to the reduction of the debt of said city;" third, in chap. 508 of the Laws of 1874, which granted the right to "construct, operate, maintain, and use railways" in certain streets in the city of New York, and provided that "the said persons, or their assigns, shall annually, on the first day of November, pay into the treasury of the city of New York 1 per cent. of the gross receipts of the road herein provided for, the amount of which gross receipts shall be determined by the sworn statement of the president and treasurer of said railway, but subject to the inspection of its books by the comptroller of the city of New York."

Subsequent to the law of 1884, above referred to, fifteen other franchises now belonging to the relator were granted by the common council of the city of New York. Most of them provided for annual payment to the city of New York of either a fixed amount or a fixed percentage, varying from 2 to 8 per cent of the gross earnings.

Messrs. William D. Guthrie and Elihu Root, for plaintiff in error.

Messrs. Julius M. Mayer and Louis Marshall, for defendant in error.

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MR. JUSTICE BREWER delivered the opinion of the court: The decision of the court of appeals settles that there is nothing in the law or the proceedings in this case in conflict with the Constitution of that state. It is not contended by the plaintiff in error that there is any constitutional objection to the taxation of franchises. The right to subject them to a share in the burden of supporting the government is conceded.

The main contention is that this tax legislation impairs the obligation of contracts. It must be borne in mind that presumptively all property within the territorial limits of a state is subject to its taxing power. Whoever insists that any particular property is not subject has the burden of proof, and must make it entirely clear that, by contract or otherwise, the property is beyond its reach. In *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939, Mr. Chief Justice Marshall, in delivering the opinion of the court, said (p. 561, L. Ed. p. 955):

"That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a state may not relinquish it, that a consideration sufficiently valuable to induce a partial release of it may not exist; but, as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear."

In *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665, 29 L. Ed. 770, 6 Sup. Ct. Rep. 625, Mr. Justice Gray cited many authorities, quoting the different phraseology in which, by the several writers of the opinions, the same rule was announced. In *Wells v. Savannah*, 181 U. S. 531, 45 L. Ed. 986, 21 Sup. Ct. Rep. 697, the law was thus stated by Mr. Justice Peckham (p. 539, L. Ed. p. 991, Sup. Ct. Rep. p. 700):

"The payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such payment; and the validity of such contract presupposes a good consideration therefor. If the property be, in its nature, taxable, the contract exempting it from taxation must, as we have said, be clearly proved. It will not be inferred from facts which do not lead irresistibly and necessarily to the existence of the contract. The facts proved must show either a contract expressed in terms, or else it must be implied from facts which leave no room for doubt that such was the intention of the parties, and that a valid consideration existed for the contract. If there be any doubt on these matters, the contract has not been proven, and the exemption does not exist."

In *Chicago Theological Seminary v. Illinois*, 188 U. S. 662, 47 L. Ed. 641, 23 Sup. Ct. Rep. 386, the same Justice declared (p. 672, L. Ed. p. 648, Sup. Ct. Rep. p. 387):

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"The rule is that, in claims for exemption from taxation under legislative authority, the exemption must be plainly and unmistakably granted; it cannot exist by implication only; a doubt is fatal to the claim."

See also *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. Ed. 595; *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 36 L. Ed. 972, 13 Sup. Ct. Rep. 72; *Ford v. Delta & P. Land Co.*, 164 U. S. 662, 41 L. Ed. 590, 17 Sup. Ct. Rep. 230.

This rule is akin to, if not part of, the broad proposition, now universally accepted, that in grants from the public nothing passes by implication. As said by Mr. Chief Justice Taney, in *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 549, 9 L. Ed. 773, 824:

"The inquiry, then, is, Does the charter contain such a contract on the part of the state? Is there any such stipulation to be found in that instrument? It must be admitted on all hands that there is none,—no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description no rights are taken from the public or given to the corporation beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied."

Applying these well-established rules to the several contracts, it will be perceived that there was no express relinquishment of the right of taxation. The plaintiff in error must rely upon some implication, and not upon any direct stipulation. In each contract there was a grant of privileges, but the grant was specifically of privileges in respect to the construction, operation and maintenance of a street railroad. These were all that, in terms, were granted. As consideration for this grant the grantees were to pay something, and such payment is nowhere said to be in lieu of or as an equivalent or substitute for taxes. All that can be extracted from the language used was a grant of privileges and a payment therefor. Other words must be written into the contract before there can be found any relinquishment of the power of taxation.

In the well-considered opinion of the court of appeals in this case it was stated by Mr. Justice Vann:

"The franchises are grants which usually contain contracts, executed by the municipality, but executory as to the owner. They contain various conditions and stipulations to be observed by the holders of the privilege, such as payment of a license fee, of a gross sum down, of a specific sum each year, or a certain percentage of receipts, as a consideration, or 'in full satisfaction for the use of the streets.' There is no provision that the special franchise, or the property created by the grant, shall be exempt from taxation. * * *

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"The condition upon which a franchise is granted is the purchase price of the grant, the payment of which in money, or by agreement to bear some burden, brought the property into existence, which thereupon became taxable at the will of the legislature, the same as land granted or leased by the state. There is no implied covenant that property sold by the state cannot be taxed by the state, which can even tax its own bonds, given to borrow money for its own use, unless they contain an express stipulation of exemption. The rule of strict construction applies to state grants, and unless there is an express stipulation not to tax, the right is reserved as an attribute of sovereignty. Special franchises were not taxed until, by the act of 1899, amending the tax law, they were added to the other taxable property of the state. This is all that the statute does, so far as the question now under consideration is concerned. No part of the grant is changed, no stipulation altered, no payment increased, and nothing exacted from the owner of the franchise that is not exacted from the owners of property generally. No blow is struck at the franchise, as such, for it remains with every right conferred in full force; but, as it is property, it is required to contribute its ratable share, dependent only upon value, toward the support of government."

It would not be doubted that, if a grant was of specific tangible property, like a tract of land, and the payment therefor was a gross sum, no implication of an exemption from taxation would arise. Whether the amount paid was large or small, greater or less than the real value, if the payment was distinctly the consideration of a grant, that which was granted would pass into the bulk of private property, and, like all other such property, be subject to taxation. Nor would this result be altered by the fact that the payment for the thing granted was to be made annually instead of by a single sum in gross. If it was real estate it would be equivalent to the conveyance of the tract subject to ground rent, and the grantee taking the title would hold it liable to taxation upon its value. If this be true in reference to a grant of tangible property, it is equally true in respect to a grant of a franchise, for a franchise, though intangible, is none the less property, and oftentimes property of great value. Indeed, growing out of the conditions of modern business, a large proportion of valuable property is to be found in intangible things like franchises. We had occasion to review this subject in *Adams Exp. Co. v. Ohio*, 166 U. S. 185, 41 L. Ed. 965, 17 Sup. Ct. Rep. 604, where we said (p. 218, 219, L. Ed. pp. 976, 977, Sup. Ct. Rep. p. 605):

"In the complex civilization of to-day a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a state from taxing at its real value such intangible property. * * * It matters not in what this intangible property consists,—whether privileges, corporate franchises, contracts, or obligations. It is enough that it

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is property, which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country."

In *State Railroad Tax Cases*, 92 U. S. 575, 603, 23 L. Ed. 663, 669, is this language by Mr. Justice Miller, speaking for the court:

"That the franchise, capital stock, business, and profits of all corporations are liable to taxation in the place where they do business, and by the state which creates them, admits of no dispute at this day. 'Nothing can be more certain in legal decisions,' says this court in *Society for Savings v. Coite*, 6 Wall. 607, 18 L. Ed. 903, 'than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a state for the support of a state government. *State Freight Tax Case* (Philadelphia & R. R. Co. v. Pennsylvania), 15 Wall. 232, 21 L. Ed. 146; *State Tax on Gross Receipts* (Philadelphia & R. R. Co. v. Philadelphia), 15 Wall. 284, 21 L. Ed. 164.'"

It is urged that when the public grants a privilege on condition of the payment of an annual sum the contract implies that the public shall exact no larger amount for that privilege, that to impose a tax is simply increasing the price which the grantee is called upon to pay for the privilege, and *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. Ed. 529, is relied upon as authority. It is true, in the opinion of the court, announced by Mr. Justice Wayne, is this language (p. 145, L. Ed. p. 535):

"Such a contract is a limitation upon the taxing power of the legislature making it, and upon succeeding legislatures, to impose any further tax upon the franchise. But why, when bought, as it becomes property, may it not be taxed as land is taxed which has been bought from the state? was repeatedly asked in the course of the argument. The reason is, that everyone buys land, subject, in his own apprehension, to the great law of necessity, that we must contribute from it and all of our property something to maintain the state. But a franchise for banking, when bought, the price is paid for the use of the privilege whilst it lasts, and any tax upon it would substantially be an addition to the price."

But there was in that case an express exemption from taxation, in these words:

"And be it enacted, that, upon any of the aforesaid banks accepting and complying with the terms and conditions of this act, the faith of the state is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act.'"

There being thus an express stipulation on the part of a state not to impose any further tax or burden, the question decided was really the extent of the exemption, and it was held to apply not merely to the franchise, but to the property of the bank. The statements of Mr. Justice Wayne were only by way of argument

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to support the conclusion that the exemption went beyond the franchise alone. Furthermore, that case has been repeatedly qualified and limited by subsequent decisions. In *New Orleans City & Lake R. Co. v. New Orleans*, 143 U. S. 192, 36 L. Ed. 121, 12 Sup. Ct. Rep. 406, Mr. Justice Gray, speaking for the court, said (p. 195, L. Ed. p. 122, Sup. Ct. Rep. p. 406):

"Exemption from taxation is never to be presumed. The legislature itself cannot be held to have intended to surrender the taxing power, unless its intention to do so has been declared in clear and unmistakable words. *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665, 29 L. Ed. 770, 6 Sup. Ct. Rep. 625, and cases cited. Assuming, without deciding, that the city of New Orleans was authorized to exempt the New Orleans City Railroad Company from taxation under general laws of the state, the contract between them affords no evidence of an intention to do so. The franchise to build and run a street railway was as much subject to taxation as any other property. In *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. Ed. 529, upon which the plaintiff in error much relied, the only point decided was that an act of the legislature continuing the charter of a bank, upon condition that the corporation should pay certain sums annually for public purposes, and declaring that, upon its accepting and complying with the provisions of the act, the faith of the state was pledged not to impose any further tax or burden upon the corporation during the continuance of the charter, exempted the stockholders from taxation on their stock; and so much of the opinion as might, taken by itself, seem to support this writ of error, has been often explained or disapproved. *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 386, 401, 402, 14 L. Ed. 977, 984, 990, 991; *New York v. Tax & A. Comrs.* 4 Wall. 244, 259, 18 L. Ed. 344, 350; *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 446, 17 L. Ed. 173, 178; *Farrington v. Tennessee*, 95 U. S. 679, 690, 694, 24 L. Ed. 558, 561, 562; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 328, 29 L. Ed. 636, 643, 6 Sup. Ct. Rep. 334, 388, 1191. The case at bar cannot be distinguished from that of *Memphis Gaslight Co. v. Taxing Dist.*, in which this court upheld a license tax upon a corporation which had acquired by its charter the privilege of erecting gas works and making and selling gas for fifty years; and, speaking by Mr. Justice Miller, said: 'The argument of counsel is that if no express contract against taxation can be found here it must be implied, because to permit the state to tax this company by a license tax for the privilege granted by its charter is to destroy that privilege.. But the answer is that the company took their charter subject to the same right of taxation in the state that applies to all other privileges and to all other property. If they wished or intended to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of their business, they should have required a provision to that effect in their charter. The Constitution of the United States does not profess in all cases to protect property from unjust and

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oppressive taxation by the states. That is left to the state Constitutions and state laws.' 109 U. S. 398, 400, 27 L. Ed. 976, 977, 3 Sup. Ct. Rep. 205, 206."

Murray v. Charleston, 96 U. S. 432, 24 L. Ed. 760, is not in point. The city of Charleston, having issued bonds, subsequently passed an ordinance assessing a tax upon all real and personal property in the city, and directed the treasurer to retain out of the interest due on those bonds the amount of the tax. *Murray* was a resident of Germany, and resisted the reduction of interest, and it was held that the city could not, by way of a tax, reduce the amount of the interest which it had promised to pay to this non-resident holder, the court saying in its opinion (p. 440, L. Ed. p. 761): "A nonresident creditor cannot be said to be, in virtue of a debt due to him, a holder of property within the city; and the city council was authorized to make assessments only upon the inhabitants of Charleston, or those holding taxable property within the same."

Chicago v. Sheldon, 9 Wall. 50, 19 L. Ed. 594, is also not in point. An ordinance was passed by the city council of Chicago prescribing the amount of work which a street railway company must do in the grading, paving, etc., of the streets on which its railway was authorized to be constructed. The company, having accepted, complied with the terms of this ordinance, the city attempted by assessments for special improvements to compel the railway company to pay for further work of the nature required by the original ordinance, and it was held that the obligations assumed by the railway company in respect to street improvements, as provided by the ordinance, could not be increased by special assessments for further improvements. But this involved no question of liability to general taxation, and only held void the effort of the city, under the guise of special assessments, to increase the obligations specifically assumed by the railway company under the original ordinance.

In *New Jersey v. Yard*, 95 U. S. 104, 24 L. Ed. 352, there was a contract that a certain tax should "be in lieu and satisfaction of all other taxation or imposition whatsoever, by or under the authority of this state, or any law thereof," and the decision simply upheld that exemption specifically contracted for.

It is further contended that there has been a recognition and practical construction in respect to the grants of these franchises, and on these grounds: First, no attempt has been made to legislate in respect to their taxation until 1899, although some of them had been in existence for many years; second, Governor Cleveland, in one of his messages, called the amount required to be paid by the contract a tax, and Governor Roosevelt also spoke of existing "taxes;" third, § 46 of the legislation authorizing the tax upon these franchises provided that "any sum based upon a percentage of gross earnings, or any other income, or any license fee, or any sum of money on account of such special franchise, granted to or possessed by such person, copartnership, association, or corporation, which payment was in the nature of

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a tax, all amounts so paid for the exclusive use of such city, town, or village, except money paid or expended for paving or repairing of pavement of any street, highway, or public place, shall be deducted from any tax based on the assessment made by the state board of tax commissioners for city, town, or village purposes, but not otherwise; and the remainder shall be the tax on such special franchise payable for city, town, or village purposes;" fourth, the court of appeals of New York in *Heerwagen v. Crosstown Street R. Co.*, 179 N. Y. 99, 104, 71 N. E. 729, 730, said:

"In the first place, both in statutes and in judicial decisions, the term 'tax' is frequently used in a much more comprehensive sense than that which we have stated to be its accurate meaning. It is not used so broadly as to include the revenue from private property which the state or one of its political divisions may hold for emolument, the same as other owners; but it certainly is used to comprehend exactions for the privilege of exercising franchise rights, which latter are often, especially in the case of foreign corporations, merely the consideration received for privileges which the state is at liberty to grant or to withhold at pleasure."

We are not disposed to undervalue the force of these suggestions, but it would be giving them undue significance to hold that they are potent to displace the power of the state to subject to the burdens of taxation property within its limits. The word "tax" is not infrequently used in a general sense as denoting a burden or charge, and not in the strict legal sense of the charge or burden imposed by the state for the purposes of revenue for its support. Undoubtedly the payment for the franchise of an annual sum was a burden, and in that sense it might not unnaturally have been spoken of as a tax. Being recognized as a burden, it may also well be that when the franchise itself was of comparatively little value the legislature did not see fit to subject it to the burdens of ordinary taxation. But the omission of one legislature or a dozen legislatures does not destroy the power of the state. The language quoted from § 46 indicates the desire of the legislature to deal equitably with the corporations holding these franchises. Surely the manifestation of this desire cannot be construed into a repudiation of power. These annual charges are not called taxes, but are spoken of as in the nature of a tax; and the legislature, recognizing the equitable force of the claim based thereon, provided that the corporation be given credit for sums thus payable. In this connection it is well to recall that in § 1 of the act of 1886, *supra*, these annual charges are called "rental or percentage of gross earnings."

The quotation from the court of appeals must be interpreted in the light of the question presented. That was whether the appellee company was entitled to avail itself of the provision of § 46 just quoted, it having been required by its charter to pay a certain percentage of its gross receipts. It was held that it was so entitled, and the argument was to show that the words "in the nature of a tax" were used in a broad and comprehensive

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sense to include a payment made on account of the privilege granted. No question was made or considered as to the liability of the company to the tax on its franchise. Its only claim was to the deduction on account of the percentage of its receipts already paid. The court, in addition to the language quoted, said (p. 106, N. E. p. 731) :

"The statute in question was enacted at a special session of the legislature convened by the governor for that purpose. In his message to the legislature he recommended that 'it should be provided that from the sum assessed by the state authorities as the tax which a corporation must pay because of its local franchise there shall be deducted the amount already annually paid by it to the locality for such franchise. In no other way is it possible to tax these corporations with uniformity and equity.' It may be that this view is erroneous, and that the more accurate and equitable way would be to determine the value of the franchise, not as free and clear, but as burdened by the charges to which it might be subject. Nevertheless, it is plain that this view was accepted by the legislature, for under the scheme provided by the present statute the franchise is to be assessed as real estate; that is to say, not subject to diminution for charges thereon, and the allowance for such charges is made only by deducting them from the tax."

We are of opinion that no contract right of the relator was impaired by the legislation in question.

It is further insisted that the special franchise tax law denies the relator the equal protection of the laws and due process in three separate and distinct aspects, "namely: (1) in that it adds to the obligations of their various contracts while preserving all the burdens of those contracts; (2) in that it provides for the deduction of annual payments covered by existing contracts from the amount of tax levied, by reason of which deduction those who agreed to pay for their franchises lump sums or annual amounts less than the new tax are discriminated against; and (3) in that it discriminates against them and subjects them to taxation, while their competitors, operating under the surfaces of many of the same streets, are to be exempted."

The first specification is answered by the conclusion that we have reached in respect to the claim of an impairment of contract obligations; for if there was no such impairment, the fact that the companies have escaped the burden for these many years is their good fortune, and in no manner discharges them from the ordinary burdens of taxation which the present law imposes.

With respect to the second, it may be observed that the lump sum is so obviously a payment for the franchise that it cannot be considered in any just sense as possessing the nature of a tax. It is not even rental. It is like money paid for a tract of land,—part of the purchase price. It does not, like a percentage of the gross receipts, vary with the changes of business, has no resemblance to a continuing discharge of the obligation which property is under for contribution to the support of the govern-

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ment. Further, this whole matter of allowing a reduction on account of that which is spoken of as "in the nature of a tax," is a matter of grace on the part of the legislature. The franchises granted were, as we have held, subject to taxation, and the fact that, upon equitable considerations, the state has consented that a certain reduction shall, in some cases, be made, does not entitle every holder of a franchise to a like reduction. It is akin to an exemption, and there is nothing in the Federal Constitution to prevent a state from granting exemptions from taxation. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892, 10 Sup. Ct. Rep. 533.

With regard to the third contention, it may be said that there is a difference between surface and subsurface street railroads sufficient to justify a diversity in the mode and extent of taxation. In *Savannah, T. & I. of H. R. Co. v. Savannah*, 198 U. S. ante, 690, 25 Sup. Ct. Rep. 690, just decided, taxation of a street railroad was challenged on the ground that a steam railroad which ran into the city and along its streets, and there did some of the same kind of work as the ordinary street railroad, was not subject to the same tax, and, referring to this contention, is this declaration by Mr. Justice Holmes: "The difference between the two railroads is obvious, and warrants the diversity in the mode of taxation." Further, the condition of the title to the only subsurface road in the city of New York clearly puts it in a class by itself.

These are all the questions we deem it important to consider. We find no error in the decision of the Supreme Court of New York, and it is affirmed.

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(Supreme Court of Michigan, June 8, 1905.)

[103 N. W. Rep. 856.]

Right to Institute Condemnation Proceedings in Name of Railroad.

—Where a railroad company contracted with an individual to obtain for it the necessary right of way, and to construct the remainder of its projected railway, authorizing him to take necessary steps in its name to condemn any lands—he to defray the expenses and be compensated in an agreed sum—he had a right to institute condemnation proceedings in the name of the railroad company.

Right to Condemn Land—Effect of Receivership.

—Where a receiver of a railroad company was appointed on a creditors' bill—the receiver being ordered to carry on the business of the corporation, but not being vested with title to its property—the existence of the receivership did not divest the corporation of its authority to condemn land for a right of way, where such action did not interfere with the control of the receiver, or transgress any order of the court appointing him.

Same—De Facto Corporation.—A de facto railroad corporation may maintain condemnation proceedings, as only the state can question the validity of incorporation.

Eminent Domain—Right of Way—Map—Sufficiency.—Comp. Laws,

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§ 6232, in relation to the incorporation of railroad companies, provides that each road proceeding to construct a line into a county shall make a map of such part of the route intended to be adopted, giving the location of the point selected for crossing any other railroad, which shall be certified by a majority of the directors, and proved by the Attorney General, etc., and filed in the office of the register of deeds of such county, provided that any change shall be approved by the Board of Railroad Commissioners, and a new map, showing the new route adopted, shall be made. Held, that, if a map is essential to condemnation proceedings, one showing the route of the road, but not the land to be devoted to a right of way, is sufficient.

Same—Appeal—Review—Evidence.—Questions raised over the introduction of evidence in proceedings by a railroad company for the condemnation of land cannot ordinarily be considered on appeal, though evidence clearly improper might justify a reversal of confirmation, should it appear that it caused a substantial error on the part of the jury.

Same—Same—Same.—On appeal in proceedings by a railroad company to condemn land for a right of way, it is not within the province of the Supreme Court to review questions of fact, further than to see that the finding is supported by the evidence.

Condemnation Proceedings.—The statute contemplates that one jury shall determine in one proceeding the questions relating to condemnation by a railroad company of lands of different persons in a locality.

Same—Trial.—In proceedings by a railroad company to condemn land for a right of way, it was error for the counsel, witnesses, and jurors to mingle freely together, dining together, and for meals, cigars, and drinks to be furnished by petitioner's representatives.

Same—Same.—In proceedings by a railroad company to condemn land for a right of way, error consisting in the treating of the jury, etc., by petitioner's representatives, was seasonably taken advantage of by objection to confirmation.

Appeal from Circuit Court, Wayne County; George S. Hosmer, Judge.

Proceedings by the Detroit & Toledo Shore Line Railroad Company against Henry M. Campbell and others for the condemnation of land for a right of way. From the judgment of condemnation, defendants appeal. Reversed.

Argued before MOORE, C. J., and MCALVAY, GRANT, BLAIR, and HOOKER, JJ.

Russel & Campbell (Gray & Gray, of counsel), for appellants.
Brennan, Donnelly & Van De Mark and Henry L. Lyster, for appellee.

HOOKER, J. The Detroit & Toledo Shore Line Railroad Company, being completed from Toledo to Trenton, let a contract to Strang to obtain for it the necessary right of way and construct the remainder of its projected railway from Trenton to Detroit; authorizing Strang to take the necessary steps in its name to condemn lands necessary for the purpose. Proceedings to condemn a right of way across many parcels of lands were instituted by Strang, a jury was impaneled, and awards made. The defendants named in this record have appealed.

The questions raised may be divided into three classes: (1)

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Those raised to the jurisdiction of the court to submit the cause to a jury; (2) alleged errors in the admission or exclusion of evidence before the jury; (3) objections to the order of confirmation.

Upon the presentation of the petition the defendants answered, raising a number of questions relating to the jurisdiction of the court, to submit the matter to a jury, and a hearing was had and proofs were taken upon the issues thus raised. It was contended:

1. That this was not a proceeding by the railroad company, but by and for the benefit of a private person, and that such had no authority to institute the proceedings. The evidence upon which this was based tended to show, as hereinbefore stated, that Strang was under contract obligations to perform the service of securing the right of way, including payment for the same, and to construct the road, for which he was to receive an agreed sum in payment. He was authorized to use the company's name in condemnation proceedings where necessary, and instituted these proceedings in its name after failing in an attempt to obtain the right of way by purchase.

The right to the benefit of the law of eminent domain inures to railroad companies by virtue of the statute which confers powers upon the railroad companies similar to those used by highway authorities. These powers are sustained upon the theory that railroads are public highways, in a sense, and that the public may condemn lands for railways, and that it is lawful to delegate the power to the railroad companies for the use of the public; i. e., the power is "delegated to a public agent to work out a public use." See *Swan v. Williams*, 2 Mich. 435; *M. C. v. Ward*, 2 Mich. 547; *Consumers' Gas Co. v. Harlers* (Ind. Sup.) 29 N. E. 1062, 15 L. R. A. 507; *Venable v. W. W. R. Co.* (Mo. Sup.) 20 S. W. 493, 18 L. R. A. 73; *Gano v. M. & St. L. Co.* (Iowa) 87 N. W. 714, 55 L. R. A. 267; *Pine Grove v. Talcott*, 86 U. S. 677, 22 L. Ed. 227; *Taylor v. Ypsilanti*, 105 U. S. 64, 26 L. Ed. 1008. That a corporation must in all things work through individuals who act as agents is obvious, and it is not necessary that it limit such agents to its officers or stockholders. It may employ an attorney to act for it, or it may choose a layman, so long as he is to act as the representative of the company and for its benefit. Strang acted for the company in procuring the right of way from the owners. Presumably the land required was designated by the company, and Strang was expected to procure it, not for his own, but the railroad's, use. We do not see a reason for denying the railroad the right to acquire a right of way by condemnation merely because it had a contract with Strang to take the necessary steps to condemn the land for and in the name of the railroad, or that the authority of the railroad was affected by the terms agreed upon between them as to how he should be paid for his services and disbursements. In the case of *Ten Broeck v. Sherrill*, 71 N. Y. 276, it was held that the authority given to canal commissioners by statute to take lands from which to obtain

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gravel for repairs of the canal was not impaired by the fact that the state had let the work by contract, or that the contractor was to furnish the materials. It was said that this was a question between the state and the contractor, and did not affect the power of the canal commissioners. A similar holding is found in the case of *Bliss v. Hosmer*, 15 Ohio, 45. See, also, *State v. Newark*, 54 N. J. Law, 62, 23 Atl. 129. Several cases are cited by counsel which hold that although the railroad company may lease the road, even though it be for the full period of its charter rights, the authority to condemn property is not lost, and proceedings may be taken in its name. In *re N. Y., L. & W. R. Co.*, 35 Hun, 225; s. c., 99 N. Y. 20, 1 N. E. 27, following *Kip et al. v. N. Y. & H. Ry. Co.*, 67 N. Y. 227; *C. & W. I. R. Co. v. Ill. Cent. R. Co.*, 113 Ill. 156.

We must hold, therefore, that the arrangement made with Strang did not divest the petitioner of its power to condemn land, and that the institution of the proceedings by Strang was upon its behalf.

2. It was urged that the proceedings were void for the reason that the road was, at the time they were instituted, in the hands of a receiver appointed by the federal court at Detroit, who, if any one, had the exclusive authority to institute such proceedings. As a foundation for this point, it was shown that a judgment had been rendered against the railroad company by the federal court at Detroit in favor of Henry A. Everett; that a creditors' bill had been filed and a receiver appointed in 1902, who had not been discharged at the time the petition in this proceeding was filed, though he has been since. The gist of this objection we understand to be that the appointment of the receiver divested the company of the power granted it by the state, and gave it to the receiver, or, if not that, it suspended its power to act while its property was in the custody of the court.

We have said that the receiver was appointed upon a creditors' bill, which, of course, sought to apply the property of the defendant to the judgment owned by Everett. We have not before us the proceedings in that case. All that our attention is called to is the order appointing the receiver, which provides that: "On reading and filing the bill of complaint and the answer of the defendant in this cause, and on motion of Brennan, Donnelly & Van De Mark, solicitors for the complainant, with the consent of Mr. Guy M. Walker, solicitor for the defendant, it is ordered, adjudged, and decreed that Allen F. Edwards be, and he is hereby, appointed temporary receiver, until the further order of this court, of all the property, real and personal and mixed, of every kind, belonging or in the possession of the defendant railroad company, and, if necessary, to sue for, in the name of said receiver, and recover, all such property, whether in possession or in action, and that, upon demand made by said receiver, the defendant company, its officers and agents, shall forthwith deliver over to the receiver all of the aforesaid property, and that neither said company, nor any officers or agent or employee of said com-

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pany, shall interfere with or molest the possession or enjoyment of any of said property in the possession of such receiver by said receiver. And it is further ordered, adjudged, and decreed that the said receiver be, and he is hereby, empowered and directed to carry on the business of the said defendant company until the respective rights of the parties in interest can be fully ascertained and determined, under and subject to the supervision, direction, and control of this court, and until otherwise ordered by this court, and to use and employ the property, franchises, rights of way, roadbed, tracks, locomotives, rolling stock, machinery, fixtures, and property, of whatever kind or nature, and to take and receive revenues, issues, and profits of said business and property; and said receiver shall be, and he is hereby, invested with all the rights and franchises vested by law in said defendant railroad company in the duties and trusts aforesaid; and said receiver shall have authority to employ all necessary and proper agents, officers, and laborers, and to fix and alter their compensation, subject to the supervision of this court. Said receiver shall also have authority, subject to the supervision of this court, to make such repairs and necessary additions to said railroad and property as may be essential to the interest and safety of the same, and proper, in his judgment, for carrying on said business; also to make all contracts that may be necessary in carrying on the business of said railroad company, subject to like supervision of this court; also to collect in his own name, as receiver as aforesaid, all debts, claims, or demands, of whatsoever kind or nature, owing, or that may become due and owing, to said company or to said receiver from any and all sources. Such receiver is ordered to make and return a full, true, and correct inventory of all of the property that may come into his hands as receiver. It is further ordered that, out of the moneys that shall come into the hands of said receiver from the operation of said railroad, he shall pay all current expenses incident to the creation or administration of his trust, and all sums to become due to connecting or intersecting lines of railroads, arising from the interchange of business, and all amounts now legally due from said railroad company for taxes. It is further ordered that said receiver shall retain possession and continue to discharge the duties and trusts aforesaid until the further order of this court in the premises; and that he shall from time to time make reports of his doings in the premises, and may from time to time apply to the court for such other and further order and directions in the premises as he may deem necessary and requisite to a due administration of said trust; and said receiver is hereby vested, in addition to the powers aforesaid, with all the general powers of receivers of this kind, subject to the supervision of this court."

It can hardly be contended that this order was effective to divest the railroad company of its title to its property. Counsel for the petitioner have cited many cases which support their claim that under the rule of the federal courts a receiver appointed under circumstances like those in this case is a mere custodian

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of property, without title, which remains in the company. *Wisswall v. Sampson*, 14 How. 52, 14 L. Ed. 322; *Chicago Union Bank v. Kansas City Banks*, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341. In this case a receiver was appointed upon a judgment creditors' bill. The court said: "A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title or even the right of possession in the property." This language was cited with approval in the case of *Quincy, etc., R. Co. v. Humphreys*, 145 U. S. 97, 12 Sup. Ct. 787, 36 L. Ed. 632, as was also the case of *Gaither v. Stockbridge*, 67 Md. 222, 9 Atl. 632, 10 Atl. 309, where it was said: "It is manifest that the scope of his duties and powers is very much more restricted than those of an assignee in bankruptcy or insolvency. In the case of an assignee in bankruptcy, the law casts upon such assignee the legal title to the unexpired term of the lease; and he thus becomes assignee of the term by operation of law, unless, from prudential considerations, he elects to reject the term as being without benefit to the creditors. But not so in the case of receivers, unless it be, as in New York and some of the other states, where, by statute, a certain class of receivers are invested with the insolvent's estate, and with powers very similar to those vested in an assignee in bankruptcy. *Booth v. Clark*, 17 How. 331, 15 L. Ed. 164. The ordinary chancery receiver, such as we have in this case, is clothed with no estate in the property, but is a mere custodian of it for the court, and, by special authority, may become an officer of the court to effect a sale of the property, if that be deemed necessary for the benefit of the parties concerned. If the order of the court under which the receiver acts embraces the leasehold estate, it becomes his duty, of course, to take possession of it. But he does not, by taking such possession, become assignee of the term, in any proper sense of the word. He holds that, as he would hold any other personal property involved, for and as the hand of the court, and not as assignee of the term." *Dayton Hydraulic Co. v. Felsenthal*, 116 Fed. 995, 54 C. C. A. 537; *Stokes v. Hoffman House*, 167 N. Y. 560, 60 N. E. 667, 53 L. R. A. 870. The case of *O. & M. C. Co. v. Russell*, 115 Ill. 52, 3 N. E. 561, indicates that a receivership not only does not divest title, but does not necessarily suspend all powers of a railroad company. The court said: "Notwithstanding the appointment of the receiver, the corporation is clothed with its franchises, and such corporation still exists. The effect of the appointment of the receiver is simply to give him the temporary management of the railroad, under the direction of the court, instead of the manager appointed by the directors of the corporation. It is that, and nothing more. As the corporation still exists, it may still exercise, as before, its franchises, so it does not interfere with the rightful manage-

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ment of the road by the receiver, so far as his duties are defined by the court appointing him. No doubt, it may do many corporate acts, and certainly it can do all things necessary to preserve its legal existence, notwithstanding the appointment of the receiver to which the temporary management of the road is given; otherwise the appointment of the receiver would be tantamount to a dissolution of the corporation." *Herring v. N. Y., L. E. & W. R. Co.*, 105 N. Y. 371, 12 N. E. 763; *Ellis v. Boston, H. & E. R. R.*, 107 Mass. 1; *Union Trust Co. v. Weber*, 96 Ill. 346; *Keeney v. Home Ins. Co.*, 71 N. Y. 396, 27 Am. Rep. 60; *Memphis R. Co. v. Com'rs*, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. Ed. 837.

Counsel for the defendants cite several cases holding that a receiver may, under the direction of the court, proceed to condemn property necessary to the use of the road which has been placed in his charge. In such cases, where title has not vested in him, he must do it as one representing the road, if not in its name. In this case the receiver has not been directed to take such action, and has not assumed to do so. Neither has he in any way opposed the action by Strang, and in fact he was discharged by the court pending the proceedings, though the latter fact may not affect the question. The evident object of this receivership was to impound, and incidentally conserve, the property, to the end that it might be applied to Everett's judgment so far as should be necessary. At that time this road was completed to Trenton. Strang was under contract obligations to procure the right of way on behalf of the company, and complete the road to Detroit. We may well doubt the efficacy of this order to confer upon the receiver authority to prevent Strang from doing this, though we place a most liberal construction upon the order. We have no doubt that the receiver must have proceeded in the name of the company, had the court directed him to complete the road, and we cannot suppose that the court intended to direct this in disregard of Strang's contract rights. At all events, we are of the opinion that, where title does not vest in the receiver, the fact that he may, if directed by the court, proceed to condemn land for and on behalf of the railroad, is not inconsistent with the claim that the railroad company is not divested of its power, and may exercise it so long as it does not interfere with the control of the receiver, or transgress any order of the court appointing him. See *Morrison v. Forman*, 177 Ill. 427, 53 N. E. 73; 3 Elliott on R. R. § 958.

3. The jurisdiction was attacked on the ground that the articles of association failed to show that the railroad company was lawfully incorporated. The grounds upon which this claim was made are that the articles of association did not sufficiently designate the termini of the road, and that the map and survey filed did not comply with the law.

Comp. Laws, § 6223, provides for the organization of railroad companies, and that for such purposes the requisite persons shall subscribe articles of association. The statute provides what the

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articles shall contain, and among them is the requirement that they shall state the places from and to which, and the name of each county into or through which, it is intended to be constructed, and its length, as near as may be. It provides further that after subscription and payment of the required amount the articles shall be filed, and thereupon the subscribers shall be a body corporate. The petition alleged that the petitioner was a corporation organized and duly incorporated under the laws of this state. The answer questions this, and avers that the "articles of association do not state the points between which said road is intended to be constructed, nor its length, as near as may be, as required by section 6223 of the Compiled Laws of 1897." It also denied that any map or survey such as is required by the railroad law has been filed in the office of the register of deeds for the county of Wayne. It now claims that the company failed to prove compliance with the statute. The petition is the only source from which we can ascertain petitioner's description of the line. It states that the railway was to extend "from a point in the northeast corner of sections 9, 10, 15, and 16," etc., northerly to the city of Detroit. Nothing is indicated as to the length of the line. The petition states, also, "that your petitioner has surveyed the route of its proposed road in said county of Wayne, and has made a map and survey thereof, by which said route is designated, which said map has been submitted to and approved by the Railroad Crossing Board of the said State of Michigan, as required by law, and which is on file in the office of the register of deeds in and for said county, and that it has located its said road according to such survey, and that it has filed a certificate thereof, signed by the president and secretary of said company, your petitioner, and under its corporate seal, in the office of the said register of deeds." Defendants contend that the termini mentioned are indefinite; that the length of the line should have been stated. The points made against the map and survey are that "a red line shows the center of the tracks, and not the center of the right of way"; "it does not state the width of the right of way, nor any courses or distances," and that "it would be impossible from the map to lay out respondents' land, or the right of way desired across it, except as one might measure the distances on the map by scaling and determine the courses by measurements and angles"; and that entire accuracy would be impossible.

We may pass the claim that the company was not legally incorporated by saying that the record shows a de facto corporation, which is sufficient. See Elliott on Railroads, § 497, and cases cited. It has been often held in this state that the state only can question the validity of an incorporation. See *Tol. R. Co. v. Johnson*, 49 Mich. 148, 13 N. W. 492; *Tol. R. R. v. Johnson*, 55 Mich. 456, 21 N. W. 888. And in *Schroeder v. R. R.*, 44 Mich. 387, 6 N. W. 872, it was held that the question could not be passed upon in condemnation proceedings, and it was repeated in the case of *Trav. City & R. Co. v. Seymour*, 81 Mich. 378, 45 N. W. 826. This being so, the failure to state the terminal

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or length of the road in the articles becomes unimportant in that connection.

It is asserted that the map and survey filed were indefinite, and did not comply with the requirements of the statute. Section 18 of the act as originally passed (section 6243 of the Compiled Laws of 1897) contains the requisites of a petition for condemnation. Among these is the requirement that the petition contain the description of the real estate sought to be condemned, and the allegation that the company has made a map and survey by which the route is designated; that it has located its road according to such survey, and filed a certificate thereof in the register's office of the county. Under this section we have held that a failure to allege and show the filing of such a map and survey, and that they fully and definitely described, or at least included, the land sought to be condemned as a part of the route, is fatal to the proceeding. In *re Convers*, 18 Mich. 465; *R. Co. v. R. Co.*, 72 Mich. 225, 40 N. W. 436. At the time these decisions were made the provisions of section 18, as above set forth, were in force. That section has since been amended, and now contains no provision requiring an allegation that a map or survey has been filed. Had section 18, as theretofore existing, been the same as it now is, it would have afforded no ground for the decisions cited, and they could only have been planted upon the then existing provisions of section 7, viz.: "(6232) Sec. 7. Every such company proceeding to construct a part of its road into or through any county named in its articles of association, or which shall have been so constructed, shall make a map of such part of the route intended to be adopted by such company, or which shall have been adopted, giving also the location of the points selected for crossing any other railroad, which shall be certified by a majority of the directors and approved by a board consisting of the Commissioner of Railroads, Attorney General and Secretary of State, and filed in the office of the Register of Deeds of such county." We doubt if section 7 contained any such requirement, first, because it did not mention a survey, and the map there required seems to have been designed to point out, in a general way, the location of the route, rather than the land to be devoted to it, subject to approval by the statutory board; and, second, no allusion is made to the subject of condemnation of lands. Its object may well have been to afford an opportunity for opposition from other railroad companies, and perhaps other persons interested in preventing such location of the route.

Counsel cite cases supporting their claim that this map is not a prerequisite to condemnation. See *Gulf R. Co. v. Shepard*, 9 Kan. 647. In this case a similar statute was relied upon. Mr. Justice Brewer disposed of the question by showing that the filing of the map was not a prerequisite to the condemnation of the land—a matter which is within legislative control. Our statute is subject to the same construction. See Pub. Acts 1901, p. 114, No. 80, § 7. See, also, *Elliott on R. R.* § 926; *R. Co. v. Grovier*, 41 Kan. 685, 21 Pac. 779; *R. Co. v. Oil Co.*, 35 W. Va. 205,

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13 S. E. 369. It is unnecessary for us to go so far, though we know no reason for not doing so. There is nothing in section 7 which requires certainty of description as to the exact land to be taken. It is a map of the route, not of the right of way to be acquired.

Our decisions cited would be conclusive, but for the amendment of section 18. As it now stands, there is no express requirement that a map be filed as a prerequisite to condemnation; and, if the proviso in the amended section 7 is to be taken as an implication that a map is essential, it is only such a map as section 7 provides for, and we think the one filed sufficient. See Pub. Acts 1901, p. 114, No. 80.

5. It was insisted that there was insufficient proof of preliminary negotiations requisite to the commencement of condemnation proceedings. We are of the opinion that the evidence justifies the conclusion that a reasonable effort to purchase the land was made. The claim that the parties did not have a mutual understanding as to the land desired is technical. The evidence shows that no dispute arose about that subject, but only over the price per acre to be paid, and that there would have been no trouble over the particular land required, if they could have agreed upon the price per acre. We think that we have covered the jurisdictional questions, and that the court did not err in impaneling a jury.

6. We will next consider questions which arose upon the hearing of the cause before the jury. These involve (a) the question whether the testimony of several witnesses upon the question of value, etc., should not have been excluded; (b) the propriety of receiving evidence regarding the amounts paid for, and offers of, other parcels of land; (c) testimony by Strang regarding the expense caused by the delay of these proceedings. Questions raised over the introduction of evidence cannot be considered in these proceedings, ordinarily. We have so held in many cases cited in the briefs of counsel, repeated here for future reference. *Mich. Air Line Ry. v. Barnes*, 44 Mich. 226, 6 N. W. 651; *Tol. R. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271; *Port Huron Ry. v. Voorheis*, 50 Mich. 510, 15 N. W. 882; *Det. Ry. Co. v. Crane*, 50 Mich. 182, 15 N. W. 73; *Fort St. Un. Dep. v. Jones*, 83 Mich. 415, 47 N. W. 349; *R. Co. v. Longyear* (Mich.) 94 N. W. 670. It is true that evidence clearly improper might justify a reversal of confirmation, should it appear that it had caused a substantial error on the part of the jury, but we do not find such to be the fact here.

7. The order of confirmation is attacked on the ground that the jury was subjected to improper influences, and because the award was inadequate. It is not within our province to review the question of fact, further than to see that the finding is not supported by the evidence. There was a wide difference in the opinions of witnesses as to the value of the land, and damage to follow its condemnation, and the finding should not be disturbed on the ground of inadequacy of the award.

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8. It is urged that the verdict is void for the reason that the jury determined the necessity for taking the defendants' land before hearing the testimony as to its value, or the damages resulting from its condemnation. We understand this to mean that, by rendering prior awards as to other parcels, the jury had prejudged the question of necessity as to defendants' parcels. We think that the statute contemplates one proceeding for the condemnation of lands of different persons in a locality. *C. & M. L. S. R. v. Sanford*, 23 Mich. 428. Without saying that successive applications may not be made, or that one petition embracing all land sought to be condemned on a line, or even in a county, is necessary, the common practice is for a jury to determine the necessity for a railroad, highway, or drain in connection with the various parcels sought to be condemned, and any other method would seem to be impracticable. If a different jury were to be required for each parcel, the verdict of any one which failed to find a necessity for the improvement would block the proceedings, perhaps after many awards had previously been made and paid. That the jury should not prejudge a defendant's rights by foreclosing the question of necessity before considering his parcel, or the prospective damages to it, is true. See *Paul v. Detroit*, 32 Mich. 108. But we do not see that this was done in this case. It is intimated in counsel's brief that successive awards were made, but our attention is not called to the same in the record, while the award which was confirmed includes a number of parcels and parties. Manifestly the amount of damage to each parcel must be determined by itself, and such determinations, if made separately, and tentatively or conditionally, and subject to a final conclusion as to necessity, should not be objectionable. It is not shown that confirmation was objected to upon this ground, and this is another reason why we cannot disturb the verdict.

Confirmation of the verdict was opposed upon the ground that the verdict was ascribable to the improper conduct of persons interested for the petitioner toward the jury, and the court was asked to refuse such confirmation and order a retrial upon the ground that the jury had been influenced thereby. Testimony was taken upon this subject, and it was shown that, on the occasion of the view of the premises, counsel and witnesses and jurors mingled freely, dined together, and that meals, cigars, and even drinks were ordered for the jury and paid for by petitioner's representatives. The court was of the opinion that there was no impropriety in all visiting the land together, i. e. court, counsel, parties, and jurors. Taking property by virtue of the right of eminent domain is a proceeding that ought to demand quite as careful oversight as the trial of any other case, for it deals with as important interests as any civil cause. If it is necessary for the jury to view the premises—and it generally is—we think that the opportunity should not be given to parties and bystanders to express unsworn opinions to them, either in private or general conversation; and the practice of dining or treating jurors, which

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would be considered as unwarranted, if not censurable, is quite as objectionable in these cases. We do not know that the jurors were influenced in this case, but we are of the opinion that owners of land should not be subjected to such dangers, or be required to show affirmatively that they have suffered. It is claimed that objection was not seasonably made, and that the point was therefore waived. In the case of *Hicks v. Circuit Judge, Mich. Mandamus Cases, 734*, a new trial was ordered in a similar case, after confirmation, although the return of the circuit judge shows that the offending consisted merely of the furnishing of cigars to the jurors upon the statement in the presence of the opposite party that he would do so if he (the opposite party) consented. Assuming such consent from his silence, the cigars were furnished. In that case the relief granted was by mandamus. Here it arises upon objection to confirmation, which amounted to the same thing as a motion for new trial. The order of the circuit court is reversed, and a new trial ordered, as to the land in controversy in this cause.

The respondents will recover costs of this court.

GULF, C. & S. F. RY. CO. v. MATTHEWS et al.

(Supreme Court of Texas, June 19, 1905.)

[88 S. W. Rep. 192.]

Railroads—Injury to Person on Track—Contributory Negligence.—

Where defendant railroad company had knowingly permitted the public to use its roadbed within the corporate limits of a city as a walkway for a number of years, plaintiff's decedent, who was killed while walking on the track within such city, was not guilty of contributory negligence, as a matter of law, in walking on the track.

Same—Licensees.*—Where defendant railroad company had knowingly permitted the public to use its track within the limits of a city as a walkway for a number of years, a person so using the track was a licensee, and not a trespasser.

Same—Action for Death—Opinion Evidence.—In an action against a railroad company for killing plaintiff's decedent while walking on the track, it was not error to permit a witness to testify that, in his opinion, deceased was one of the men he saw walking on the track shortly before deceased was killed, from the resemblance of the dead man, in form and clothes, to the second man he saw going along the track.

Same—Admissibility of Evidence.—Where defendant railroad company had knowingly permitted the public to use its roadbed at the place where deceased was killed for a number of years as a passway, evidence of defendant's general manager that defendant had never consented to such use by persons other than those having business with the company on its right of way, etc., was inadmissible.

Certified questions from Court of Civil Appeals of Fifth Supreme Judicial District.

*As to who are licensees on railroad tracks, see foot-notes appended to *Booth v. Union Terminal Ry. Co. (Iowa)*, 14 R. R. R. 768, 37 Am. & Eng. R. Cas., N. S., 768.

Gulf, etc., Ry. Co. v. Matthews

Action by Maggie Matthews and others against the Gulf, Colorado & Santa Fe Railway Company. On certified questions from the Court of Civil Appeals.

. See 73 S. W. 413; 66 S. W. 588.

Smith & Beaty, J. W. Terry, and Lee & Goree, for appellant.
Wolfe, Hare & Maxey, for appellees.

BROWN, J. Certified question from the Court of Civil Appeals of the Fifth Supreme Judicial District. The statement and questions are as follows:

"We deem it advisable to present to the Supreme Court of the state of Texas for adjudication the following issues of law arising in the above-entitled cause.

"Statement.

"This suit was instituted by appellee Mrs. Maggie Matthews, on behalf of herself and her minor children, against appellant, to recover damages sustained on account of the alleged negligent killing of her husband, J. L. Matthews. It is alleged in substance that J. L. Matthews on the 8th day of May, 1899, was walking along on appellant's railroad track within the corporate limits of the city of Ft. Worth, where said track was commonly and habitually used as a pathway by pedestrians with the knowledge, consent, and acquiescence of appellant; that, while so walking along and upon said track, the said J. L. Matthews was, by the negligence of appellant's servants operating one of its freight trains, in running such train within the city limits at a greater rate of speed than allowed by an ordinance of said city, and in negligently failing to ring the bell of the engine and to keep a lookout for persons who might be expected to be on its track, knocked down, run over, and killed by said train. Appellant pleaded the general issue, contributory negligence, and specially that appellant had posted along its road in the city of Ft. Worth warning notices to the public, to the effect that all persons not having business with the company were forbidden to sit, stand, or walk upon its railroad tracks, and were prohibited from walking on or crossing the tracks of the company, except at legally established crossings; that the company did not consent to such use of its track, and that no officer or agent of the company had authority, by acquiescence or otherwise, to consent to such use of the tracks, etc.; that J. L. Matthews was not walking along its track when struck by its train, but that he was lying down upon the same; that he had either been foully dealt with, and stunned or murdered and placed upon the track, or else that he was in a state of intoxication, and had walked upon appellant's track and lain down upon the same, or for some other reason was lying asleep or in a state of insensibility on the track, and that its servants in charge of said train did not discover him in time to prevent the injury; that by an ordinance of the city of Ft. Worth it is provided, in substance, that it shall be unlawful for any person to trespass upon the property of any corporation without

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its consent, and any person so doing shall be deemed guilty of a misdemeanor, and, upon conviction, be fined any sum not exceeding ten dollars. A jury trial resulted in a verdict and judgment against appellant in the sum of \$15,500, from which this appeal is prosecuted.

"J. L. Matthews owned a grading outfit, consisting of teams and tools, and had been working for the Santa Fe Railroad near Hudenheimer up to a few days before his death. He quit work near Hudenheimer, and his teams and grading outfit had been carried to Cleburne, Texas. On the afternoon of May 7, 1899, the day before he was killed, he left Cleburne for Ft. Worth, in company with T. W. Turner, expecting to get work either at a gravel pit in the city or from the Texas & Pacific Railway Company. Before leaving Cleburne, Matthews instructed one of his employees to carry the grading outfit across the country to Ft. Worth, and meet him at a certain watering trough on Main street about 3 o'clock p. m. on May 8th. About 10 o'clock p. m. on May 7th, Matthews and Turner separated at a hotel or lodging house on Main street, agreeing to meet next morning at 7 o'clock on Front street, and then go together to look for a camping place for the teams and grading outfit. Matthews told the clerk at this lodging house that he wanted to secure a bed, but did not care to go to sleep right then; that he was going away, but would be back in about one hour to occupy the bed. He was informed that he could get the bed, and about 10 o'clock p. m. left in a state of intoxication, but did not return to occupy the bed.

"L. C. Andrews testified: 'My name is L. C. Andrews; age, 43 years. I reside in Ft. Worth. Am a cooper by occupation or trade. At the present time I am in the employ of Armour & Co., of North Ft. Worth. On May 8, 1899, I resided in Ft. Worth, Texas, and was employed as night clerk at the Tremont Hotel, on Rusk street, just east of the courthouse. I am not acquainted with the plaintiffs, or any of them. Never saw them, that I know of. I did hear of the circumstances of the finding of the body of a dead man on the track of the defendant railway company near the Old Cemetery, in the city of Ft. Worth on or about the 8th day of May, 1899. I don't remember the date, but remember that it was along about that time. I heard of the matter through hearing people talk about it at the time. I met and got slightly acquainted with a man, who, I believe, was J. L. Matthews, on the night previous to the morning J. L. Matthews, deceased, was found dead on the Santa Fe Railroad, out near the Old Cemetery. I met him about 11 p. m. in the office of the Tremont Hotel in Ft. Worth, Texas. This man Matthews came into the hotel office and applied for a bed for the night. I let him have the bed, received payment from him for the bed for the night, and showed him his room. He occupied the bed that night. I know it was the night just preceding the morning on which the dead body of J. L. Matthews, deceased, was found on the Santa Fe track, out near the Old Cemetery. My only transaction with him was renting him a bed for that night, and re-

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ceiving payment for it. He came in and asked me for a bed. We got into a short conversation after he had secured the bed. He told me that he had some teams on the road to Ft. Worth, and that he wanted to find some suitable grounds for a camp. He asked me where he could find some suitable grounds for a camp, and I told him I was not much acquainted with such as that, but I had seen people camped on the north side of the river, back of the jail, and also out along the Santa Fe track beyond the Old Cemetery. We had just a short conversation. I don't remember our exact words, but they were substantially as above. I know he wanted a place for his teams to camp, and I informed him of the two places where I had seen campers. Before going to bed on the night before, he told me to wake him up about 5 o'clock; that he wanted to get out and get a camp for his teams. I woke him up about 5:30 in the morning. I knocked at his door and awakened him. A few minutes after, he came downstairs and entered the office. It was necessary for him to come through the office, coming down from his room. I did have a short conversation with him that morning. He remained in the office a very short time. He again asked me about the camping grounds, and the directions to them. I gave him the directions to the place I had informed him about. He left, saying he was going to look out for a camping place. I never saw him after he left the office. I never noticed what direction he went after leaving the hotel office. The last time I saw him was in the office, as he was leaving, and it was about ten or fifteen minutes before 6 o'clock in the morning. It was daytime. I never saw him, dead or alive, after that. I cannot give a minute description of him. As I remember him, he was about five feet six or seven inches high, and would weigh about 135 or 140 pounds; had a light complexion; had on a brown or dark suit of clothes, and a black slouch hat. I don't remember whether or not he was clean shaven, or the color of his eyes. I only saw Matthews the two times—first at night, when I rented him the bed, and next in the morning, after he got up and came down to the office. I saw him only a short time on each of these occasions. The first time I saw him, when he came for the bed, he was drinking, but he was at himself. He could get along by himself. When he came down the next morning he was sober. The hotel at which I was working the night that Matthews was killed did keep a register. I did not enter Matthews' name on it. I saw he was drinking, and never required him to register. He paid me cash for his bed. I afterwards inquired for his name, and got it, but neglected to place it on the register.'

"W. C. Prince was sexton of the Old Cemetery, near where the dead body of Matthews was found. On the morning Matthews was killed Prince saw one of appellant's trains pass, going north. About five or ten minutes before this train passed, he (Prince) saw two men walking on the railroad track, both going north. He was about thirty-five yards distant from them, and did not know who they were. They passed along on the track about

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sixty or seventy yards apart. Prince was then on his way to the cemetery, and, in a few minutes after this train passed, he saw several persons gathered at the scene of the accident, and went there, and saw the dead body.

"Clyde Baptist was a section hand in the employ of appellant, and lived at its section house. This section house was about fifty feet west of appellant's track at Peach street, which is about ($\frac{1}{4}$) one-fourth of a mile south of where the body of Matthews was found. On the morning the body was found, he saw a man walking up appellant's railroad track, north. He did not know the man. The man he saw was about five feet and six inches high, medium build, and wore a dark suit of clothes and slouch hat, probably of a brown color. About five minutes after this man passed up the track, a stock train of appellant passed, going north, running about twenty-five or thirty miles per hour. The man Baptist saw, who had just preceded the train up the track, was walking very brisk when he passed the section house—a little over an ordinary walk, and about like a business man would go to and from his business. This witness on the same morning found one-half of a vest about one mile from the point where the dead body was found. This piece of goods or vest was of the same quality of goods, in the witness' judgment, as the clothes the man wore who passed the section house, going north, on the appellant's track. This piece of a vest had not been cut, but torn, from the other part of the garment. Baptist did not know whether the dead body found was the same man he saw pass the section house, or not. When Matthews left home, some months before the accident, he carried with him two hats—one a black, and the other a drab. He also took with him a dark-brown coat and vest, and a lighter-colored brown pair of pants. After his death the black hat was returned to his wife, but the coat, vest, pants, and drab hat were not.

"There were about three miles of appellant's railroad lying within the corporate limits of the city of Ft. Worth, its general direction being north and south. Situated within the city limits, about one mile and a half north of the depot, and on the west side of the road, is what is known as 'Old Cemetery.' Beginning near Peach street, which is about one-fourth of a mile south of the point where the dead body was found, and extending north to the Trinity river, about a mile, the railroad is built upon an embankment varying in height, but a good portion of it is probably 15 feet high. Just north and near Old Cemetery were grounds that had been used for campers for many years, and the stock yards are about three miles north of the city.

"H. E. Bemis, for defendant, testified: 'I am a locomotive engineer. Have been for 24 years. I am in the employ of the G., C. & S. F. Ry. Co., and have been for 16 years. I know about a man having been run over about May 8, 1899, in the northern part of Ft. Worth, near the Old Cemetery; that is, what was told to me afterwards was the body. I heard there was a body run over. On that morning I was running an engine on a

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train. We left the Ft. Worth Station at 6 o'clock. I know where the Old Cemetery is, in the city of Ft. Worth. I remember passing it that morning. The railroad runs right close to it. Some of the embankments are walled up, to keep it from sliding into the cemetery. That morning was very foggy. As near as I can recollect we were making about twenty-five miles an hour when we passed the Old Cemetery that morning. I did not time myself; just judging it—the speed and grade, and things like that. It is a down grade there towards the Trinity river. After leaving Peach street there are no more surface crossings before you get out of town. As we went along by the Old Cemetery, my attention was attracted to something on the track. It was a dark object, and, going at that rate of speed, it being so vague, and all considered, I could not distinctly tell what it was—whether it was a pile of rocks, or what it might be. I thought it might be a hog or a dog, or something like that. I could not tell. It was not a great distance ahead of the engine; only a short distance. I would not think it was more than thirty or fifty feet; something like that. I could not tell. You could form a pretty good idea, knowing the condition of the weather and the speed of the train. I could not say how far it might have been ahead. I should say a car length in front of the engine, which is from thirty to forty feet. About twenty-five or thirty feet is the engine's length. I have not the exact dimensions. That is my best judgment. I know the fireman noticed that object by his asking the question, "What is that?" that is how I know he did. He made the exclamation, "What is that?"—is about all I remember was said between me and the fireman about the time we went over that object. I do not remember what else was said in that conversation. It has been too long ago. Our first meeting point was the stockyards. We had orders that we had until 6:15 to get to the stockyards. The other train had the right to come out on the main line and come to Ft. Worth against us after that. They had orders to wait until 6:15 for us. We met another train that morning at the stockyards. I did not see any man that morning walking along the track in front of the engine, and did not strike any man walking along in front of my engine. As we went along the track that morning I was watching the track closely. When it is foggy, if anything it is more necessary to keep a constant lookout. The headlight of my engine was burning. In a fog the headlight of an engine is of no aid to the engineer. The idea is that it aids one in a fog to see the engine. Going at the rate of speed that we were at the time we hit the object on the track, I could not have checked my train by the use of the appliances at hand in time to prevent running over that body.'

"A. R. Woodward, for defendant, testified: 'I reside at Cleburne. I am a locomotive engineer. I was a fireman before my promotion in 1901. I remember the circumstances of a man being run over alongside of the Old Cemetery, in the northern part of Ft. Worth, some time in May, 1899. I was on an engine

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running from Ft. Worth that morning. H. E. Bemis was my engineer. I am familiar with the track. I know where the Old Cemetery is. The cemetery borders on the right of way. My train passed there about 6 o'clock in the morning. It was very foggy, and, if I remember, misting rain some. About the time we passed Peach street there was a signal given for the curve—both bell and whistle. I don't know just how long the bell continued to ring as we passed the Old Cemetery, but some distance down the road. The signal was given somewhere near Peach street, both by bell and whistle. The whistle signal is two long blasts and two short blasts for every road crossing or curve. The fireman rings the bell. I was ringing the bell on that morning. As we passed along the track by the Old Cemetery that morning, I saw an object on the track. As we were going down the hill, I was sitting on the seat box and looking ahead; and this object appeared on the track, and looked very unusual and uncommon, and I looked closer at it. I don't suppose I seen the object over sixty, seventy, or eighty feet ahead of the engine. We passed over it quickly, and, as we passed over it, I glanced over at the engineer and says, "What is that? He says, "That's what I want to know." That is about all there was to it. There was a general conversation to the stockyards. The engineer spoke up very soon, and says, "I believe it looked like a human form." I says, "That's what it looks like to me."

"John Woods, a negro, had spent the night at his mother's, who lived near the appellant's railroad, and about 200 yards north of where the dead body was found. He was walking down the track southward on the morning Matthews was killed, going to the city of Ft. Worth. He met a freight train loaded with cattle on the railroad track, going north. He heard no signal of the approaching train, either by ringing of the bell or sounding of the whistle, and the train was within about 30 or 40 feet of him when he discovered it. He saw and heard it about the same time. He stepped aside to let the train pass, but it was running so fast and so near to him before he discovered it that he narrowly escaped being struck by it. After the train passed, Woods got back on the track and proceeded on towards the city, and, when about 100 yards south of the point where the train passed him, he discovered the body of a dead man lying on the railroad track. This body was badly mangled and almost nude, nearly all the clothing having been torn from it, but was warm when found, and blood flowing from it freely.

"It was admitted on the trial that the body found by John Woods and viewed by the other witnesses was that of J. L. Matthews, and that the point where Matthews was killed was within the corporate limits of the city of Ft. Worth. The morning Matthews was killed there was a very dense fog.

"By an ordinance of the city of Ft. Worth, it was made a misdemeanor for any person to trespass upon the premises of another or corporation without his or its consent; and it was also made a penal offense, by an ordinance of that city, to run a train

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anywhere within the city limits at a greater rate of speed than six miles per hour. Appellant had also promulgated a rule as follows: 'All trains will reduce speed to six miles per hour through the corporate limits of * * * Ft. Worth.' Indorsed on the time card containing this rule was the following: 'For the information and government of employees only. The company reserves the right to vary from it at pleasure.' It was admitted that this rule was in force at the time of the accident.

"Appellant's railroad track north of Peach street and alongside of the Old Cemetery, and where J. L. Matthews was run over by appellant's train and killed, was commonly and habitually used by a great number of pedestrians at the time of the accident as a footpath, and had been so used for many years prior thereto. This track had been used so constantly as a footpath, and by such a large number of people, and for so long a time, that we conclude that appellant's agents and servants located at Ft. Worth, and those operating its trains over said track, had full knowledge of such use.

"M. R. Pendell, for defendant, testified: 'I was superintendent of the Northern Division of the Santa Fe in May, 1899. My duties as superintendent took me all over the line. I had full charge of the track north of Ft. Worth between the station and the Ft. Worth Stockyards. We were making some improvements along there at that time. I used to go there sometimes two, three, and four times a week; sometimes over it several times. Was division superintendent three years and a half, and was trainmaster three years and a half before that time. There was no footpath along that track. Like any other track, occasionally saw people on it. We had workmen along there. There were few people along there. I had full control of the track along there by the cemetery. There was no one—not even myself—had any authority to give permission to citizens and outsiders to use the tracks as a highway. The general manager or general superintendent at Galveston did have this authority. Colonel Polk was then general manager, and B. F. Yoakum was general manager prior to Colonel Polk. If any authority had been given to any person for footway or use of the track, it would have gone through my hands—through my office. It would have come under my jurisdiction.

"L. J. Polk testified: 'I am 46 years of age; residence, Galveston, Texas. My occupation is that of general manager of the Gulf, Colorado & Santa Fe Railway Company, and my residence and occupation were the same in May, 1899. The company caused notice to be printed and posted at all depots, warehouses, and other numerous places on the company's property, and, as far as practicable, the notice has been kept posted ever since that time. I did not know that the portion of the defendant's track in question has been, and was for a long time prior to May 8, 1899, used by the public as a footway. I have not been so informed. I have no personal knowledge as to what extent the track of the company has been used at Ft. Worth.'

"Appellant had posted on the north and south ends and on the

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sides of its depot at Ft. Worth, in conspicuous places, notices warning the public and positively forbidding them 'to enter, sit, stand or walk upon its railroad side tracks, right of way,' etc. This depot was situated one mile and a half south of the point where J. L. Matthews was run over and killed. There is slight evidence tending to show that there may have been a notice at Peach street, which is about one-fourth of a mile south of where the accident occurred, but we think the verdict of the jury embraces a finding that there was none there; and we find there was no such warning notice nearer than one mile and a half of the point where Matthews was run over by the train. There was no express consent on the part of appellant or its agents for pedestrians to use that portion of its railroad track in question as a footpath. We also think the verdict of the jury embraces a finding that, at the time J. L. Matthews was struck by appellant's train, he was walking along on appellant's railroad track, and was not lying down upon the track; and, in deference to the verdict, we so find.

"Appellant offered, by L. J. Polk, its general manager, to prove that appellant had never consented to the use by the public or any person or persons, except on business of the company, of the appellant's right of way, depot grounds, or reservation as a pathway. Appellees' counsel objected to the introduction of this testimony on the ground 'that it stated an opinion and conclusion of the witness, and involved not only a question of fact, but a question of law as well, and that it invaded the province of the jury: being a statement of the very question which the jury was to decide.' The objection was sustained, and the testimony excluded.

"When the dead body of Matthews was discovered, it was almost nude, nearly all the clothing having been torn from it. The witness Prince, in testifying, did not describe the size, form, or clothing of either of the men he saw going north on appellant's railroad track just a few minutes before the train passed and Matthews' dead body was found. Nor did he or any other witness describe what there was of clothing on Matthews' body. The trial court permitted the witness Prince to testify, over appellant's objection, that such testimony was 'an opinion and conclusion of the witness on a matter that was for the jury, and that it was incompetent, irrelevant, and immaterial, as follows: 'I have not undertaken to say that I believed that one of the men walking on the track was the man that was killed. It is my opinion that such is a fact from the resemblance of the dead man, in form and clothes, to the second man I saw going along the track.'

"Upon the issue of contributory negligence the court charged the jury as follows: 'You are further instructed that if you find and believe from the evidence that J. L. Matthews was walking along the defendant's track, and was struck and killed by said train; but if you further believe from the evidence that in going upon said track to walk along same at the time and under the

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circumstances he did, if you find he was so walking, said Matthews was guilty of negligence, as this term has been defined to you; or if you believe that said Matthews was at the time in a state of intoxication, and that such state of intoxication placed him in such a condition that he was unable and failed to exercise ordinary care for his own safety, as ordinary care has been heretofore defined to you, and that by reason of such condition he was struck and killed by said train, if you find he was so struck and killed; or if you believe from the evidence that said Matthews could, by the exercise of ordinary care, have seen or heard said train in time to have gotten out of the way of it and avoided injury; and if you further believe from the evidence that he failed to look and listen, or to do either, for an approaching train, and that in such failure, if you find he did so fail, you find and believe said Matthews was guilty of negligence, as this term has heretofore been defined and explained to you; and you further believe that said negligence, if any, proximately contributed to his death; or if you believe from the evidence that there was sufficient space for said Matthews to have walked along the embankment of defendant's roadbed, outside of the railway tracks, without danger of being struck by a passing train; and if you further believe from the evidence that when he was struck by said train, if you find he was struck by said train, he was walking between the rails on defendant's roadbed; and if you further find and believe that in walking between said rails, if you find he was so walking, said Matthews was guilty of negligence, as this term has been defined to you—then, in either of the events mentioned in this paragraph, you will find for the defendant, although you may believe that the defendant was negligent in any or all of the particulars submitted to you by the court.'

"Question 1. Did the trial court err in submitting to the jury the question whether or not the deceased, J. L. Matthews, was guilty of contributory negligence in being upon appellant's railroad track at the time and place of the injury? In other words, under the facts stated, was the said Matthews guilty of contributory negligence, as a matter of law, in being upon appellant's railroad track at the time and place when run over and killed and should the jury have been instructed to return a verdict in favor of defendant?

"Question 2. Under the facts and evidence stated, was the said J. L. Matthews, at the time he was run over, a licensee upon appellant's railroad track?

"Question 3. Did the court err in permitting the witness Prince, over appellant's objections, to testify: 'I have not undertaken to say that I believed that one of the men I saw walking on the track was the man that was killed. It is my opinion that such is a fact from the resemblance of the dead man, in form and clothes, to the second man I saw going along the track?'

"Question 4. Did the trial court err in excluding the testimony of appellant's general manager, L. J. Polk, that appellant had never consented to the use by the public or any person or persons,

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except on business of the company, of appellant's right of way, track, depot grounds, or reservation as a pathway?"

We answer the first question, that the facts do not show that, as a matter of law, Matthews was guilty of contributory negligence in walking upon the defendant's roadbed. Therefore the trial court did not err in submitting that issue to the jury.

To the second question, we reply, under the facts found by the Court of Civil Appeals, the jury might have concluded that Matthews was a licensee, as defined by the decisions of this court. *Washington v. Railroad Co.*, 90 Tex. 314, 38 S. W. 764; *Lee v. I. & G. N. Ry. Co.*, 89 Tex. 583, 36 S. W. 63; *Railroad Co. v. Watkins*, 88 Tex. 20, 29 S. W. 232; *Railroad Co. v. Crosnoe*, 72 Tex. 79, 10 S. W. 342. It is well settled by the decisions of this court and by the decisions of courts of other states that if a portion of the roadbed of a railroad company has been commonly and habitually used for a long time by the public as a footpath, with the knowledge and acquiescence or by the permission of the company, it is considered as having licensed the public to use such portion of its roadbed for that purpose. The evidence in this case would justify a jury in finding that the railroad company had knowingly permitted the public to use its roadbed at the place of the accident for a number of years, and, under such facts, Matthews would be considered as a licensee; that is, he would not be held to be a trespasser in the sense that his act of walking upon the roadbed would per se constitute negligence that would defeat a recovery for his death by his wife and children.

We answer the third and fourth questions in the negative.

TEXAS & N. O. RY. CO. v. McDONALD.

(Supreme Court of Texas, June 25, 1905.)

[88 S. W. Rep. 201.]

Railroads—Negligence—Personal Injuries to Person on Track—Contributory Negligence.*—The act of sitting on a railroad track over which cars are expected to pass is a negligent one, which precludes one guilty of it, when hurt, from complaining of mere negligence on the part of those operating the cars in failing to discover his presence and avoid injuring him.

Same—Evidence.—Where defendant railroad was delivering cars, to be unloaded by the consignee's men, and was permitting all uses of

*As to the care due licensees and trespassers on railroad tracks, see foot-note appended to *Central of Georgia Ry. Co. v. Williams Buggy Co.* (Ga.), 14 R. R. R. 171, 37 Am. & Eng. R. Cas., N. S., 171; foot-notes appended to *Anderson v. Seattle-Tacoma Interurban Ry. Co.* (Wash.), 14 R. R. R. 380, 37 Am. & Eng. R. Cas., N. S., 380; foot-notes appended to *Jordan v. Grand Rapids & I. Ry. Co.* (Ind.), 13 R. R. R. 397, 36 Am. & Eng. R. Cas., N. S., 397; foot-note appended to *Maysville & B. S. R. Co. v. McCabe* (Ky.), 13 R. R. R. 459, 36 Am. & Eng. R. Cas., N. S., 459; foot-notes appended to *Koegel v. Missouri Pac. Ry. Co.* (Mo.), 11 R. R. R. 358, 34 Am. & Eng. R. Cas., N. S., 358.

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the cars and of the track and right of way proper in carrying on the work, it was under no obligation to plaintiff, one of the men, while not so engaged, which it did not owe to the public generally, who might be about the track and cars.

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by Ed. McDonald against the Texas & New Orleans Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

For former opinion, see 85 S. W. 493.

Baker, Botts, Parker & Garwood, Andrews, Ball & Streetman, and C. L. Carter, for plaintiff in error.

Jno. W. Parker and R. R. Hazlewood, for defendant in error.

WILLIAMS, J. The defendant in error, the plaintiff below, recovered judgment in the district court and Court of Civil Appeals against plaintiff in error, as defendant, for damages for personal injuries sustained under the following circumstances:

Plaintiff was in the service of one Shea, a contractor with the city of Houston, to whom the defendant was delivering gravel upon flat cars on a spur track which was located on Burnett street, in that city, running east and west. West of the place of accident was McKee street, and east of it was Hardy street, both running north and south and intersecting Burnett street. For several days before plaintiff was hurt, the defendant had been delivering upon this spur track the cars loaded with gravel, which was taken off and put in wagons by men employed by Shea. From time to time the unloaded cars were removed, and other loaded ones set in to be unloaded. The evidence conflicts as to the time of the day when this handling of the cars had been done, the plaintiff introducing the evidence of a witness from which it might be inferred that it had been done, at least during the time of plaintiff's employment, and for a day or two before, in the intervals between the times of the hands quitting and resuming work in the evenings and mornings, and when they were not about the track. The defendant's evidence, on the other hand, tended to show that the practice had been to take out empty and put in loaded cars in the daytime, and that, in order to avoid interruption of the work of unloading, it had been arranged between Shea's representative and the employees of the defendant that this was to be done during the noon hour, from 12 to 1 o'clock, when Shea's men were not at work but were getting their dinners. On the day in question there were upon the spur, and west of McKee street, a long string of unloaded cars. East of that street, and between it and Hardy street, were other cars, some of which had been unloaded and others not, an opening between the two strings having been left at McKee street as a passageway. The number of cars in the last-named string is variously estimated, but there were certainly more than two, and all but two had been unloaded. Of the two nearest Hardy street,

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one had been nearly unloaded, and the other was full of gravel. On that day, just before 12 o'clock, Shea's representative arranged with defendant's foreman to take out the unloaded cars and put in other loaded ones during the noon hour, in order that there might be work for the hands to do in the afternoon. An announcement of this arrangement was made to the men at or just before noon, but plaintiff and some of the others did not hear it. Plaintiff had been at work about that place for two or three days, but, as well as can be gathered from his confused statement, had been unloading cars only a day and a half. According to his testimony, he had known of no engine coming in upon this spur during the daytime, and did not expect that the standing cars, which he says were there all the while he worked there, would be disturbed during the hour allowed for dinner. When the signal for dinner was given, the hands left their work of unloading the cars, and those who had their dinners with them sat down to eat at various places near the cars. As the weather was hot, some of them sought the shade of trees and weeds near by. Plaintiff and two others took their positions under one of the unloaded flat cars, plaintiff sitting on the end of a cross-tie outside of but near to the rail, and in front of the brake beam, facing east, with the edge of the car extending over him. While he was thus seated, employees of defendant came upon the spur track with an engine to take out the empty cars, coupled with the cars west of McKee street, pushed them across the open space, and struck those east of that street, causing them to move eastward, so that the brake beam or shoe of the one by which plaintiff was sitting struck him, knocking him under the wheels and causing the loss of both legs. The evidence, though conflicting, is sufficient to authorize a conclusion that this was done without any signal of bell or whistle or other warning of the intended movement, except the announcement before stated, not heard by plaintiff.

The part of Burnett street south of the track, on which side plaintiff was seated, was unused as a street, and was covered with tall weeds. There is evidence to the effect that, before the movement of the cars, a switchman walked down on the north side a part of the distance from McKee to Burnett street, but did not look under the cars to see if persons were there. There is much testimony in the case directed to the question whether or not the parties under the cars could have been seen by him or others attending the engine, much of which, as stated, is very obscure. It does not show that any of the defendant's servants did see them or know their situation, and the judgment is not based on that theory. Nothing is shown to have been brought to their knowledge during the time they had been engaged in handling the gravel cars to indicate a probability that any of Shea's hands would be under the cars. It was shown, indeed, that this spur, prior to this period, had not been much used, and that engines had rarely gone upon it; that it had been a storage or repair track for cars in bad order; and that it had been a practice

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for employees of defendant to eat their dinners, and for children to play, about and under such cars. But all cars of this character had been removed to make room for the movement of the gravel cars, as stated, and during the time of plaintiff's service there, and longer, this had been the use made of the track. There is nothing to indicate that plaintiff knew of or was influenced by the practice of the employees and children to be under the cars.

One of the positions of the defense is that, from these facts, no reasonable conclusion can be drawn but that plaintiff was himself guilty of such negligence, contributing to his injury, as precludes him from recovering, and we are of the opinion that it must be sustained.

That the act of sitting upon a railroad track over which cars are expected to pass is a negligent one, which precludes a person guilty of it, when hurt, from complaining of mere negligence on the part of those operating the cars in failing to discover his presence and avoid injuring him, is well settled. 2 Thompson, Com. Neg. § 1789, and cases cited. Of that character was plaintiff's act in not only sitting on the track, but in sitting immediately under a car where his view of the movements of the defendant's servants, and their view of him, were greatly, if not wholly, obstructed, unless it is excused by his claim that he did not know or expect that the cars would be moved. What assurance had he of this? He had none, according to any view that can be taken of the evidence. That for defendant is to the effect that the switching of the cars was done in strict accordance with the understanding and the previous practice. This, however, may be treated as disproved by the evidence for plaintiff. The facts stated by the witness for plaintiff from which the inference is drawn that the taking out and putting in of cars had for a few days prior to the accident been done between the times when Shea's hands quit work in the evenings and resumed in the mornings do not go to the extent of showing that there had been any understanding that the business should be managed in this way or that this practice should continue and be uniform. They gave no assurance that the defendant would not take out empty cars at any other time, when it could do so consistently with the work being done for Shea.

When we come to plaintiff's own testimony, we find that the only facts stated by him as a basis for his belief that the cars would not be disturbed are that these cars had been on this track and had not been moved during the time of his service there, and that no engine had come upon the spur. He claims, not that any particular time had been fixed for putting in and taking out cars, but that he judged they were not to be disturbed before they were unloaded. He says: "I do not know whether it was the intention to move these cars until they had been unloaded or not; they were there to be unloaded, and I knew that after we got them unloaded I supposed they would move them somewhere; I did not suppose they would do that until they were unloaded." His inference that loaded cars would not be taken out was a just

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one; but the two that had not been unloaded were so connected with others that were empty that any attempt that might be made to take away the latter was likely to move the former, and that is what happened.

We have asked what assurance he had that the cars would not be moved, because in our opinion nothing short of that would justify him in taking a position, merely from choice and for his own pleasure, where any movement of the car was almost sure to hurt him. In taking this position, he was not performing any duty or work, and had not even the excuse that it was the only convenient place where he would be in the shade. Without some definite assurance or understanding of the kind referred to, the only restriction upon the right of the defendant to move its cars was that to be implied from the fact that it was delivering them to be unloaded by Shea's men, and was permitting all uses of them and of the track and right of way which was proper in carrying on such business. This imposed upon it the duty of conducting its business with due regard to the safety of the men while engaged in carrying on this work, and, had plaintiff been hurt while so engaged, his case would have been different. He would then have been where he had the right to be, and where defendant must have anticipated he would be; and it may be that defendant would have had no right to disturb the cars without knowing his situation, and he could have relied on the observance of its duty. But, as he was not thus employed, no such restriction existed upon the right of the defendant to control its own business, and in doing so it was under no obligation to the plaintiff that it did not owe to the people generally, who might be about the track and cars. Hence he had no right to assume that it would know that he might be situated as he was and would find him out.

There being nothing to prevent the defendant moving the cars at that time, the very fact that they were cars on a track, the business in which they were employed, constituted a warning that the empty ones were at some time to be moved, and that they might as well be moved at this time as at another. But for the fact that plaintiff was under one of them, no better time could have been chosen, and of that fact defendant's servants had no notice. If it be conceded that they were guilty of negligent omissions in moving the engine without signals, we think it unquestionably true that his own contributing negligence was the chief cause of his misfortune. His contention amounts to this: that having thus, without reason and for his own pleasure, placed himself in one of the most dangerous positions he could have chosen, he yet had the right to exact of defendant and its servants the foresight and the clocklike precision of action necessary to discover and save him from the consequences of his own imprudence—a foresight and caution for his protection utterly wanting in his own conduct. Having thus thoughtlessly exposed himself to a danger from which he suffered, and which he could easily have foreseen and avoided, he is not in a position to say that

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he relied on the defendant's employees to discover his danger and protect him from it. *Central Ry. Co. v. Smith*, 78 Ga. 694, 3 S. E. 397. His case is not better than that of persons who negligently walk, sit, or lie upon railway tracks. These often do not know, or have especial reason to expect, that trains will be passing while they are on the track; but of this they take the risk, the very nature of the place warning them of the dangers they incur. The fact that the cars were being used as they were for the purpose of hauling gravel to this place notified plaintiff of the probability of the empty ones being moved so as to cause a movement of the one under which he sat. In this respect his attitude is the same in principle as those instanced, and, in so far as he so placed himself as to limit the opportunities of himself and of defendant's servants to see his peril, it is worse.

Giving due consideration to the verdict and the judgments of the courts below, we yet cannot escape the conviction that the evidence conclusively establishes a case of contributory negligence which requires us, reluctant as we are to interfere on such a ground, and regretting, as we do, the necessity, to reverse the judgment.

Reversed and remanded.

BRIGGS v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, Middlesex, June 21, 1905.)

[74 N. E. Rep. 667.]

Accident at Crossing—Bicyclist Struck by Gate—Contributory Negligence.—In an action against a railroad for personal injuries received by plaintiff through being struck by a descending gate at a street crossing while attempting to cross the tracks, evidence examined, and held not to warrant a finding that plaintiff was in the exercise of due care.

Same—Same—Same.*—In an action against a railroad for personal injuries received by plaintiff through being struck by a descending gate at a street crossing while attempting to cross the tracks, the fact that the gate was going up when he started to cross, did not justify him in ignoring all the other sights and sounds indicating that he could not safely advance.

Action by John J. Briggs against the Boston & Maine Railroad. Judgment on the verdict.

James W. Wellington, for plaintiff.

Richardsons, Trull & Wier, for defendant.

KNOWLTON, C. J. The plaintiff was riding on his bicycle in Waltham, along a street which crossed the defendant's railroad, on which, at that point, were four tracks where trains passed very frequently. When he was about 300 feet from the crossing, he discovered that the gates were down, and he rode his bicycle to the curbstone, and there engaged in conversation with one McGluckey, who stood upon the sidewalk in front of the building in

*See extensive note appended to *Sager v. Atchison, etc., Ry. Co.* (Kan.), 14 R. R. R. 670, 37 Am. & Eng. R. Cas., N. S., 670.

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which his office was located. He continued the conversation about 10 minutes. During the first three minutes the gates were down, then they went up entirely, and remained up two or three minutes, then they were lowered while an express train passed. In the meantime a local train entered the station and stopped at a point from 50 to 100 feet from the crossing. It was daylight, and the engine and the whole train were in full view of the plaintiff while he stood talking with McGluickey. The gates were then down, and the gateman allowed them to remain down while a flagman attached lanterns to the ends of them. As two women were apparently desirous of passing, he raised the gates about two-thirds up, and allowed them to pass. Then the bell of the engine began to ring, indicating that this train was about to start, and the gateman, as soon as he heard the bell on the local train, reversed the direction of the gates, and began to lower them. The plaintiff, who had started to ride over the crossing, was hit on the head and knocked down into the street by one of the gates. The approaching train was all the time in full view. The continuous ringing of the engine bell was in his hearing, and other bells were ringing on the gates during all the time that they were descending. No bell rang while the gates were going up. The plaintiff testified that as he saw the gates going up he jumped on his bicycle and rode towards the crossing; that as he rode he was looking on the ground, straight ahead, and did not see whether the gates were being lowered or whether the local train was moving, and did not hear, or listen to hear, the bells on the gates or the bell on the engine, or know whether they were ringing or not. He further testified that he knew that trains passed very frequently over this crossing, going both east and west; that the whole of the local train could be seen the entire distance between where he stood with McGluickey and the crossing; that there were buildings on the other side of the street which obstructed the view of the tracks on that side of the crossing until he came within a few feet of the tracks. He also testified that he could have stopped his bicycle at any time within a distance of 30 feet.

We are of opinion that there was no evidence to warrant a finding that the plaintiff was in the exercise of due care. While the fact that the gate was going up when he started to go across was proper to be considered, it did not justify him in shutting his eyes and ears to all the other sights and sounds which should have shown him that he could not safely go forward. His testimony, in connection with the undisputed facts as to the situation and the dangerous conditions at the crossing, shows that he was entirely inattentive, and was not in the exercise of ordinary care. The case resembles in some of its features *Sewell v. New York, New Haven & Hartford Railroad Company*, 171 Mass. 302, 50 N. E. 541. See, also, *Creamer v. West End Street Railway Company*, 156 Mass. 320-324, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. Rep. 456; *Chase v. Maine Central Railroad*, 167 Mass. 383-387, 45 N. E. 911.

Judgment on the verdict.

MACGREGOR v. RHODE ISLAND CO.

(Supreme Court of Rhode Island, March 15, 1905.)

[60 Atl. Rep. 761.]

Permanency of Injuries—Pleading.—Where a description of injuries sued for did not show that they were necessarily permanent, plaintiff should allege their permanency, in order to recover therefor.

Personal Injuries—Future Consequences—Sufficiency of Evidence.—In an action for injuries, to entitle plaintiff to recover present damages for apprehended future consequences, the evidence must show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.

Same—Evidence—Life Tables.*—Where, in an action for injuries not of themselves permanent, nor alleged to be permanent, the evidence did not establish with reasonable certainty that plaintiff would not recover therefrom, the admission of life tables in evidence was erroneous.

Excessive Verdict.—Plaintiff, while a passenger on defendant's street car, sustained a severe shock or jolt, which caused pain and suffering to the date of the suit. No bones were broken, nor was there a loss of any limb or organ; and her physician testified that under the most favorable conditions her recovery would be a question of probably 18 to 24 months, but that under ordinary circumstances it might last indefinitely. Held, that a verdict for \$6,000 was excessive.

Action by Emma R. MacGregor against the Rhode Island Company. On defendant's motion for a new trial. Motion granted on issue of damages.

Argued before DOUGLAS, C. J., and DUBOIS and BLODGETT, JJ.

David S. Baker and Lewis A. Waterman, for plaintiff.

Henry W. Hayes, Frank T. Easton, Lefferts S. Hoffman, and Alonzo R. Williams, for defendant.

BLODGETT, J. The defendant's exception that the verdict is contrary to the evidence must be overruled. The liability of the defendant is clearly established by the testimony, and the only questions remaining for consideration are questions relating to damages.

1. The declaration contains no averment of permanent injury, and, while such an averment is not required when it appears from the nature of the injury that permanent incapacity must inevitably result, yet the rules of good pleading require such an averment when the injuries complained of are not necessarily permanent in their nature. Thus, in 1 Chitty, Pl. (16th Am. Ed.) § 411, the rule is thus stated: "Whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent the surprise on the defendant which might otherwise ensue on the trial, the plaintiff must in general state the particular damage

*See foot-notes appended to *Atlanta, etc., Ry. Co. v. Gardner* (Ga.), 14 R. R. R. 602, 37 Am. & Eng. R. Cas., N. S., 602; foot-note appended to *Philip v. Heraty* (Mich.), 12 R. R. R. 39, 35 Am. & Eng. R. Cas., N. S., 39.

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which he has sustained, or he will not be permitted to give evidence of it." This is but an amplification of the familiar rule of pleading that special damages must be specially averred. In the case of an injury resulting, for example, in the loss of a limb or of an eye, it is obvious that the element of permanency is necessarily implied in the very description of the injury, and consequently an averment to that effect is not requisite. But there are many injuries, the description of which shows that their permanence is merely probable, as well as many other injuries where permanence is more doubtful and more improbable, but nevertheless is within the bounds of possibility. We think it is no hardship to require a plaintiff in such cases to aver permanence, if he wishes to offer evidence of it. And see *Watson on Damages for Personal Injuries*, § 305. In the case at bar the accident complained of was a severe shock or jolt to the plaintiff while a passenger seated in the car, not resulting in any broken bones or in the loss of any limb or organ, and causing pain and suffering to the date of suit. The declaration contains the averment that "for a long time to come she will continue to suffer like pain and nervous shock, and will be unable to earn any wages or income," etc. A careful consideration of the medical testimony offered by the plaintiff, and construed most favorably in her behalf, shows that there is no evidence that the injuries complained of will be permanent, since no one of them testifies that their permanence is even probable. Their utmost claim is that under certain conditions her injuries may last indefinitely. Thus the testimony of Dr. Eccleston, who attended the plaintiff from the month of August succeeding the accident until within a week of the trial, and who was called as a witness on her behalf, is as follows on the question of the permanency of her injuries: "Q. 29. Has she improved? A. I think she has. Q. 30. How much? A. Well, I think there is a perceptible improvement. Q. 31. Judging from her condition, how long do you think this trouble may last? A. Under the most favorable conditions, I should think that it would be a question of probably eighteen to twenty-four months. Q. 32. Under the most favorable conditions? A. Yes. Q. 33. And under ordinary circumstances how long do you think it would last? A. No man knows. Q. 34. How long may it last? A. It might last indefinitely."

2. In *Strohm v. N. Y., L. E. & W. R. Co.*, 96 N. Y. 306, the Court of Appeals of New York thus defines the rule: "Future consequences which are reasonably to be expected to follow an injury may be given in evidence for the purpose of enhancing the damages to be awarded. But to entitle such apprehended consequences to be considered by the jury, they must be such as in the ordinary course of nature are reasonably certain to ensue. Consequences which are contingent, speculative, or merely possible are not proper to be considered in ascertaining the damages. It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury, nor even that they are likely to so develop. To entitle

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a plaintiff to recover present damages for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury." *Strohm v. N. Y., L. E. & W. R. Co.*, supra, was affirmed and followed in *Tozer v. N. Y. & H. R. Co.*, 105 N. Y. 617, 11 N. E. 369, and in *Ayres v. Delaware, L. & W. R. Co.* (1899) 158 N. Y. 264, 53 N. E. 22; also in *L'Herauld v. Minneapolis*, 69 Minn. 264, 72 N. W. 73, and *McBride v. St. Paul City R. Co.* (1898) 72 Minn. 294, 75 N. W. 231. And see 1 Sedgwick on Damages, § 172. In *W. U. Tel. Co. v. Morris* (1897) 83 Fed. 992, 28 C. C. A. 58, the United States Circuit Court of Appeals says: "In some cases injuries are sustained which are of such a nature as will in themselves warrant an inference that they will permanently affect the injured person's health or lessen his or her capacity to labor; but in the present case we cannot say that the injuries inflicted by the surgical operation were of such a character that the jury were at liberty to infer therefrom that the health of the plaintiff would be permanently affected, or that her capacity to labor would be thereby impaired. It is just as reasonable to suppose, in the absence of any evidence on the subject, that she sustained no loss in either of these respects," And see *Dudley v. Front Street Cable Ry. Co.* (C. C.) 73 Fed. 128; *Cameron v. Union Trunk Line*, 10 Wash. 512, 39 Pac. 128; *Hardy v. Milwaukee Street Ry. Co.*, 89 Wis. 187, 61 N. W. 771, affirmed in *Kucera v. Merrill Lumber Co.* (1895) 91 Wis. 645, 65 N. W. 374; *Kenyon v. Mondovi* (1897) 98 Wis. 54, 73 N. W. 314.

3. Such being the state of the pleadings and of the evidence, we fail to see the relevancy of the Carlisle life tables to show the expectancy of the plaintiff's life. In *Sweet v. Providence & Springfield R. Co.*, 20 R. I. 785, 40 Atl. 237, we held that such tables were properly introduced in the case of an accident causing death, and we think that their admission is proper in cases in which permanent injury necessarily or with reasonable certainty must result. *Foster v. Bellaire* (1901) 127 Mich. 13, 86 N. W. 383, and cases cited. And see, also, *Steinbrunner v. Ry. Co.*, 146 Pa. 514, 23 Atl. 239, 28 Am. St. Rep. 806; *Kerrigan v. Penn. R. Co.*, 194 Pa. 105, 44 Atl. 1069; *Atlanta & West Point R. Co. v. Johnson*, 66 Ga. 269; *Ohio & Mississippi Ry. Co. v. Cosby et al.*, 107 Ind. 36, 7 N. E. 373; and *Stomne v. Hanford Produce Co.*, 108 Iowa, 145, 78 N. W. 841. But in a case in which permanence is neither averred nor even shown to be probable, not to say that it is not proved, we are of opinion that the admission of evidence as to the probable duration of the plaintiff's life is improper, and can only mislead the jury as to the real import of the testimony upon the question of damages.

While it is not possible to determine with accuracy from the record upon what testimony the jury based their verdict of \$6,000, it is nevertheless entirely clear that that amount is an excessive amount for such injuries as the testimony discloses in this case, if their duration is considered as established by the

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foregoing testimony; and, if the amount is based upon permanent injury for a period presumptively established by the life tables, it is sufficient to say that the evidence does not warrant a finding of permanent injury. In either event the defendant's exception thereto must be sustained.

The case will accordingly be remitted to the common pleas division for a new trial upon the single question of the amount of the plaintiff's damage.

LITTLE ROCK TRACTION & ELECTRIC CO. v. MCCASKILL.

(Supreme Court of Arkansas, April 22, 1905.)

[86 S. W. Rep. 997.]

Negligence—Evidence—Proximate Cause—Cutting Fire Hose.*—

Where the motorman of a street car negligently ran over a fire hose which was conveying water to a burning residence, cutting the hose, so that by reason of the waste of water from the opening the firemen lost control of the fire to such an extent as to cause the destruction of the furniture in the residence, the owner thereof was entitled to recover damages from the street railroad company, on the ground that the cutting of the hose was the proximate cause of the loss.

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by J. M. McCaskill against the Little Rock Traction & Electric Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The evidence showed that defendant street railroad company was operating a line on a street on which a fire plug was situated, from which water was being taken to extinguish a fire in plaintiff's house; that the hose was stretched across the car tracks, and was playing on the burning house under a full head of water; and there was evidence to show that a few minutes after the fire was under control a street car of defendant company approached the place where the hose was stretched across the tracks and ran over the hose, cutting it in two, whereby so much water was lost as to render the supply being used to extinguish the fire inefficient, and inefficient to such an extent that the fire thereupon increased its headway so that by the time the hose was repaired it was impossible for plaintiff to move his furniture and other property from the building before it was destroyed. Plaintiff testified that after the hose was repaired the flames were extin-

*As to what is, and is not, the proximate cause of an injury, see foot-notes appended to *Flaherty v. Boston & M. R. R.* (Mass.), 14 R. R. R. 246, 37 Am. & Eng. R. Cas., N. S., 246; *Wabash R. Co. v. Billings* (Ill.), 14 R. R. R. 203, 37 Am. & Eng. R. Cas., N. S., 203; *Denison, B. & N. O. R. Co. v. Barry* (Tex.), 14 R. R. R. 201, 37 Am. & Eng. R. Cas., N. S., 201; *Denison & S. Ry. Co. v. Carter* (Tex.), 14 R. R. R. 129, 37 Am. & Eng. R. Cas., N. S., 129.

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guished in a few minutes, and the motorman testified that he could see the light from the fire which lit up the sky, and that to his knowledge he did not run over the hose, he not having seen the same; and on cross-examination he admitted that he was not looking for the hose, but he was looking at the fire, and the court instructed: "If you find there was negligence by defendant, any loss to plaintiff which you undertake to compensate in damages must be such as is directly attributable to such negligence; not such as might or could have resulted, but such as did result from such negligence."

Rose, Hemingay & Rose and Cantrell & Loughborough, for appellant.

John Hallum, for appellee.

HILL, C. J. McCaskill's house was burning in the nighttime, and three streams of water were playing upon it, one from a hose crossing Markham street, which lay across the street car track. The hose was four or five inches in diameter, and the street brilliantly illuminated from the burning building, which was near by. A car of appellant company ran over the hose and cut it on each rail. There was no reason why the motorman could not have seen it for a long distance. He denies seeing the hose, but tells of watching the fire as he came near it. McCaskill's evidence tended to prove that the cessation of water from this hose stopped the work of taking furniture out of the burning house, and that the fire was in such a state of control that most of his furniture could have been rescued, if this stream of water had not suddenly ceased. The evidence conflicted, and the issues went to a jury, and a verdict for McCaskill resulted. The reporter will set out the instructions and the substance of the testimony.

The appellant presents the case of *Mott v. Hudson River Ry. Co.*, 1 Rob. 585, as conclusive against appellee's action. This is a decision of the Superior Court of the City of New York, and the case in question was heard and determined before Justices Robertson, White, and Barbour, and decided in 1863. The point reaching to this case is thus stated in the syllabus: "Damages caused by the spreading of a fire in consequence of the defendant's negligently injuring a hose actually in use in extinguishing it, whereby the only supply of water available for the purpose was stopped, are too remote to sustain an action." Justice White, in a dissenting opinion, pointed out that cutting a fire hose in an instance remotely causing loss would not be actionable, and then added: "But in the present instance the hose was actually carrying water upon the plaintiff's burning building, and rapidly extinguishing the fire, when it was cut. The plaintiff was instantly deprived by this act of the flow of water upon his house, and the flames that had been going out under the action of the hose immediately rose, and destroyed that and other property owned by him. It would be difficult to state a case of more direct or immediate damage resulting from a specific act." The same question came before the Supreme Judicial Court of Massachusetts in

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1872, and the Mott Case was cited as first in a long list of cases relied upon by the appellant, but it did not receive notice in the opinion. After discussing the question and reviewing cases on proximate causes, the court said: "The law regards practical distinctions, rather than those which are merely theoretical; and practically, when a man cuts off the hose through which firemen are throwing a stream upon a burning building, and thereupon the building is consumed for want of water to extinguish it, his act is to be regarded as the direct and efficient cause of the injury." *Metallic Compression Casting Co. v. Fitchburg R. R. Co.*, 109 Mass. 277, 12 Am. Rep. 689. The high standing of the Massachusetts court, the sound reasoning given, re-enforced by the able dissenting opinion in the Mott Case, impel the court to follow it, rather than the Mott Case.

No other questions are presented, and the judgment is affirmed.

HARSHMAN v. NORTHERN PAC. RY. CO.

(Supreme Court of North Dakota, Jan. 26, 1905.)

[103 N. W. Rep. 412.]

Wrongful Death—Right to Recover—Common Law.*—At common law and independent of statutory authority no right of recovery for the wrongful or negligent injury of another resulting in death exists.

Same—Same—Parties.—Where a right of recovery is given by statute, and the exercise of that right is committed to particular persons, it cannot be exercised by another person, even though he may be the sole beneficiary.

Same—Same—Same—Father of Minor.—Section 5976, Rev. Codes 1899, designates three classes of persons who may maintain an action for the wrongful or negligent killing of another. These do not include surviving parents. It is accordingly held that a complainant by a father in an action prosecuted in his own name and right to recover for the death of his minor son does not state a cause of action.

Complaint—Objections—Appeal.—Where a complaint wholly fails to set out a substantial cause of action, and cannot be made good by amendment, the objection to its sufficiency may be urged at any stage of the proceedings, and may be considered upon appeal by the court on its own motion.

(Syllabus by the Court.)

Appeal from District Court, Barnes County; W. S. Lauder, Judge.

Action by Jacob R. Harshman against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Ball, Watson & Maclay, for appellant.

Young & Wright, for respondent.

YOUNG, J. The plaintiff brought this action in his individual

*See foot-note appended to *Gregory v. Illinois Cent. R. Co.* (Ky.), 11 R. R. R. 380, 34 Am. & Eng. R. Cas., N. S., 380.

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capacity and right to recover damages from the defendant for the alleged negligent killing of his son, Walter Harshman, a boy 10 years of age. The complaint alleges, among other things, that the deceased was in good health; that the plaintiff was entitled to his services and earnings until his majority; and that said services and earnings, after deducting the cost of his maintenance, were of the value of \$2,000, for which sum he demanded judgment. At the opening of the trial counsel for defendant objected to the introduction of any evidence, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The objection was overruled. At the close of the testimony defendant moved for a directed verdict upon several grounds, one of them being "that the plaintiff has not shown that he has suffered any legal damage or injury through the death of said Walter Harshman which entitles him to a verdict." This motion was also overruled. Both rulings were excepted to. The jury returned a verdict for \$1,500 in plaintiff's favor. The defendant then moved in the alternative for judgment notwithstanding the verdict or for a new trial. The motion was in all respects denied, and this appeal is from the order denying the same.

The view we have taken of this case makes it necessary to consider but one question, and that is whether the complaint states a cause of action in plaintiff's favor. Counsel for defendant contend that it does not, and we fully agree with this contention. It may be said at the outset that whatever right of recovery exists for injuries caused by the negligent killing of another is created by legislative authority only. At common law no such right of recovery existed. This is well settled. "The authorities are so numerous and so uniform on the proposition that by the common law no civil action lies for an injury which results in death that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the state courts, and no deliberate, well-considered decision to the contrary is to be found." *Insurance Co. v. Brame*, 95 U. S. 754, 24 L. Ed. 580; *Carey v. Railway Co.*, 55 Mass. 475, 48 Am. Dec. 616, and cases cited in note, page 633; also *Am. & Eng. Encyc.* (2d Ed.) vol. 8, p. 855, and cases cited.

The statutory provisions upon which the plaintiff's right to maintain this action depends are contained in chapter 36, Code Civ. Proc. (sections 5974-5979, Rev. Codes 1899, inclusive). It is patent upon an inspection of these sections that no cause or right of action is given to a surviving father. Section 5974 declares that those who wrongfully or negligently cause an injury resulting in the death of another are liable notwithstanding the death of the person injured. Section 5975 fixes the measure of their liability by declaring that "in such actions the jury shall give such damages as they think proportionate to the injury resulting from the death to the persons entitled to the recovery." Section 5976, which designates the persons to whom the right of action

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is given, reads as follows: "The action shall be brought by the following persons in the order named: 1. The surviving husband or wife, if any. 2. The surviving children, if any. 3. The personal representative. If any person entitled to bring the action refuses or neglects so to do for a period of thirty days after demand of the person next in order, such person may bring the same." Section 5977 exempts the amount recovered from liability for the debts of the decedent, and provides that "it shall inure to the exclusive benefit of his heirs at law in such shares as the judge before whom the case is tried shall fix in the order for judgment, and for the purpose of determining such shares the judge may, after the trial, make any investigation which he deems necessary." Section 5978 provides that the action shall not abate by the death of either party. Section 5979 confers the power of making settlement, either before or after suit brought, upon the persons who are entitled to bring the action, and provides that "such compromise shall be binding upon all persons authorized to bring the action or to share in the recovery." It will be observed that the right of action is given to three classes of persons, and that the plaintiff belongs to neither one of them. We are bound to know, because of the extreme youth of the decedent, that there was no surviving wife or surviving children. The only remaining person, then, who could maintain this action, under the statute, is the personal representative. Statutes similar to this are found in almost all of the states, and it is universally held that only the persons designated in the statute can maintain the action. The reason is self-evident, namely, that the right or cause of action is statutory, and is given only to those whom the statute designates. See *Tiffany on Death by Wrongful Act*, § 616, and cases cited; also *Nash v. Tousley*, 28 Minn. 5, 8 N. W. 875; *Scheffler v. M. & St. L. Ry. Co.* (Minn.) 19 N. W. 656; *Major v. B., C. R. & N. Ry.* (Iowa) 88 N. W. 815; *Killian v. Southern Ry. Co.* (N. C.) 38 S. E. 873; *McGinnis v. M., C. & F. Ry. Co.* (Mo. Sup.) 73 S. W. 586; *Fabel v. C., C. & St. L. Ry. Co.* (Ind. App.) 65 N. E. 929; *Woodward v. C. & N. W. Ry.*, 21 Wis. 309; *Weidner v. Rankin*, 26 Ohio St. 522.

It is contended by plaintiff, however, that inasmuch as he is the sole heir, and as such is entitled to any sum which may be lawfully recovered, the verdict which has been returned in his favor, even though he has no right under the statute to maintain the action, should be sustained. We cannot agree to this contention. Aside from the absence of any legal right to the verdict, we are not permitted to assume that a verdict returned in a different action prosecuted under authority of law would be the same as that which has been returned without legal sanction or right. A similar contention was urged in *Usher v. West Jersey R. R. Co.*, 126 Pa. 206, 17 Atl. 597, 4 L. R. A. 261, 12 Am. St. Rep. 863. In that case a widow sought to recover damages for the death of her husband. The statute of New Jersey, where he was killed, provided that the action "shall be brought by and in the name of the personal representative of such deceased person."

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It was contended that, inasmuch as the amount recovered in such action is to be for the exclusive benefit of the widow and next of kin, the widow may be allowed to sue for it in her own name. This the court denied, and sustained a nonsuit, saying: "There is no room for latitude of construction. The meaning of the language is plain and unambiguous, and its directions mandatory. It is an established rule that statutory remedies are to be strictly pursued, and we have no right, when the Legislature have commanded one form, to say that another will serve the purpose equally well. The lawmaking power has settled the remedy as well as the right, and courts are not authorized to vary or depart from either. Moreover, the distinction made in this statute between the party having the right of action and the ultimate beneficiary is familiar to all common-law states, and is of settled importance. * * * In the face of this settled distinction, clearly recognized and commanded by the statute, it would be an act of judicial usurpation to say that the mandate of the statute may be disregarded." We know of no case, and none is cited, where a recovery by one having no right of action has been allowed or sustained over objection upon the ground that the plaintiff would be the beneficiary in an action prosecuted by the person having the right. This was urged in *Friese v. Friese*, 12 N. D. 82, 95 N. W. 446, and was overruled.

It may be, and probably is, true, as counsel for plaintiff contend, that the defendant's general objection to the introduction of evidence, as well as the ground stated for granting a directed verdict, did not definitely apprise the trial court or opposing counsel of the nature of the objection now being considered; but that does not affect our right to consider it. This is not a case where a cause of action is substantially but defectively stated, and in which the defect could be cured by amendment. The complaint in this case not only does not state a cause of action, but it shows upon its face that it cannot be made to state a cause of action. It is well settled that where a complaint wholly fails to set out a substantial cause of action, and is incapable of being made good by amendment, the objection to its sufficiency may be taken at any stage of the proceedings, even upon appeal and upon the court's own motion. *Porter v. Booth*, 1 S. D. 558, 47 N. W. 960; *Johnson v. Burnside*, 3 S. D. 230, 52 N. W. 1057; *De Witt v. Chander* (N. Y.) 11 Abb. Prac. 459; *Crosby v. Huston*, 1 Tex. 203, 225; *Thomas v. Franklin*, 42 Neb. 311, 60 N. W. 568. See, also, cases collected, 2 Cent. Dig. Appeal & Error, § 1232.

No amendment can make the present complaint state a cause of action in plaintiff's favor. The only way it can be made to state a cause of action in favor of any one is to substitute the personal representative of the decedent as plaintiff, and that cannot be done under the guise of an amendment, for that would not continue the existing suit except in form, "but would create and institute a new suit or a new question, and in a controversy between different parties." *Lower v. Segal*, 60 N. J. Law, 99, 36 Atl. 777; *Lowell v. Segal* (N. J. Sup.) 34 Atl. 945.

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This case is not one of defect of parties or of want of legal capacity to sue. It is purely a want of a cause of action. The objection that a complainant does not state a cause of action "calls in question not only the sufficiency of the facts stated in the complaint to constitute a cause of action, but also the right or authority of the plaintiff to institute or maintain a suit upon such a cause of action." *Frazer v. State* (Ind. Sup.) 7 N. E. 203; *Tipton County v. Kimberlin* (Ind. Sup.) 9 N. E. 407, and cases cited.

It follows that the order appealed from must be reversed, and the action dismissed; and it is so ordered. All concur.

BEST v. GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota, June 2, 1905.)

[103 N. W. Rep. 709.]

Railroads—Killing Stock—Evidence—Instructions.*—In an action to recover damages for the loss of stock alleged to have been killed by the wanton and willful negligence of the defendant's trainmen, it is held that the evidence sustains the verdict for plaintiff, and that the trial court did not err in its charge to the jury.

(Syllabus by the Court.)

Appeal from Municipal Court of Minneapolis; H. D. Dickinson, Judge.

Action by E. C. Best against the Great Northern Railway Company. Judgment for plaintiff. From an order denying judgment notwithstanding the verdict, or a new trial, defendant appeals. Affirmed.

Rome G. Brown and *Charles S. Albert*, for appellant.

Geo. C. Stiles, for respondent.

START, C. J. On September 1, 1904, the plaintiff was the owner of two ponies, and while they were being driven across the defendant's railway track near Orono, this state, they broke away from the persons in charge of them, ran upon the track, and were hit and killed by the defendant's locomotive. This action was brought in the municipal court of the city of Minneapolis to recover damages for the loss of the ponies, on the ground of the defendant's alleged wanton and willful negligence in the premises. The case was tried by a jury, and a verdict returned for the plaintiff for \$211. The defendant appealed from an order denying its motion for judgment notwithstanding the verdict, or for a new trial. Two questions are raised by the assignments of error: The first is to the effect that there is no evidence in the case to sustain the allegation that the defendant was guilty

*As to the care required of trainmen to avoid collisions with stock, see foot-note appended to *Nashville & K. R. Co. v. Davis* (Tenn.), 13 R. R. R. 432, 36 Am. & Eng. R. Cas., N. S., 432.

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of willful and wanton negligence; and, second, that the trial court erred in its charge to the jury, and in its refusal to charge upon the subject of wanton and willful negligence.

1. To entitle the plaintiff to recover, it was necessary for him to show that the ponies were discovered upon the track, in a perilous position, by those in charge of the defendant's train, in time, with safety to the train and those on it, to have avoided hitting them, by the exercise of ordinary care, and that they failed to do so. *Hohl v. Ry. Co.*, 61 Minn. 321, 63 N. W. 742, 52 Am. St. Rep. 598; *Mooers v. Ry. Co.*, 69 Minn. 90, 71 N. W. 905. The evidence was conflicting. The testimony of the trainmen was to the effect that as soon as the ponies were discovered upon the track the danger signal was given, the brakes applied, and all done that could have been reasonably done to stop the train and avert the threatened collision. There was, however, evidence on behalf of the plaintiff tending to show that the defendant's engineer must have seen the ponies on the track and in a perilous position in time, by the exercise of ordinary care, to have avoided striking them. The weight of the evidence seems to be in favor of the defendant, but there certainly was evidence tending to support the verdict; and we cannot set it aside simply because the preponderance of the evidence is, in our opinion, in favor of the defendant.

2. The defendant requested the court to instruct the jury as follows: "You are instructed that if you find that the engineer of defendant, after discovering the horses upon the track, gave the danger alarm, and had reasonable cause to believe that said animals would leave the track, it would not be necessary for him to stop the train." The refusal to give this instruction is urged as error. The request was misleading, for the reason that the jury might infer from it that if the engineer gave the signal, having reasonable cause to believe the animals would leave the track, it was not his duty to stop the train, even if he discovered that the animals did not heed his signal. But this aside, the request was an abstract proposition, in view of the testimony of the engineer to the effect that he gave the signal and attempted to stop the train immediately upon discovering the ponies on the track. The request was properly refused. The defendant also requested the court to give this instruction: "You are instructed that the plaintiff must show by a preponderance of the evidence that the defendant's engineer and fireman saw the horses in a perilous position, and that they could, after seeing them in such position, with safety to the train, have stopped said train before reaching said horses, and that after seeing them they omitted to do some particular thing which they could have done to avoid the injury. If you do not so find, your verdict must be for the defendant." It is true that the duty of those in charge of the train to avoid injury to those on the train and to the train itself was paramount to the duty of avoiding injury to trespassing stock upon the track. But the request placed upon the plaintiff the burden of showing that both the engineer and

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fireman saw the horses in a perilous position, and failed to exercise ordinary care. The plaintiff's evidence tended to show that the engineer must have seen the animals on the track. It was not error to refuse this request. The charge of the trial court to the jury, taken as a whole, was a full and accurate statement of the law applicable to the case. We find no reversible error in it.

Order affirmed.

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(Court of Appeals of Kentucky, June 15, 1905.)

[88 S. W. Rep. 312.]

Corporations—Affiliated Institutions—Separate Organizations—Liability of Dominant Corporation.*—A railroad hospital association was organized as a corporation independent of the railroad, and by its articles its directors were declared to be certain officers of the railroad and their successors in office; and all employees of the railroad were, as such, made members thereof. By its by-laws, employees of the railroad were entitled to its benefits in case of illness or accident, and were required to pay a monthly assessment, proportionate to their salaries, for its support. These assessments were deducted by the railroad from the employees salaries, and paid over to the treasurer of the hospital association for its benefit. Held, that the hospital corporation was a separate and distinct organization from the railroad, and the latter was not liable for the conduct of the hospital directors, nor for the negligence of physicians or attendants of the hospital in treating a railroad employee.

Hobson, C. J., and Nunn, J., dissenting.

Appeal from Circuit Court, Hopkins County.

"Not to be officially reported."

Action by Ed Buchanan against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. M. Dickinson, Trabue, Doolan & Cox, and Gordon, Gordon & Cox, for appellant.

C. J. Waddill and Wm. Worthington, for appellee.

PAYNTER, J. While appellee was in the service of the Illinois Central Railroad Company his kneecap was broken, and he was sent to the Illinois Central Hospital for treatment. He claims that while under the care of the physicians and nurses of the hospital he was unskillfully and improperly treated, and thereby sustained damages, and this action was instituted to recover them, a trial of which resulted in a verdict for him. The alleged right to recover of the Illinois Central Railroad is based upon the

*For the authorities in this series on the subject of the liability of railroad companies for the negligence of physicians and others in charge of sick or injured persons, see foot-note appended to *Chicago City Ry. Co. v. Saxby* (Ill.), 14 R. R. R. 568, 37 Am. & Eng. R. Cas., N. S., 568.

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avermment that it had entered upon a contract with him by which it undertook, in the event of his injury, "that he should be properly and skillfully treated by proper and skillful surgeons in attendance." The court, by its instructions, in substance, submitted to the jury the issue made by a denial of the above averment.

The appellee had been in the employ of the Illinois Central Railroad Company for more than four days, and therefore was entitled to be received by the Illinois Central Hospital Association at Paducah for treatment. The Illinois Central Railroad Hospital Association is a corporation organized under the general laws of this state. The articles of incorporation read as follows:

"That M. Gilleas, W. J. Harahan, A. Philbrick, D. G. Murrell, John L. McGuire, John W. Whedon, have associated themselves pursuant to an act of the General Assembly of the commonwealth of Kentucky of March 22, 1892, which act is incorporated into chapter 32, section 879, 880, and 881, Kentucky Statutes, to form a charitable corporation, from which no private pecuniary profit is to be derived, and have formed and now form such corporation and adopt the following articles of incorporation:

"Article 1. The name of the corporation is Illinois Central Railroad Hospital Association. The hospital of said association is located at Paducah, Kentucky, and the principal office and place of business is at Paducah, Kentucky.

"Art. 2. The object for which the corporation is formed is to give proper care and treatment to the sick and wounded employees of the Illinois Central Railroad Company on the Louisville Division, and that portion of the Memphis Division extending from Paducah, Kentucky, to Memphis, Tennessee, and including Memphis, Tennessee.

"Art. 3. The corporation shall have the right to sue and be sued, contract and be contracted with, have and use a common seal and alter the same at pleasure, and receive and hold such property real and personal, whether obtained by purchase, gift, or devise as may be necessary to carry on or promote the objects of the corporation, and may sell or dispose of such property at pleasure, unless the property has been received as a gift or devise, for some special purpose and if so received it shall be used and applied only for such purpose. The corporation may adopt such rules for its government and operation not inconsistent with law as the directors may deem proper, but it shall not be operated, managed or used for private gain or engaged in any plan or scheme of banking or insurance. The corporation by the consent of two-thirds of the directors may amend any part of the articles of incorporation by filing and recording the amendment in the office of the Secretary of State and recording in the county clerk's office of McCracken county, Kentucky. The corporation for the support of its hospital shall have power to levy a monthly assessment upon the members of the corpora-

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tion of such sums as shall be fixed by the by-laws of the corporation and enforce the payment of such assessment in the manner provided by the by-laws of the corporation.

"Art. 4. All officers and employees of the Illinois Central Railroad Company on the Louisville Division and that portion of the Memphis Division extending from Paducah, Kentucky, to Memphis, Tennessee, including Memphis, Tennessee, shall be members of the corporation except persons of known disability or suffering from chronic disease.

"Art. 5. The corporation shall be governed by a board of eleven directors constituted as follows: M. Gilleas, the assistant general superintendent of the Southern lines of the Illinois Central Railroad Company and his successors in office; D. G. Murrell, the assistant chief surgeon of the Illinois Central Railroad Company, located at Paducah, Kentucky, and his successors in office; W. J. Harahan, superintendent of the Louisville Division of the Illinois Central Railroad Company, and his successor in office; A. Philbrick, the superintendent of the Memphis Division of the Illinois Central Railroad Company, and his successor in office; H. R. Dill, the assistant superintendent of the Evansville District of the Illinois Central Railroad Company, and his successor in office; L. A. Downs, the road master of the 10th Division of the Illinois Central Railroad Company, and his successor in office; D. Sheahan, the road master of the 13th Division of the Illinois Central Railroad Company, and his successor in office; John McGuire, John W. Whedon, and John Lane. The term of office of the first-named eight members of the board of directors shall be continuous. The term of office for the last named three of the board of directors shall be for one year, and until their successors shall be elected. The successors of the said three members shall be elected by the other eight members of the board on the second Friday in August, 1901, and annually thereafter, and shall be so selected as to represent as nearly as possible the employees of the transportation department, of the mechanical department and of the road department and such persons shall be selected from said departments as will best be able to attend all meetings of the board of directors. M. Gilleas shall be chairman of the board of directors and shall be succeeded in the chairmanship of the board of directors by his successor in office, the assistant general superintendent of the southern lines of the Illinois Central Railroad Company. The regular meetings of the board of directors shall be held quarterly on the second Friday in February, May, August and November of each year, and the meeting held in August shall be the annual meeting of the board of directors. All the corporate powers of the corporation shall be vested in the board of directors. The board of directors shall elect all officers except chairman of the board, and shall fix the term of office of the officers of the hospital at one year with power to remove such officers for cause, which shall be stated in writing and acted upon by a majority of the members consti-

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tuting the board. The by-laws shall provide for the government of the hospital, for proper committees of the board and for such officers as the board of directors may deem proper for conducting the business of the corporation. The principal officer of the corporation shall be the chairman of the board of directors.

"Art. 6. The corporation shall begin its existence when these articles have been filed in the office of the Secretary of State of Kentucky and recorded in the office of the county clerk of McCracken county, Kentucky, and shall continue for fifty years from that date."

These articles of incorporation were signed by the persons designated as directors therein, and were duly acknowledged and recorded, and the corporation was thus regularly formed. It is contended that the directors are officers and agents of the Illinois Central Railroad Company, and therefore the Illinois Central Railroad Company is liable for the misconduct or unskillful act of the physicians and nurses in charge of the institute. It will be observed, by article 4, that all officers and employees of the Illinois Central Railroad Company are members of the corporation, with certain exceptions. By article 3, the hospital corporation, for its support, shall have power to levy upon its members such sums as shall be fixed by the by-laws of the corporation, and enforce their payment as provided by the by-laws. Under the by-laws of the corporation, those entering the service of the Illinois Central Railroad Company who work more than four days are entitled to the benefits of the hospital. Under the by-laws, the members of the association who receive \$40 per month and under are required to pay 40 cents monthly, and the amounts to be paid by other employees are governed by the salary or compensation received by them. Members of the association are entitled to free medical and surgical attendance, medicine, board, and nursing at the hospital while disabled, whether from sickness or injury, unless the disability arises from certain diseases. Sums which the members of the association are required to pay are collected by the Illinois Central Railroad Company to pay the expenses of the hospital, and it goes into the hands of the treasurer of the hospital association, who is also the treasurer of the Illinois Central Railroad Company. There is no evidence that the Illinois Central Railroad Company retains or gets the benefit of a cent of the money or enjoys any profit by the operation of the hospital. Under the articles of incorporation, the appellant does not even retain control of the funds which it gathers for the association, for they go to the treasurer of the hospital association. The parties who are designated as directors are not made so as the officers of the Illinois Central Railroad Company, but they are selected by the hospital association by reason of the fact that they hold such positions with the Illinois Central Railroad Company. The evident purpose is to make it easy to keep a full board of directors of the hospital, and that that board shall be composed of persons who are entitled to the benefits of it, and who are in-

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terested in its success. The mere fact that the board of directors are selected by the hospital association by reason of the fact of their connection with the Illinois Central Railroad Company does not make them the agents or officers of the Illinois Central Railroad Company in the performance of a duty for another and distinct corporation. The duties which they are required to perform are not such as are required in the execution of the purposes and objects of the organization of the appellant.

There is no evidence showing that the Illinois Central Railroad Company made any contract with the appellee that he should be "properly and skillfully treated by proper and skillful surgeons and attendants." The fact that the hospital association was organized for that purpose does not tend to prove that the appellant made such a contract with the appellee. There is an implied contract between the employee who becomes a member of the association and the Illinois Central Railroad Company that the latter will pay over the money which it retains out of his earnings to the treasurer of the hospital association for its benefit. The Illinois Central Railroad Company is simply the agent that gathers the funds for the benefit of the hospital association—consequently for the benefit of its members. So the proposition is presented that, because the Illinois Central Railroad Company simply acts as the agent in the gathering of the funds from its employees for the hospital purposes, it thereby made a contract to be responsible for the conduct of those in control of the hospital—a separate and distinct corporation. If the Illinois Central Railroad Company was the real party in interest, and was simply using the hospital association for its financial profit, then the court might consider whether or not it was a case where it should look at the substance, and not the shadow, of things, in determining its liability. But this question has not arisen because of the facts we have detailed. Doubtless the Illinois Central Railroad Company is indirectly benefited by its employees having proper and humane treatment at the hospital prepared for them, but that incidental benefit cannot raise the question suggested, or make it liable for the act of servant or agent of an independent corporation.

Our conclusion is that the hospital corporation is a separate and distinct corporation from the Illinois Central Railroad, and that the latter has no financial interest in the result of its management, and in no way is it liable for the conduct of its directors, or the physicians or the attendants at the hospital. The appellee is a member of the hospital association, and those in charge of it in part serve him and his interest; and he contributes to help pay the expenses of those performing that service, and for the care and treatment of his associate employees. A peremptory instruction should have been given to the jury to find for the appellant.

We have not seen proper to discuss the question as to the liability of the Illinois Central Railroad Company for plaintiff's

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injury, had it owned or controlled the hospital, nor the liability of the hospital association for the alleged unskillful acts of the surgeons and attendants in charge of it, because, from the conclusions we have reached, these questions do not arise, and had best be discussed when a case involving them is brought to the consideration of the court.

The judgment is reversed for proceedings consistent with this opinion.

BROOKS v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, Middlesex, June 21, 1905.)

[74 N. E. Rep. 670.]

Crossings—Gates—Sufficiency.—A railroad is not negligent in failing to maintain gates at street crossings of sufficient strength to successfully sustain the shock of a runaway team hitched to a vehicle on coming into contact therewith.

Accident at Crossing—Negligence—Gates—Absence of Gateman—Gate Broken by Runaway Team.*—The failure of a railroad to have a gateman or flagman on the ground at a street crossing, instead of operating the gates by an attendant in a tower, who at the same time, by the same movement, operated another gate at another crossing, 120 feet away, is not a negligent act, so as to render it liable for the death of a person at the crossing, whose team, frightened at an automobile, ran away, dashing into and breaking the gate, which was down, and dropping the deceased on the railroad track immediately in front of an approaching express train.

Exceptions from Supreme Judicial Court, Middlesex County.

Action by Mary L. Brooks against the Boston & Maine Railroad. Verdict in favor of defendant, and plaintiff brings exceptions. Exceptions overruled.

Walter M. Lindsay, for plaintiff.

Richardsons, Trull & Wier, for defendant.

KNOWLTON, C. J. The plaintiff's intestate and two children, who were riding with him, were run over and fatally injured at a street crossing of the defendant's railroad in Reading. Some of the circumstances attending the accident are stated in the bill of exceptions as follows: "While on the Main street, and some mile or mile and a half from the grade crossing in question, the horse driven by Mr. Brooks became frightened. When within five hundred and seventy feet of the Main street crossing, a witness testified substantially: That he saw Mr. Brooks pulling on the reins and calling out, 'Whoa! whoa!' At this time the horse had his head down, was running very fast, and the bits appeared to be between his teeth. That, from

*As to the duties and liabilities of railroads as affected by the presence or absence of flagmen or watchmen at crossings, see footnotes appended to *Montgomery v. Missouri Pac. Ry. Co.* (Mo.), 11 R. R. R. 274, 34 Am. & Eng. R. Cas., N. S., 274, where all the preceding authorities in this series are collected.

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this point down to the time that the team got to the Main street crossing, Mr. Brooks was pulling on his reins and talking to his horse. One witness testified that the horse, when within one hundred feet of the crossing, had come down to a trot, but had the appearance of having run away. When within twelve or fifteen feet of the gates, which were down, the horse turned and swerved sharply to the left; ran along even or parallel with the gate arms, lunging, and rearing. Another witness testified that she saw Brooks pull the horse over to the left when he was within twelve feet of the gate, and that he was coaxing him to be quiet. When the horse came to that portion of the gate arm which was braced the most, and which rested or rocked on the iron standard or gate post, the horse went against the gate arm or reared over it, breaking the gate arm short off, and the gate arm, horse, carriage, and occupants pitched right over onto the railroad, between the rails of the south-bound track; and in a few seconds the train of the defendant came along, struck the team, and caused the injuries complained of. * * * The evidence shows that the gates were down when the plaintiff's intestate passed a house about five hundred and seventy feet from the crossing. * * * A view of the Main street in the direction from which the team in question came could be seen for nearly a mile as one stood in or upon the highway on the location at Main street."

We will assume, in favor of the plaintiff, without deciding, that there was evidence from which the jury might have found that her intestate was in the exercise of due care. The important question in the case is whether there was any evidence that the accident was caused by negligence of the defendant. The weight of the evidence is in favor of the defendant's contention that the signals required by the statute were given as the train approached the crossing, although, perhaps, there was evidence upon which that question might have been submitted to the jury. It was an undisputed fact that the gates were down a considerable time before the horse reached the crossing; thus giving to the driver full information that a train was expected, and that he could not safely attempt to cross. It was early in the afternoon, in the full light of day, and the plaintiff's intestate was very familiar with the crossing. If the jury could have found that the bell was not rung continuously for a distance of eighty rods before the train reached the crossing, there was no evidence to warrant them in finding that this neglect caused the accident. The plaintiff's intestate was sufficiently warned that a train was approaching, and he evidently was acting in the belief that he could not safely cross. His horse had been frightened by an automobile, and could not be controlled. The train which struck him was a passenger express, running on a slightly descending grade, at a rate of speed which was estimated by different witnesses differently; the engineer giving it at 30 to 35 miles an hour, and some calling it 40 to 50 miles an hour. There is nothing to show that the accident was caused

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by running the train at an excessive rate of speed. Seemingly the rate was not greater than is usual for express trains in the country, and, if it had been less, there is nothing to indicate that the accident would have been avoided. The engineer could not see the horse and carriage until he was almost upon them.

It is contended that the gates were not so strong as they should have been, but the evidence shows that they were "the usual ones erected at independent crossings," and there was no evidence that for such places as this any other kind would be better. As was said in *Marks v. Fitchburg Railroad Company*, 155 Mass. 493-496, 29 N. E. 1148, 1149, "Ordmarily the principal purpose of gates is effectually to warn travelers not to cross." While, in peculiar situations, considerable strength may be desirable, it is necessary that they should be so light that they can be raised and lowered quickly, with mechanism that can be easily controlled: and it would be unreasonable and impracticable at ordinary crossings to construct them of such strength as to withstand the force of a runaway team dashing at full speed against them. At a crossing such as the evidence in this case shows, we are of opinion that the defendant was not called upon to maintain gates which would successfully sustain such a shock as this gate yielded to. It is to be noticed that there was no evidence of a defect or want of repair in the gates, but the contention is that the kind of gate should have been different from that in common use. In *Marks v. Fitchburg Railroad Company*, 155 Mass. 493, 29 N. E. 1148, the facts which were held to require the submission of the evidence to a jury were materially different from those now before us.

It is also contended that the company was negligent in not having a gateman or flagman on the ground at the crossing, instead of operating the gates by an attendant in a tower, who at the same time, by the same movement, operated another gate at another crossing 120 feet away. We are of opinion that this contention is not well founded. The gates were operated effectually, and proper warning was given in this way. If there had been a gateman on the ground, it is difficult to see what he could have done to avert this accident. Gatemen are not employed to place themselves in front of runaway horses for the purpose of stopping them. An attempt of this sort is more likely to be harmful than otherwise.

This lamentable accident happened from causes for which the defendant was not responsible, and against which it was not called upon to make such provision as to render an injury impossible. It was, under the law, to take proper precautions for the safety of travelers on the highway, having reference to all the conditions and probabilities to be anticipated. We discover in the bill of exceptions no evidence of negligence on the part of the defendant or its servants which was a direct and proximate cause of the accident.

Exceptions overruled.

GOLDSTEIN v. PEOPLE'S RY. CO.

(Superior Court of Delaware, New Castle, Feb. 20, 1905.)

[60 Atl. Rep. 975.]

Negligence—Burden of Proof.—In an action for injuries, the burden of proving negligence is on plaintiff.

Same—Question for Jury.—Whether negligence exists in a particular case is a question of fact for the jury.

Same—Question of Law.—What constitutes negligence is a question of law for the court.

Injury to Child Ordered to Jump from Moving Car—Negligence—Question for Jury.—In an action against a street railroad company for the death of a child, on the ground that defendant's motorman ordered him to jump off a car when it was in motion, whereby he was frightened, and either fell or jumped from the car, the jury were to determine whether defendant exercised due care, such as a reasonably prudent person would have done under the circumstances.

Electric Cars—Ordinary Care—Definition.—The term "ordinary care and diligence," applied to the management of electric cars in motion, means all the care, prudence, and discretion which the circumstances of the place and occasion require.

Children—Contributory Negligence.*—In an action for the death of a child, if deceased, notwithstanding his tender years, contributed to the accident, so that his conduct was the proximate cause thereof, no recovery can be had.

Same—Care Required of.†—The ordinary care of an infant is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under like circumstances.

Trespassers—Injury to Child on Street Car—Liability.—Where a child of tender years gets on the platform of a street car, and remains there unobserved by the servants of the company, and the child then jumps off or falls off without any negligence on the part of the servants, the company is not liable.

Same—Same—Care Due.—A street railroad company is not bound to so guard its cars as to prevent trespassing children from getting on or off while the car is in motion.

Same—Same—Same.‡—Where an infant trespasser on a street car was seen in a perilous position by the operatives, who could have

*As to whether young children can be chargeable with contributory negligence, see foot-notes appended to *Poland v. Union R. Co.* (R. I.), 12 R. R. R. 648, 35 Am. & Eng. R. Cas., N. S., 648; *St. Louis, etc., Ry. Co. v. Colum* (Ark.), 11 R. R. R. 807, 34 Am. & Eng. R. Cas., N. S., 807; *Carney v. Concord St. Ry.* (N. H.), 11 R. R. R. 307, 34 Am. & Eng. R. Cas., N. S., 307.

†See foot-notes appended to *Indianapolis St. R. Co. v. Schomberg* (Ind.), 14 R. R. R. 627, 37 Am. & Eng. R. Cas., N. S., 627; foot-notes appended to *Atlanta & W. P. R. Co. v. West* (Ga.), 14 R. R. R. 548, 37 Am. & Eng. R. Cas., N. S., 548; *St. Louis, etc., Ry. Co. v. Colum* (Ark.), 11 R. R. R. 807, 34 Am. & Eng. R. Cas., N. S., 807; foot-notes appended to *Carney v. Concord St. Ry.* (N. H.), 11 R. R. R. 307, 34 Am. & Eng. R. Cas., N. S., 307.

‡As to the care due trespassing children from railroads, see foot-note appended to *Nashville, etc., R. Co. v. Harris* (Ala.), 14 R. R. R. 562, 37 Am. & Eng. R. Cas., N. S., 562; foot-notes appended to *Denison & S. Ry. Co. v. Carter* (Tex.), 14 R. R. R. 129, 37 Am. & Eng. R. Cas., N. S., 129.

As to whether it is the duty of a railroad company to lookout for

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prevented injury to him, caused by his jumping or falling off, but they made no effort to do so, there was such a lack of care as to constitute gross negligence.

Injury to Child on Street Car—Threats of Motorman—Liability.—Where the motorman of a street car saw a five year old trespasser in a dangerous position on the front platform while the car was in motion, and by order or threat of the motorman the infant was frightened, so that he jumped or fell from the car, whereby he was injured, the company was liable.

Action by Bernard G. Goldstein, as administrator of Oscar Goldstein, deceased, against the People's Railway Company. Verdict for defendant.

Argued before LORE, C. J., and PENNEWILL and BOYCE, JJ.

Andrew E. Sanborn and John W. Huxley, for plaintiff.

Robert H. Richards and William S. Hilles, for defendant.

BOYCE, J. (charging jury). Bernard G. Goldstein, administrator of Oscar Goldstein, deceased, the plaintiff in this action, seeks to recover from the People's Railway Company, the defendant, damages for the death of the decedent, which the plaintiff alleges was caused by the negligence of the defendant company through one of its motormen while on one of its cars on King street, near Second street, in the city of Wilmington, on the 16th day of November, 1902: (1) In that the said motorman suffered and permitted the said Oscar Goldstein, an infant of about the age of five years, to be and remain in a dangerous position upon the front platform or step of the said car after he, the motorman, had knowledge thereof, and while the car was in rapid motion; (2) in that the said motorman did so order and direct the said infant to get off the car as to frighten him, and cause him either to jump or fall from the car while in rapid motion; (3) in that, by the negligence and carelessness of the said motorman, the decedent fell or was thrown or knocked from the step or platform of said car while in rapid motion, whereby he was run over by the car and sustained such injuries that he very soon thereafter died. The defendant company, however, denies that it was guilty of any negligence or wrongdoing from which, as it is alleged, the injury complained of was inflicted, resulting in the death of the said Oscar Goldstein. The said company further contends that it was in the exercise of reasonable and proper care at the time of the accident, and that immediately before and at that time its motorman either knew, or by the exercise of reasonable care might have known, of the presence or perilous position of the said Oscar Goldstein. It is admitted that the decedent was run over by a car operated by the defendant company at the time and place as alleged, re-

trespassing children on or about cars, see foot-note appended to *Wagner v. Chicago & N. W. Ry. Co. (Iowa)*, 14 R. R. R. 749, 37 Am. & Eng. R. Cas., N. S., 749; *Jordan v. Grand Rapids & I. Ry. Co. (Ind.)*, 13 R. R. R. 397, 36 Am. & Eng. R. Cas., N. S., 397; *Monehan v. South Covington & C. St. Ry. Co. (Ky.)*, 12 R. R. R. 671, 35 Am. & Eng. R. Cas., N. S., 671.

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ceiving injuries from the effects of which he shortly thereafter died, and that letters of administration were subsequently, and prior to the bringing of this action, duly granted to Bernard G. Goldstein, the plaintiff in this case.

This action was brought upon the alleged negligence of the defendant company, and, if the death for which this action has been instituted was not the result of the negligence of the defendant company, the plaintiff cannot recover. Negligence is never presumed in cases of this character. It must be proved; and the burden of proving the negligence to the satisfaction of the jury, by a preponderance of the evidence, rests upon the plaintiff. Whether a particular accident was the result of negligence, and whose, is a question of fact to be determined by the jury from the evidence. Whether negligence exists in a particular case is a question of fact to be found by the jury, if they may, under the evidence. What constitutes negligence is a question of law for the court. It has been variously defined in the courts of this state; but, after all, the different definitions mean substantially one and the same thing. It has been termed the want of ordinary care; that is, the want of such care as a reasonably prudent and careful man would exercise under similar circumstances. It has been termed the failure to observe, for protection of the interest of another, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. While the obligation to exercise care in the conduct of one's business varies under different circumstances, there always remains the duty to exercise such reasonable care as should be exercised by a person of ordinary prudence under like circumstances. Applying these general principles of the law as to what constitutes negligence to the facts in the case drawn from the evidence produced before you, you are to determine whether the defendant did exercise due care such as a reasonably prudent man would have exercised under similar circumstances. You will observe that what is due and proper care must depend on the particular facts and circumstances of each case. The term "ordinary care and diligence," when applied to the management of electric cars in motion, must be understood to import all the care, circumspection, prudence, and discretion which the particular circumstances of the place or occasion require of the servants of the defendant company; and this will be increased or diminished as the ordinary liability to danger and accident and to do injury to others is increased or diminished in the movement and operation of such cars.

You are to determine from the evidence, applying it to the law as announced to you by the court, whether the death of Oscar Goldstein was caused by the negligence of the defendant company, and, if so, whether that negligence was the proximate cause of the accident resulting in his death. If the decedent, notwithstanding his tender years, contributed to the said accident in such a manner as that his conduct was the proximate

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cause of the accident, a recovery cannot be had therefor. The rule as to contributory negligence, as it affects the conduct of children, is not the same that governs adults. It is the duty of the infant to exercise ordinary care to avoid injury, yet ordinary care for him is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under like circumstances. While a particular act committed by an infant of the age of discernment and discretion, or by an adult, might clearly constitute contributory negligence, yet, if the same act should be committed by an infant of five years or under, contributory negligence, because of his tender years, might not be imputed to him. Nevertheless, if such child places himself in a position of peril, although he may be unable to comprehend and appreciate the danger to which he is exposed, and sustains injuries in consequence thereof, the person injuring him under such circumstances would not be liable therefor, if by the exercise of due and reasonable care he could not have avoided the injury.

A railway company is not required to anticipate the presence of children on its cars who may not come on as passengers or by invitation, and the company is not an insurer of the safety of infant trespassers. If such a child of tender years gets upon the platform or step of a car while standing, or when in motion, and remains unobserved by the servants of the company because of their attention to their duties in the management of the car, and the child afterwards voluntarily jumps off or falls while the car is in motion, and is thereby injured, without any negligent fault or omission on the part of the servants of the company, there can be no recovery for such injury. Street railway companies, as towards trespassers or mere licensees, must exercise such care and diligence as a reasonably prudent man would ordinarily use under similar circumstances and conditions, and which it would be gross negligence and carelessness not to use. It is not so high a degree of care and diligence as the company would be required to use for the protection of persons lawfully and rightfully on its cars. It is not such care and diligence as make it necessary for a railway company to so guard its cars as to prevent a trespassing child from getting off or on while in motion; neither is it such care and diligence as would interfere with the usual and ordinary running of its cars, or in the proper and faithful discharge by the servants of the company of their duties in operating the cars, but only such as would be reasonable and proper under all the circumstances and conditions surrounding the case at the particular time. *Tully's Adm'r v. P., W. & B. R. R.*, 3 Pennewill, 455, 50 Atl. 95.

It is the duty of a railway company, in operating its cars, to provide competent and careful motormen and servants, and a disregard of this duty would constitute negligence on the part of the company; and, if a servant of the company discover an infant upon his car, he should exercise such care and caution for the safety and protection of the infant as would be reason-

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able under all the circumstances, considering the age and maturity of the infant and his capacity to comprehend and appreciate the danger of his surroundings. If you find, from the evidence, that the servants of the defendant saw Oscar Goldstein in a perilous position on the car before the accident, and could have prevented the accident, but made no effort to do so, then there was such lack of care as would constitute gross negligence; and even though he was not actually seen by the servants of the company, yet if he and they were so situated as that he might have been seen, and must have been seen, if they had used proper care under the circumstances, there was such a want of care and diligence as would amount to gross negligence. *Tully's Adm'r v. P., W. & B. R. R. Co.*, 3 Pennewill, 464, 50 Atl. 95; *Woodbridge v. D., L. & W. R. R. Co.*, 105 Pa. 460; *Wynn v. Railway Company (Ga.)* 17 S. E. 649. And if you find that the motorman of the defendant saw Oscar Goldstein in a dangerous position upon the front platform of the car while it was in motion, and that he was then an infant of about the age of five years, and that by an order or threat of the said motorman he was frightened to such an extent as to cause him to jump or fall from the said car while it was in motion, and that the accident and injury to him was caused thereby, the defendant would be liable.

Should you find for the plaintiff, the measure of damages would be such a sum as you believe, from the evidence, the deceased would probably have earned during his life, and left as his estate at the time of his death, and which would have gone to his next of kin, taking into consideration his age, health, and intelligence.

Verdict for defendant.

KERR v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, June 21, 1905.)

[74 N. E. Rep. 689.]

Street Railway and Other Users of Streets—Mutual Rights.*—An individual traveling on a street and a street car operated thereon have equal rights, except as modified by the fact that the car cannot leave the track; so that the individual must not unreasonably interfere with its progress.

Same—Same.*—A traveler on a street on which street cars are

*See foot-notes appended to *Lightfoot v. Winnebago Traction Co.* (Wis.), 14 R. R. R. 1, 37 Am. & Eng. R. Cas., N. S., 1; *Rhymes v. Jackson Elec. Ry., etc., Co.* (Miss.), 14 R. R. R. 7, 37 Am. & Eng. R. Cas., N. S., 7; *Birmingham Ry., L. & P. Co. v. Oldham (Ala.)*, 14 R. R. R. 165, 37 Am. & Eng. R. Cas., N. S., 165; foot-notes appended to *Greene v. Louisville Ry. Co.* (Ky.), 14 R. R. R. 589, 37 Am. & Eng. R. Cas., N. S., 589; foot-note appended to *Dungan v. Wilmington City Ry. Co.* (Del.), 14 R. R. R. 746, 37 Am. & Eng. R. Cas., N. S., 746; *O'Brien v. Blue Hill St. Ry. Co.* (Mass.), 14 R. R. R. 806, 37 Am. & Eng. R. Cas., N. S., 806; foot-note appended to *Conrad v. Elizabeth, etc., Ry. Co.* (N. J.), 13 R. R. R. 126, 36 Am. & Eng. R. Cas., N. S., 126; *Portsmouth St. R. Co. v. Peed (Va.)*, 13 R. R. R. 65, 36 Am. & Eng. R. Cas., N. S., 65.

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operated has the right to travel on any part of the street, but if the path he selects subjects him to the liability of being struck by a passing car he is bound to use reasonable care to avoid a collision, and he has the right to expect corresponding care on the part of the motormen in charge of the cars.

Same—Negligence and Contributory Negligence—Questions for Jury.—In an action by a traveler on a street for injuries sustained in a collision with a street car, evidence examined, and held, that the questions of defendant's negligence and plaintiff's contributory negligence were for the jury.

Exceptions from Supreme Judicial Court, Suffolk County.

Action by one Kerr against the Boston Elevated Railway Company. Judgment for defendant, and plaintiff brings exceptions. Sustained.

William B. Sprout and William R. Bigelow, for plaintiff.

R. A. Sears, James F. Sweeney, and A. A. Capotosto, for defendant.

HAMMOND, J. The plaintiff, an experienced bicyclist, while riding in a public macadamized street in which were located double tracks of the defendant, came into collision with one of the defendant's cars going in the same direction. The accident occurred about 8 p. m. on October 19, 1901. The plaintiff, for some minutes before, had been riding so near to the outer rail of the track as to be in the way of any car passing upon that track, and he so continued up to the time of the accident. The distance from this outer rail to the curbstone was about 15 feet, and on cross-examination the plaintiff testified that there was "no particular necessity for hugging the railroad tracks so closely with his machine," but in explaining his reason for being there said that the rest of the street had been muddy, and "hadn't got smoothed down." There was the usual conflict of testimony as to the cause of the collision. The defendant's theory was that at the time of the accident, the plaintiff was somewhat under the influence of intoxicating liquor; that he was racing with the car; that the fork of the bicycle, which had been broken before and repaired, gave way, with the result that the plaintiff was thrown against the side of the car; and there was testimony justifying the conclusion that this was the correct theory. The plaintiff's theory was entirely different. He testified that while he was going along the street "the first thing that attracted his attention he heard a noise, and the next thing he knew he was struck. He did not hear any bell. It was such a noise as is made by the wheels of a car. He was riding a wheel with low handle bars, and was bent over pretty well, and going straight ahead, * * * and not turning in either direction. After he heard the noise he was struck on the left hip and side and thrown unconscious in the road." Upon cross-examination: "He could not say positively whether or not any cars had passed him from the time when he crossed the bridge until he was struck. He imagined there was. * * * He was not racing with the car. * * * He did not have time to get out of the way. * * * His wheel was within

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a foot or a little over from the outer rail. * * * He had a clear road ahead of him. He did not at any time ride alongside of the car which struck him." One witness called for the plaintiff testified that she saw the car "come up behind the plaintiff, and strike him, and throw him off his wheel into the street"; that "the bell of the car was not rung"; and that the "car did not stop, but went right on towards Everett." Of course, if the theory of the defendant is correct, the plaintiff has no case. But, if the evidence presented by the plaintiff is to be believed, we do not see why it would not justify a verdict in his favor. Both he and the car were travelers upon the street, with equal rights as such, except as modified by the fact that the car could not leave the rail, and consequently that the plaintiff must not unreasonably interfere with its progress. *Commonwealth v. Temple*, 14 Gray, 69. The plaintiff had the right to travel upon any part of the highway, and could choose the path he took if he pleased. But the care required of him varied with the danger. If that path subjected him to a liability to be hit by a passing car, he was bound to use reasonable care to avert a collision. But he had the right to expect corresponding care on the part of the motorman. Upon his evidence a jury might have found that he had reason to believe that he could be seen by the motorman at a distance of at least 200 feet; that it was reasonable that he should expect the gong to strike to let him know that a car in the rear desired to pass him; and that in other ways he might hear the car coming up in time to get out of the way. The evidence warranted a finding that the gong was not sounded, that the only warning given to the plaintiff was the noise of the car and that the car was going so fast that when that warning reached him there was not time for him to get out of the way. It cannot be said, as a matter of law, that the plaintiff in such a place should ride with his face constantly over his shoulder. In view of all the circumstances, we are of opinion that the questions of the due care of the plaintiff and of the negligence of the defendant were for the jury. The principles involved in this case are somewhat discussed in *Le Blanc v. Lowell, Lawrence & Haverhill Street Railway*, 170 Mass. 564, 49 N. E. 927; *Vincent v. Norton & Taunton Street Railway*, 180 Mass. 104, 61 N. E. 822; *Tashjian v. Worcester Consolidated Street Railway*, 177 Mass. 75, 58 N. E. 281; *Sullivan v. Boston Elevated Railway*, 185 Mass. 602, 71 N. E. 90.

Exceptions sustained.

SMITH v. MINNEAPOLIS ST. RY. CO.

(Supreme Court of Minnesota, June 23, 1905.)

[104 N. W. Rep. 16.]

Street Railroads—Collision with Vehicle—Negligence.*—Where an electric car collides with a vehicle, which while being driven along a public street parallel and in the same direction with an advancing street car, turns at a street crossing to go over the track in front of that car, the negligence of the street car company is to be determined in accordance with rules of law giving both the car and the vehicle the right to use the streets and intersections, and imposing on both the reciprocal duty of the exercise of due care to avoid harm.

Same—Care Required of Motoneer.†—The exercise of care on the part of the motoneer has special reference to the rate of speed at which the car was moving, his control and exercise of control over it, and his opportunity for observing that the vehicle was about to cross, including the distance from the track at which the vehicle turned and the rapidity with which it was then traveling.

Same—Care at Crossing.‡—The test of the care to be exercised at a street car crossing is not necessarily the same as is required at a steam railway crossing.

Same—Contributory Negligence.‡—If a driver of a vehicle approaching a street railway track to cross it at an intersection with another street looks and listens and sees and hears no car approaching for such a distance that he could probably make the crossing safely, he is not guilty of contributory negligence, as a matter of law, if, while attempting to cross the tracks, the car strikes and overturns his vehicle.

*As to the mutual rights and duties of street railways and other users of streets, see foot-notes appended to *Lightfoot v. Winnebago Traction Co.* (Wis.), 14 R. R. R. 1, 37 Am. & Eng. R. Cas., N. S., 1; *Rhymes v. Jackson Elec. Ry., etc., Co.* (Miss.), 14 R. R. R. 7, 37 Am. & Eng. R. Cas., N. S., 7; *Birmingham Ry. L. & P. Co. v. Oldham* (Ala.), 14 R. R. R. 165, 37 Am. & Eng. R. Cas., N. S., 165; foot-notes appended to *Greene v. Louisville Ry. Co.* (Ky.), 14 R. R. R. 589, 37 Am. & Eng. R. Cas., N. S., 589; foot-note appended to *Dungan v. Wilmington City Ry. Co.* (Del.), 14 R. R. R. 746, 37 Am. & Eng. R. Cas., N. S., 746; *O'Brien v. Blue Hill St. Ry. Co.* (Mass.), 14 R. R. R. 806, 37 Am. & Eng. R. Cas., N. S., 806; foot-note appended to *Conrad v. Elizabeth, etc., Ry. Co.* (N. J.), 13 R. R. R. 126, 36 Am. & Eng. R. Cas., N. S., 126; *Portsmouth St. Ry. Co. v. Peed* (Va.), 13 R. R. R. 65, 36 Am. & Eng. R. Cas., N. S., 65.

†As to the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-notes appended to *Lightfoot v. Winnebago Traction Co.* (Wis.), 14 R. R. R. 1, 37 Am. & Eng. R. Cas., N. S., 1; *Rhymes v. Jackson Elec. Ry., etc., Co.* (Miss.), 14 R. R. R. 7, 37 Am. & Eng. R. Cas., N. S., 7; *Christy v. Des Moines City Ry. Co.* (Iowa), 14 R. R. R. 42, 37 Am. & Eng. R. Cas., N. S., 42; foot-note appended to *Indianapolis St. Ry. Co. v. Taylor* (Ind.), 14 R. R. R. 356, 37 Am. & Eng. R. Cas., N. S., 356; *Richmond Passenger & Power Co. v. Allen* (Va.), 14 R. R. R. 566, 37 Am. & Eng. R. Cas., N. S., 566; foot-notes appended to *Greene v. Louisville Ry. Co.* (Ky.), 14 R. R. R. 589, 37 Am. & Eng. R. Cas., N. S., 589; *Indianapolis St. Ry. Co. v. Schomberg* (Ind.), 14 R. R. R. 627, 37 Am. & Eng. R. Cas., N. S., 627; *Cameron v. Duluth-Superior Traction Co.* (Minn.), 14 R. R. R. 632, 37 Am. & Eng. R. Cas., N. S., 632.

‡As to whether the stop, look, and listen rule applies to street railway crossings, see foot-notes appended to *Lightfoot v. Winnebago*

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Same—Questions for Jury.—In this case held, the negligence of the defendant and the contributory negligence of the plaintiff were for the jury, and its verdict was justified by the evidence.
(Syllabus by the Court.)

Appeal from District Court, Hennepin County; David F. Simpson, Judge.

Action by Howard W. Smith against the Minneapolis Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Koon, Whelan & Bennett, for appellant.

J. Van Valkenburg and F. N. Hendrix, for respondent.

JAGGARD, J. The plaintiff and respondent, together with a companion, were, in the daytime, driving a single horse to a phaeton with the top down, but not unbowed, in an easterly direction, parallel with defendant's and appellant's street car track, down Hennepin avenue, in the business district of Minneapolis. The plaintiff turned his horse and vehicle for the purpose of crossing the track on Hennepin avenue, near its intersection, at right angles, with Seventh street, to drive up that street. The vehicle was struck and overthrown by a car going in the same direction in which it was being driven. Plaintiff brought this action for consequent personal injuries. On the first trial the jury found for the plaintiff. The trial court granted a new trial, and refused to direct a judgment notwithstanding the verdict, without assigning reasons therefor. On appeal this court refused to presume that the order granting a new trial was based on the ground that the verdict was not sustained by the evidence, and sustained the order of the trial court, because of error, *inter alia*, in the admission of expert testimony. *Smith v. Minneapolis Street Railway Co.*, 91 Minn. 239, 97 N. W. 881. On the second trial the jury returned a verdict for \$1,800. The defendant moved for judgment notwithstanding the verdict, because the evidence failed to show negligence on the part of defendant, as alleged in the pleading, and did show contributory negligence on the part of the plaintiff. The motion was denied, and judgment entered for the plaintiff. From that judgment, this appeal was taken.

1. The charge of negligence set forth in the complaint, taken in connection with the charge of the court, to which no exception was taken, and as to which no error is assigned, was that imme-

Traction Co. (Wis.), 14 R. R. R. 1, 37 Am. & Eng. R. Cas., N. S., 1; Birmingham Ry., etc., Co. v. Oldham (Ala.), 14 R. R. R. 165, 37 Am. & Eng. R. Cas., N. S., 165; foot-notes appended to *Giardina v. St. Louis & M. R. Ry. Co.* (Mo.), 14 R. R. R. 579, 37 Am. & Eng. R. Cas., N. S., 579.

As to whether there can be a recovery for injuries sustained in an attempt to cross railroad tracks in front of a train or car which the traveler knows to be approaching, see foot-notes appended to *Lambert v. Southern Pac. R. Co.* (Cal.), 14 R. R. R. 575, 37 Am. & Eng. R. Cas., N. S., 575.

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diately prior to the collision the defendant was operating a car in the city at a dangerous rate of speed, that it failed to control the car in accordance with its legal duty, and that thereby the plaintiff was injured. The only question here presented is the sufficiency of the evidence to support the verdict. *Borgerson v. Cook Stone Co.*, 91 Minn. 91, 97 N. W. 734. The principles of law applicable are simple and familiar. Both the plaintiff and defendant had the right to use the street and its intersections; both owed the reciprocal duty of exercising that right with due reference to the other, in connection with the knowledge and the fact that the defendant's car followed a fixed path only. 2 Current Law, 1762. While the vehicle was being driven parallel with and near the track on which the car was running, the motoneer was not bound to anticipate that it would abruptly attempt to cross the tracks immediately in front of the car. If it did so undertake, the defendant company might not be guilty of negligence because of the failure of the motorman in charge to stop or slacken speed, or to avoid the collision. *Fritz v. Street Ry. Co.*, 105 Mich. 50, 62 N. W. 1007; *Chicago Union Traction Co. v. Browdy*, 206 Ill. 615, 69 N. E. 570; *Chicago Street Ry. Co. v. Ahler*, 107 Ill. App. 397; *O'Connell v. St. P. City Ry. Co.*, 64 Minn. 466, 67 N. W. 363. But the duty rested upon the street car company to have its cars in control at these points that the rights of others might be protected. People using the highways for lawful purposes had a right to rely in some measure upon the discharge of this duty (*Sesselmann v. Metropolitan St. Ry. Co.*, 65 App. Div. 484, 72 N. Y. Supp. 1010; *Id.*, 76 App. Div. 336, 78 N. Y. Supp. 482; *Traction Co. v. Glynn*, 59 N. J. Law, 432, 37 Atl. 66); and it would be actionable negligence to run a car at a rate of speed incompatible with the lawful and customary use of highways by others with reasonable safety (*Railway Co. v. Block*, 55 N. J. Law, 607, 27 Atl. 1067, 22 L. R. A. 374; *Searles v. Elizabeth, etc., Ry. Co.*, 70 N. J. Law, 388, 57 Atl. 134). In this case, therefore, as the motorman approached the intersection of the streets, he was bound to exercise due care, in view of the rights of both the car and the vehicle to use the streets and intersections, with proper reference to the rate of speed at which the car was moving, the control he had over it, and the opportunity afforded him for observing that the vehicle was about to cross, including the distance from the track at which it turned and the rate of speed at which it was then traveling.

The inquiry as to the testimony thus occasioned includes an examination of more evidence than merely that which pertains to the rate of speed at which the car was going. That is a circumstance to be considered, but the primary question is whether or not the defendant had and exercised reasonably prudent control over the car. The only eyewitness on behalf of plaintiff who testified as to the speed at which the car was running swore that it was going at the rate of 15 miles an hour when 160 or 170 feet west of the point of collision, and at the rate of 10 miles an hour when 80 feet from the plaintiff. He

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also testified that the speed of the car was checked and that the wheels were locked at a point 50 or 60 feet above the point of collision, so that they slid on the rails and fire flew from them. The significance of the latter part of this testimony is to be weighed in connection with the evidence of the motorman, defendant's own witness, that he could have stopped the car within 25 or 30 feet after he had first seen the vehicle turn across the tracks. This same witness of the plaintiff also said that when the plaintiff turned to cross the tracks the front end of the car was some 80 feet west of the point of the intersection of the street and avenue. According to his testimony and that of the plaintiff and also of plaintiff's companion, it would seem that the plaintiff drove some 25 feet after turning to cross the track before the car struck the vehicle. The plaintiff and his companion also testified that at some point, not very definitely fixed, but shortly before they reached the tracks, and at a point at which they could see some 75 feet, and before they commenced to cross over, they listened and looked up the tracks, and heard and saw no car coming. After the collision respondent's testimony tended to show that the car carried the carriage some 8 to 12 feet before it was tipped over. The defendant introduced a large number of witnesses directly contradicting the claims of the plaintiff and sustaining its own contention. This testimony, as a whole, including cross-examination, affords some basis for plaintiff's contention that it contains corroboration of material parts of his case. The present appeal, however, is not to be determined by the opinion of this court as to the preponderance of the testimony. On the contrary, plaintiff is entitled to such favorable inferences as may reasonably be drawn from the evidence. *Rehberg v. Mayor*, 91 N. Y. 137, 43 Am. Rep. 657; *Andres v. Brooklyn Heights Ry. Co.*, 84 App. Div. 598, 82 N. Y. Supp. 729. Two juries have tried this case. Both found for the plaintiff. This examination of the testimony and history of the case is sufficient to show that there was evidence reasonably tending to support the jury's conclusion of negligence on the part of defendant.

2. The rules as to contributory negligence, under the circumstances here involved, are well settled. It is the duty of a person on foot or in vehicle, who passes from a place of safety outside of a street railway track to one of danger upon it, to make reasonable use of his senses of sight and hearing for his own protection. *Hickey v. St. Paul City Ry. Co.*, 60 Minn. 119, 61 N. W. 893; *Wosika v. St. Paul City Ry. Co.*, 80 Minn. 364, 83 N. W. 386; *Terien v. St. Paul City Ry. Co.*, 70 Minn. 532, 73 N. W. 412; *Russell v. Minneapolis Street Ry. Co.*, 83 Minn. 304, 86 N. W. 346; *Honick v. Ry. Co.*, 66 Kan. 124, 128, 71 Pac. 265; *Moser v. Union Trac. Co. (Pa.)* 55 Atl. 15; *McGee v. Consol. St. Ry. Co.*, 102 Mich. 107, 60 N. W. 293, 26 L. R. A. 300, 47 Am. St. Rep. 507; *Beerman v. Union R. R. Co.*, 24 R. I. 275, 52 Atl. 1090. The street railway car, however, has no priority of way at a street crossing with respect to other vehicles. The rights of the parties are equal. 2 Current Law, 1762, note 35; *Duncan v.*

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Union Ry. Co., 39 App. Div. 497, 57 N. Y. Supp. 326; *O'Neil v. D. D. E. B. & B. R. R. Co.*, 129 N. Y. 125, 29 N. E. 84, 26 Am. St. Rep. 512; *Hewlett v. Brooklyn Heights R. R. Co.*, 63 App. Div. 423, 71 N. Y. Supp. 531. And it is the law in this state that the care required to be used in looking and listening when about to cross a street car track is not necessarily the same as is required in crossing a steam railway track. When the driver of a vehicle approaching the street railway track to go over it at a street intersection looks and sees no car approaching at such a distance that he can apparently make the crossing safely, he is not, as a matter of law, guilty of contributory negligence if he attempts to cross the tracks without looking a second time at the car. *Shea v. St. Paul City Ry. Co.*, 50 Minn. 395, 52 N. W. 902; *Watson v. Minneapolis Street Ry. Co.*, 53 Minn. 551, 55 N. W. 742; *Flanagan v. St. Paul City Ry. Co.*, 68 Minn. 300, 71 N. W. 379; *Riley v. Minneapolis Street Ry. Co.*, 83 Minn. 96, 85 N. W. 947; *Peterson v. Minneapolis Street Ry. Co.*, 90 Minn. 52, 55, 95 N. W. 751; *Holmgren v. St. Paul City Ry. Co.*, 61 Minn. 85, 63 N. W. 270. Indeed, a traveler at a crossing may obtain the right of way over a street crossing where, in the reasonable exercise of his rights, he reaches the point of crossing in time to safely go upon the track in advance of an approaching car; the latter being sufficiently distant to be checked or stopped, if need be, in the exercise of due care. *Searles v. Elizabeth, etc., Ry. Co.*, 70 N. J. Law, 388, 57 Atl. 134. And see *Kennedy v. Third Ave. R. Co.* (Sup.) 52 N. Y. Supp. 551; *San Antonio, etc., R. Co. v. Renken* (Tex. Civ. App.) 38 S. W. 829.

The testimony previously stated brings this case within these rules. It shows a dispute of fact as to the locality and movement of the car, and as to whether the point at which the plaintiff looked and listened justified him in attempting to cross as he did. The principal doubt arises upon the defendant's argument that upon the physical facts in evidence, if the plaintiff had looked for the approaching car, he must have seen it at such a distance as to render it negligent for him to attempt to cross in front of it; that he is chargeable with notice of its approach, notwithstanding his testimony that he did not see it; and that the verdict should not be allowed to stand on the unreasonable and uncorroborated testimony of the plaintiff alone. *Stafford v. Chippewa Val. E. Ry. Co.*, 110 Wis. 331, 85 N. W. 1036; *Barrie v. St. L. Transit Co.*, 102 Mo. App. 87, 76 S. W. 706; *Watson v. Mound City Ry. Co.*, 133 Mo. 246, 34 S. W. 573; *Met. St. Ry. Co. v. Agnew* (Kan.) 70 Pac. 345; *Ry. Co. v. Elliott*, 28 Ohio St. 340; *Clark on Street Ry. Acc. Law*, 106; *Cawley v. La Crosse C. Ry. Co.* (Wis.) 77 N. W. 179; *Flaherty v. Harrison* (Wis.) 74 N. W. 360. The testimony previously reviewed herein shows, however, that there was considerably more testimony to sustain the plaintiff's contention on this point than his own evidence. The record contains a fair foundation for his insistence that while he drove about 25 feet the car ran about 100 feet, and that the physical facts were not entirely inconsistent with his statement as to see-

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ing no car within 75 feet of the point at which he looked for it. Naturally dialectical method led the plaintiff to insist that he turned to cross the tracks at a considerable distance from them, but looked for an approaching car when he was quite near them, and also led defendant to insist that the plaintiff turned when near the tracks, but looked for an approaching car when a considerable distance from them. The trial court properly submitted the question of plaintiff's contributory negligence to the jury. *San Antonio T. Co. v. Upson* (Tex. Civ. App.) 71 S. W. 565; *Cass. v. Third Ave. R. R. Co.*, 20 App. Div. 591, 47 N. Y. Supp. 356; *Andres v. Brooklyn Heights R. Co.*, 84 App. Div. 596, 82 N. Y. Supp. 729. Cf. *Schmedding v. New York & Q. C. Ry. Co.*, 85 App. Div. 24, 82 N. Y. Supp. 1034.

Judgment appealed from is affirmed.

FOULK v. WILMINGTON CITY RY. CO.

(Superior Court of Delaware, New Castle, June 2, 1905.)

[60 Atl. Rep. 973.]

Street Railways—Funeral Processions—Right of Way.*—A street car is not required to stop at street intersections for a funeral procession to pass, nor to give a funeral procession the right of way.

Same—Same—Same—Care Required of Driver of Other Vehicle.†—The fact that by courtesy street railroads have given funeral processions the right of way does not relieve one driving a vehicle in a funeral procession from using reasonable care and precaution to avoid collision with a street car.

Same—Same—Same—Same.—In an action for injuries to plaintiff, who was driving a vehicle in a funeral procession, owing to a collision between his vehicle and a street car, it appearing that it had been the uniform practice of defendant to give funeral processions the right of way, which was known to plaintiff, such custom might be taken into account by the jury in estimating the degree of diligence required of plaintiff.

*As to the mutual rights and duties of street railways and other users of streets, see foot-note appended to *Lightfoot v. Winnebago Trac. Co.* (Wis.), 14 R. R. R. 1, 37 Am. & Eng. R. Cas., N. S., 1; foot-notes appended to *Rhymes v. Jackson Elec. Ry., etc., Co.* (Miss.), 14 R. R. R. 7, 37 Am. & Eng. R. Cas., N. S., 7; foot-note appended to *Birmingham Ry., etc., Co. v. Oldham* (Ala.), 14 R. R. R. 165, 37 Am. & Eng. R. Cas., N. S., 165; foot-notes appended to *Greene v. Louisville Ry. Co.* (Ky.), 14 R. R. R. 589, 37 Am. & Eng. R. Cas., N. S., 589; foot-note appended to *Dungan v. Wilmington City Ry. Co.* (Del.), 14 R. R. R. 746, 37 Am. & Eng. R. Cas., N. S., 746; foot-notes appended to *O'Brien v. Blue Hill St. Ry. Co.* (Mass.), 14 R. R. R. 806, 37 Am. & Eng. R. Cas., N. S., 806.

†As to the care required of those driving other vehicles on streets upon which street cars are operated, see foot-notes appended to *Richmond P. & P. Co. v. Allen* (Va.), 14 R. R. R. 566, 37 Am. & Eng. R. Cas., N. S., 566; *Sullivan v. Boston Elev. Ry. Co.* (Mass.), 11 R. R. R. 512, 34 Am. & Eng. R. Cas., N. S., 512; *McGauley v. St. Louis Transit Co.* (Mo.), 11 R. R. R. 247, 34 Am. & Eng. R. Cas., N. S., 247; *Hogan v. Winnebago Traction Co.* (Wis.), 11 R. R. R. 232, 34 Am. & Eng. R. Cas., N. S., 232.

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Same—Crossings—Care Required of Motorman.‡—In approaching a crossing where there is a steep down grade, it is the duty of a motorman to make the descent at reasonable speed, so as not to put the car beyond his control.

Same—Same—Same.‡—Where a street railway approaches a crossing at a point where the rails are wet and slippery, or where the view of the railway from the crossing street is obstructed, greater care is required of the car operatives than where such conditions do not exist.

Same—Collision with Other Vehicle—Negligence—Burden of Proof.—In an action against a street railroad company for injuries sustained in a collision between plaintiff's vehicle and a car, the burden of proving defendant's negligence is on plaintiff.

Same—Same—Negligence and Contributory Negligence.§—Where there was negligence on the part of the motorman of a street car, but the negligence of plaintiff contributed to the collision between plaintiff's vehicle and the car, or was the proximate cause thereof, the railway was not liable for the injuries.

Action by Spencer H. Foulk against the Wilmington City Railway Company. Verdict for plaintiff.

Action on the case (No. 149, September term, 1904) to recover damages for injuries to plaintiff's livery team, consisting of two gray mares harnessed to a landeau, by reason of a collision with defendant's trolley car at Fourth and Tatnall streets crossing in Wilmington, April 27, 1904, alleged to have been caused through the negligent operation thereof by defendant's servants.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Horace G. Knowles, for plaintiff.

Walter H. Hayes, George N. Davis, and Herbert H. Ward, for defendant.

LORE, C. J. (charging jury). Spencer H. Foulk, the plaintiff in this action, claims that on the 27th day of April, 1904, at Fourth and Tatnall streets crossing in this city, one of his livery teams, consisting of two gray mares harnessed to a cab or landeau, was run into and injured by a trolley car of the defendant company, negligently operated. He alleges that at the time

‡As to the care required of those in charge of street cars to avoid collision with other users of streets, see *Lightfoot v. Winnebago Traction Co.* (Wis.), 14 R. R. R. 1, 37 Am. & Eng. R. Cas., N. S., 1; *Rhymes v. Jackson Elec. Ry., etc., Co.* (Miss.), 14 R. R. R. 7, 37 Am. & Eng. R. Cas., N. S., 7; *Christie v. Des Moines City Ry. Co.* (Iowa), 14 R. R. R. 42, 37 Am. & Eng. R. Cas., N. S., 42; foot-note appended to *Indianapolis St. Ry. Co. v. Taylor* (Ind.), 14 R. R. R. 356, 37 Am. & Eng. R. Cas., N. S., 356; foot-notes appended to *Richmond P. & P. Co. v. Allen* (Va.), 14 R. R. R. 566, 37 Am. & Eng. R. Cas., N. S., 566; foot-notes appended to *Greene v. Louisville Ry. Co.* (Ky.), 14 R. R. R. 589, 37 Am. & Eng. R. Cas., N. S., 589; *Indianapolis St. Ry. Co. v. Schomberg* (Ind.), 14 R. R. R. 627, 37 Am. & Eng. R. Cas., N. S., 627; *Cameron v. Duluth-Superior Traction Co.* (Minn.), 14 R. R. R. 632, 37 Am. & Eng. R. Cas., N. S., 632; *Butler v. Rockland, etc., St. Ry.* (Me.), 14 R. R. R. 778, 37 Am. & Eng. R. Cas., N. S., 778; foot-note appended to *Searles v. Elizabeth, etc., Ry. Co.* (N. J.), 13 R. R. R. 781, 36 Am. & Eng. R. Cas., N. S., 781.

*See foot-note appended to *Feitl v. Chicago City Ry. Co.* (Ill.), 14 R. R. R. 798, 37 Am. & Eng. R. Cas., N. S., 798.

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of the accident his team was crossing Fourth street, going north-erly up Tatnall street, as one of the coaches in a funeral procession; that the colliding trolley car of the defendant company was going easterly on Fourth street, down a steep grade, at a high rate of speed, without ringing the bell or giving proper warning of its approach. He claims that his actual loss and expenditures by reason of the accident were \$497.10. These damages he seeks to recover by your verdict in this suit on the ground that they resulted from the negligence of the defendant company. The negligence relied on is: (1) High and dangerous rate of speed of the car, which was approaching on a steep down grade; (2) the failure of the motorman to ring the car bell or give other proper warning; (3) the violation of a uniform usage, custom, or practice on the part of the defendant company to stop the cars for the funeral procession, and wait until the procession had passed by. The defendant denies all of these allegations, and claims that the accident was not the result of its negligence, but of the negligence of the plaintiff, if there was any negligence in the case.

We know of no law requiring a trolley car to stop at the intersection of streets and wait until a funeral procession has passed, nor of any law giving to a funeral procession the right of way over cars or other vehicles or persons properly using a highway of this state. If by courtesy such privilege has been given by trolley cars and by others using the highway, such courtesy imposes no duty upon the person extending the courtesy, nor does it in any manner relieve such persons from all reasonable care and precaution in so using the highway as to prevent accident or injury. If you should find from the evidence in this case that the uniform and continuous usage or practice of the defendant company had been to stop its cars at crossings and wait until a funeral procession passed by, and that such usage was known to, and reasonably relied upon by, the driver of the injured team at the time of the accident, we say to you that such method of dealing with the public on the part of the company, and so known to the driver, may be taken into account by you in estimating the degree of diligence required of the driver in looking out for an approaching car before he crossed the railway track, for in such case he might reasonably presume or infer the continuance of that usage. To justify such presumption, however, such usage must have been uniform and continuous. Even then the failure to observe such usage would not amount to negligence on the part of the defendant company. It would not relieve the driver of reasonable care in making such crossing. He would have no right so to presume, if he actually saw the car coming down upon him, or if by the reasonable use of his senses he might have known of its approach. It may be stated as a general rule that no legal right can grow out of mere courtesy, however uniform and long continued, nor will such courtesy impose a legal obligation upon the person extending it.

It is conceded in this case that the grade of Fourth street be-

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tween West and Tatnall streets is quite a steep down grade to the Tatnall street crossing. While the speed of trolley cars is not limited by law, yet, in approaching such crossing, it was the duty of the motorman to make the descent at such reasonable speed as not to put the car beyond his control; and, as the danger of collision increased, if he saw or could see the danger, it was his duty to use all the means in his power to check or stop the car. *Price v. Warner Co.*, 1 Pennewill, 472, 42 Atl. 699. This does not impose upon the motorman, however, an impossibility. If he in fact did all that he could to control the speed of the car, under the circumstances, the company would not be liable. It was, however, equally the duty of the driver of the injured team to use all reasonable care and precaution to prevent the accident. "We will not attempt to specify the precise acts of precaution which are necessary to be done or omitted by one in the management of an electric car, or by one in the management of a wagon, approaching a railway crossing. Such acts must depend upon the circumstances of each case, and the degree of care required differs in different cases. The general rule is that the person in the management of the car and the person in the management of the wagon are bound to the reasonable use of their sight and hearing for the preventing of accident, and to the exercise of such reasonable caution as an ordinarily careful and prudent person would use under like circumstances. What is due and proper care depends upon the facts in each case. Where the railway approaches the crossing at a steep down grade, or where the rails are wet and slippery, or where the view of the railway from the crossing street is obstructed by buildings or otherwise, greater care is required of the person in charge of the car than where the approach of the railway to the crossing is at or near the grade of the crossing, or where the rails are in their usual condition, or where the view of the railway is unobstructed. A person approaching a railway crossing with which he is familiar is bound to avail himself of his knowledge of the locality and act accordingly. If the approach of the railway to the crossing be down a steep grade, whereby it is more difficult to stop or check a car, the driver of the vehicle should exercise more care than might be necessary where the approach of the railway was by a slight decline, upon a level, or by an ascending grade." *Brown v. Ry. Co.*, 1 Pennewill, 336, 40 Atl. 936; *Snyder v. People's Ry.*, 4 Pennewill, 148, 149, 53 Atl. 433. Both the company and the driver of the team in this case were required to use such reasonable care as the circumstances demanded, an increase of care on the part of both being required when there is an increase of danger. "The right of each one using the highway must be exercised with due regard to the right of the other, and in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the right of the other."

Some of the witnesses have testified that they heard the car bell ring, coming down the hill; others, that they did not hear it ring. The testimony of the former witnesses is, of course, of

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more weight than that of those who merely say they did not hear the bell ring, which might reasonably be attributed to a want of attention at the time. Such negative testimony is usually of little value. *Q. A. R. Co. v. Reed* (Del. Sup.) 59 Atl. 863.

The gist of this action is negligence, and the burden of proving the negligence of the defendant company rests upon the plaintiff in this case. If there was no negligence on the part of the company, your verdict should be for the defendant.

Even if there was negligence on the part of the defendant, yet, if the negligence of the driver of the team contributed to the accident, or was the proximate cause thereof, your verdict should be for the defendant.

If you believe that at the time of the accident each party was using such reasonable care as the circumstances demanded, then the collision was simply an unavoidable accident, and the plaintiff could not recover.

Should you be satisfied from the evidence that the negligence of the defendant was the sole and proximate cause of the alleged injuries, your verdict should be for the plaintiff, and for such reasonable amount as will compensate him for his actual loss as disclosed by the testimony in this case.

Exception noted for defendant. Exception noted for plaintiff. Verdict for plaintiff for \$434.

SOUTHERN INDIANA RY. CO. v. NORMAN.

(Supreme Court of Indiana, June 9, 1905.)

[74 N. E. Rep. 896.]

Frightening Team—Injury to Driver—Hand Car Left on Highway—Liability.*—A railroad which negligently and unlawfully places a hand car in the public highway within two feet of the wagon track, and thereby causes a team of gentle and well-broken mules, which is being driven along the highway, to become frightened and run away, is liable for injuries consequently resulting to the driver of the mules.

Same—Hand Car Left on Highway—Prima Facie Unlawful.—It is prima facie unlawful for a railroad to place a hand car on a public highway.

Harmless Error.—A charge that it was prima facie unlawful for a railroad to place a hand car "by the side of" a highway, instead of using the phrase "on or in the highway," was harmless, where the jury expressly found, in answer to special interrogatories, that the hand car was placed "in the road," and on the traveled part thereof.

Highway—Definition—Instruction.—A charge that, in order to constitute a highway, it is sufficient if the road in question be shown to have been used as a public road and "as a right" for a period of 20 years, is not subject to the objection of not requiring the user to have

*For the authorities in this series on the subject of the liability of railroad companies for frightening teams, see foot-note appended to *Fares v. Rio Grande Western R. Co.* (Utah), 13 R. R. R. 76, 36 Am. & Eng. R. Cas., N. S., 76; foot-notes appended to *O'Brien v. Blue Hill St. Ry. Co.* (Mass.), 14 R. R. R. 806, 37 Am. & Eng. R. Cas., N. S., 806.

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been under a claim of right, especially when taken in connection with another charge which stated that, "for a road to become a public highway by user, it must have been used * * * under a claim of right."

Highways—Presumption.—Under Burns' Ann. St. 1901, § 6762, providing that all public highways which have been or may be used as such for 20 years or more shall be deemed public highways, an unexplained user of a highway by the public for 20 years or more will be presumed to have been under a claim of right.

Appeal from Circuit Court, Lawrence County; Jas. B. Wilson, Judge.

Action by Elmer C. Norman against the Southern Indiana Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

F. M. Tristal and Brooks & Brooks, for appellant.

Martin & Martin and Boruff & Boruff, for appellee.

MONKS, C. J. This action was brought by appellee to recover damages for personal injuries alleged to have been caused by appellant's employees "negligently, carelessly, and unlawfully placing a hand car filled with tools, coats, dinner buckets, and other objects and things of said employees" upon the public highway, within two feet of the traveled track thereof. Appellant's demurrer to the complaint for want of facts was overruled. A trial of said cause resulted in a verdict, and, over a motion for a new trial, a judgment in favor of appellee. The errors assigned are: (1) The court erred in overruling the demurrer to the complaint. (2) The court erred in overruling the motion for a new trial.

It appears from the complaint that at a point about one-half mile north of the town of Norman, a station of appellant, a public highway crosses said appellant's railroad track, and that for the purposes of said public highway appellant has built and maintained a crossing at grade. That after crossing said railroad track said highway intersects a road traveled by the public, running for about one-half mile parallel with said railroad. It is alleged that "said last-named road was used at will by the general public, and was plaintiff's route from his home, which is situated on the same, to the first-mentioned road at its point of intersection of said railway. That on the 17th day of July, 1903, the plaintiff was driving on said parallel road, driving a pair of gentle, well-broken mules to a cultivator. On said day the servants and employees of defendant railway company were engaged in surfacing the roadbed of said railway, and had ridden to the point at which said railway intersected said first-mentioned road on a hand car, and, upon reaching said crossing, said defendant, its servants and employees, carelessly, negligently, and unlawfully removed said hand car from the track of said railway, and ran same out upon the side of said first-mentioned roadway about 50 feet from said railway and about 25 feet from the point of intersection of said two roads, and with the inner wheels of said car within two feet of the wagon track of said roadway, there being

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at the time upon said hand car the tools, coats, dinner buckets, and other objects and things belonging to and in use by the men who so placed said car. That there was no other way for plaintiff to pass along said road except by said car, and that said road was hidden from plaintiff's view until plaintiff was within a few feet of same. When driving along said road as aforesaid, and without any fault on his part, and negligence, and near said hand car, so negligently, carelessly, and unlawfully placed by the defendant, its servants and employees as aforesaid, the team driven by plaintiff took fright at said car, and sprang to the opposite side of the road, striking the fence, and throwing plaintiff from said cultivator, striking his head on a log by the side of the road, fracturing his skull and bruising his body, and causing him to be sick and sore, and suffering much pain, both physical and mental.

* * * That by reason of his said injury he is unable to do either physical or mental labor; that his said injury was all without fault or negligence on his part, but was caused solely by the careless, negligent, and unlawful acts of the defendant as aforesaid, and not otherwise." While said complaint cannot be commended as a model, yet it appears therefrom that appellant negligently, carelessly, and unlawfully placed said hand car in the public highway within two feet of the wagon track, and by means thereof caused a team of gentle and well-broken mules attached to a cultivator on which appellee was riding, and which team of mules he was driving on a highway, to become frightened and run away, thereby throwing appellee from the cultivator and injuring him; that said injury was caused solely by the careless, negligent, and unlawful acts of appellant as aforesaid, and not otherwise. Upon the authority of *Ohio, etc., R. Co. v. Trowbridge*, 126 Ind. 391, 26 N. E. 64; *Cleveland, etc., R. Co. v. Wynant*, 100 Ind. 160; *Cleveland, etc., R. Co. v. Wynant*, 119 Ind. 539, 541, 20 N. E. 730; *Cleveland, etc., R. Co. v. Wynant*, 114 Ind. 525, 17 N. E. 118, 5 Am. St. Rep. 644—we hold the complaint sufficient to withstand the demurrer for want of facts. See *Elliott on Roads & Streets* (2d Ed.) p. 695; 3 *Elliott on Railroads*, p. 1988; *Vars v. Grand Trunk R. Co.*, 23 Upper Can. C. P. 143; *Brownell v. Troy, etc., R. Co.*, 55 Vt. 218; *Denver, etc., R. Co. v. Robbins*, 2 Colo. App. 313, 30 Pac. 261; *Patterson, Railway Accident Law*, p. 152.

The court charged the jury in instruction 5 that "the placing of the hand car by the side of said highway was prima facie unlawful." It was said in *Ohio, etc., R. Co. v. Trowbridge*, 126 Ind. 395, 26 N. E. 65: "But a permanent or temporary occupancy of a highway by the cars of a railroad company is prima facie unlawful. It is therefore incumbent on a railroad company which places a car upon a highway to explain or excuse the act. The act of appellant in placing the hand car on the highway calls for an explanation from the authors of the wrong." It is clear, therefore, that placing said hand car on said highway was prima facie unlawful, and it was not error to so instruct the jury.

Appellant cannot successfully complain of said instruction 5

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because it spoke of placing the hand car "by the side" of the highway instead of "on or in" the same, because the jury expressly find, in answer to the special interrogatories, that the said hand car was "in the road" at the time appellee was injured, and that it was "on that part of the road traveled by the traveling public," and that "it was on the ground that had been and was used by the public in traveling over and on said road." What we have said in regard to the complaint and its sufficiency to withstand the demurrer renders unnecessary the consideration of the other objections to said instruction 5.

Appellant claims that the sixth instruction given by the court informed the jury "that the road was a public highway if used by the public continuously 20 years," and that the same was erroneous because the essential element, that said user must be under a claim of right, was omitted therefrom. It has been provided by statute in this state since 1852 (1 Rev. St. 1852, p. 315, § 45; 1 Gav. & H. St. p. 366, § 45) that "all public highways which have been used or may hereafter be used as such for 20 years or more, shall be deemed public highways." Section 5035, Rev. St. 1881; section 6762, Burns' Ann. St. 1901; Jones on Easements, § 459. It was said in *Strong v. Makeever*, 102 Ind. 578, 584, 587, 1 N. E. 502, 4 N. E. 11, concerning said statute, "under this statute it is the 20 years' use that makes the road a highway, and it is immaterial whether the use is with the consent or over the objections of the adjoining landowners. Such is clearly the construction of said statute and the previous rulings of this court. *Epler v. Niman*, 5 Ind. 459; *Hays v. State*, 8 Ind. 425; *State v. Hill*, 10 Ind. 219; *Lemasters v. State*, Id. 391; *Hart v. Trustees, etc.*, 15 Ind. 226; *Debolt v. Carter*, 31 Ind. 355, 365, 366; *Ross v. Thompson*, 78 Ind. 90; *Kyle v. Board, etc.*, 94 Ind. 115." See *McKeen v. Porter*, 134 Ind. 483, 489-492, 34 N. E. 223; *The City of Ft. Wayne v. Coombs*, 107 Ind. 75, 79, 7 N. E. 743; *Pittsburg, etc., R. Co. v. The Town of Crown Point*, 150 Ind. 536, 50 N. E. 741; Jones on Easements, § 459.

We need not and do not decide, however, whether such user must be under claim of right by the public, as claimed by appellant, for the reason that, even if such is the rule, said sixth instruction was not erroneous for that reason. The part of the sixth instruction objected to reads as follows: "In order to constitute a highway, for the purposes of this cause, the plaintiff is not required to prove that the road upon and beside which the defendant placed its hand car, if you find it did so place one, was a road recorded as a highway and worked by the public, but it is sufficient if it be shown by a fair preponderance of the evidence to be a road used by the public as a public road and as a right continuously for a period of 20 years." No one would understand from this language that a continuous use for 20 years alone was sufficient, for it says the use by the public must be "as a right." The court gave, at the request of appellant, instruction 9, which reads as follows: "For a road to become a public highway by user, it must have been used by the public without interruption

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for a period of 20 years or more, and that use by the public must be under a claim of right." When the sixth instruction, complained of, is read and considered in connection with all the other instructions given, especially the ninth, above set out, it is clear that the necessity of the user being under a claim of right was fairly presented to the jury, and appellant has no just ground for complaint.

What we have said as to the use by the public under a claim of right has reference to the character of the use, and not the evidence thereof, for it may be inferred from evidence of the use that it was under a claim of right. Elliott on Roads & Streets (2d Ed.) § 159; Town of Marion v. Skillman, 127 Ind. 130, 136, 137, 26 N. E. 676, 11 L. R. A. 55; Jones on Easements, § 289. This is true because evidence of the continuous use by the public for 20 years or more, unexplained, will be presumed to be under a claim of right, and therefore adverse. Washburn on Easements (4th Ed.) pp. 156-158, 199; Jones on Easements, § 289; Mitchell v. Bain, 142 Ind. 604, 607, 608, 42 N. E. 230, and authorities cited. See Rennert v. Shirk, 163 Ind. 542, 72 N. E. 546, and authorities cited.

Finding no error, the judgment is affirmed.

KANSAS CITY, M. & B. R. Co. et al. v. WILLIFORD.

(Supreme Court of Tennessee, June 8, 1905.)

[88 S. W. Rep. 178.]

Railroads—Injuries to Trespassers—Contributory Negligence.*—

Where intestate, without invitation or necessity, boarded the foot-board at the rear of a switch engine, presumably with the knowledge of the foreman, who did not order him off, and was killed by a collision at a street crossing, which was unavoidable by the utmost energies of the engineer, he was guilty of such gross contributory negligence as precludes a recovery, though the engine was running at a speed in excess of that allowed by ordinance.

Error to Circuit Court, Shelby County; J. P. Young, Judge.

Action by A. J. Williford as administrator, etc., against the Kansas City, Memphis & Birmingham Railroad Company and

*As to the care due trespassers on trains, see foot-notes appended to Jordan v. Grand Rapids & I. Ry. Co. (Ind.), 13 R. R. R. 397, 36 Am. & Eng. R. Cas., N. S., 397; foot-notes appended to Powell v. Erie R. Co. (N. J.), 13 R. R. R. 615, 36 Am. & Eng. R. Cas., N. S., 615; foot-note appended to Albert v. Boston Elevated Ry. Co. (Mass.), 13 R. R. R. 779, 36 Am. & Eng. R. Cas., N. S., 779; Bjornquist v. Boston & A. R. Co. (Mass.), 13 R. R. R. 786, 37 Am. & Eng. R. Cas., N. S., 786; Monehan v. South Covington & C. St. Ry. Co. (Ky.), 12 R. R. R. 671, 35 Am. & Eng. R. Cas., N. S., 671.

Speed in violation of ordinances as negligence, see foot-notes appended to Chicago & A. R. Co. v. Vipond (Ill.), 14 R. R. R. 295, 37 Am. & Eng. R. Cas., N. S., 295; foot-note appended to Birmingham Belt R. Co. v. Gerganous (Ala.), 14 R. R. R. 584, 37 Am. & Eng. R. Cas., N. S., 584.

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others. From a judgment for plaintiff, defendants bring error. Reversed.

C. H. Trimble, for plaintiffs in error.

Jere Horn, for defendant in error.

BEARD, C. J. This suit was brought by the administrator of one Owen to recover damages in the interest of certain statutory beneficiaries against several railroads, constituting what is called in the record the "Frisco System," for inflicting, as is alleged in the declaration, by actionable negligence, injuries on his intestate which soon after resulted in his death. On the trial of the case there was a verdict and judgment for \$6,500 against the defendants, and they have prosecuted an appeal, in the nature of a writ of error, to this court.

It is disclosed in the record that the deceased lived in Mississippi, and during the afternoon of the accident arrived in the city of Memphis in company with one Parker. Soon after their arrival these parties saw, at the corner of Georgia street and Kansas avenue, in the act of pulling out of the yards of the defendant railroads, a switch engine moving backwards, with several freight cars attached. Along the rear end of this engine, which was in front in this movement, there ran what is called a footboard. Without invitation from any one, Owen and Parker stepped upon this footboard, Owen taking a position on the west end thereof, and Parker mounting from it to a seat in the cab. On the same end of the engine, and above the footboard, was the tank, on the sloping part of which sat one Middlebrook, who was the foreman of the train crew. The engineer occupied his seat on the east side of the cab, while the fireman was on the west side, dividing his time between shoveling coal and ringing the bell as the engine proceeded. On the footboard with the deceased were two negroes. With these parties occupying the different positions indicated, the engine backing, with the cars attached, proceeded a short distance south, when it turned east on Broadway to its place of destination.

Broadway, as its name indicates, is a wide avenue, devoted, however, exclusively to railroad use. On it are located six parallel tracks, the fourth from the north being the one on which the engine and cars in question were running. Davie avenue crosses Broadway from north to south, at right angles, at a point about one mile east of where Owen and Parker boarded the engine. At the point of intersection there was a flagman.

Approaching this point from the west, the view of objects on Davie avenue, moving north to the crossing, was obstructed by a brick building located at the southwest corner of these two highways, and further, upon the occasion of this accident, by a number of cars which were standing on the track immediately south of the one on which this train was moving.

As the engine approached the crossing, a team of mules hitched to a wagon and driven by a negro came suddenly from the south, out of Davie avenue, upon the track. The uncontradicted evi-

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dence is that this driver, as he neared the track, was looking backward, but, turning his head and seeing the engine rapidly coming, he undertook to stop his team and back off. Failing in this, he released the lines and jumped from the wagon, thus saving himself. The mules, however, proceeding across the track, the engine came in violent collision with the wagon. In this collision Owen received the injuries from which his death resulted.

It is undisputed that the flagman was at his post, and as the train advanced he raised his flag to indicate to persons on Davie avenue that it would be dangerous then to attempt to cross; and, further, that, seeing the driver of this team getting dangerously near, the flagman made an ineffectual effort to stop him.

A number of witnesses were examined with regard to the speed at which this engine was running.

As is always the case where a question of this kind depends upon opinion evidence, the rate of speed was variously estimated to be from 6 to 40 miles an hour. It may be assumed, however, that the jury credited the testimony which fixed the speed at the highest rate. The plaintiff below, also for the purpose of showing negligence on the part of the crew in charge of the train, over the objection of the defendants, offered in evidence an ordinance of the city of Memphis, within whose limits this accident occurred, limiting the speed of all trains and engines passing over any of the highways of the city to six miles an hour. There is no dispute but that the engineer, with perfect appliances for that purpose, did all that could be done to stop the train as soon as the mules appeared, and that it was impossible to control it, at the rate at which it was going, so as to avoid the collision.

The record also shows Owen was on the engine without invitation or necessity, and without the knowledge of the engineer or fireman. It is assumed the foreman, who sat on the tank, did see him, from the fact that this position enabled him to do so, and it may be this is fairly inferable from that fact.

The foreman's knowledge, however, that the intestate occupied this position, and his failure to stop the train and order him from it, cannot lessen the responsibility of the intestate. As was said in *Railroad v. Bogle*, 101 Tenn. 40, 46 S. W. 760, the engine is at all times the most exposed and perilous portion of the train; and it was there held, even in the case of a passenger, who in a fancied emergency mounted the engine to prevent being left by the train, that he lost his right to the high decree of care the law accorded passengers riding in a coach, and could claim nothing more than protection from injury by the willful, wanton, or intentional act of the carrier and its employees. In *R. Co. v. Wilson*, 88 Tenn. 318, 12 S. W. 720, a baggage master left his proper place on the train, and was riding with the engineer and fireman upon the engine when he was killed in a collision with another train, resulting from the negligence of an engineer in charge of an engine running from an opposite direction to that in which his train was moving. It was there held that, having

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abandoned his post of duty and sought a more exposed and dangerous position on the train, where he was killed, the railroad was not liable.

We do not deem it necessary to consider the various assignments of error upon the action of the lower court, as we are satisfied there is no theory upon which the verdict and judgment in this case should be maintained. The intestate was voluntarily occupying the most exposed position on the most dangerous part of the train at the time of the collision, and this, as has been seen, without invitation, and without any necessity whatever for his being there. That his presence at this place proximately contributed to his injury is beyond question. No one on the engine save himself was injured, unless it be one of the negroes riding with him on this footboard. If he had been at any other place on that train, so far as we can see, he would have avoided the danger, and, as a matter of course, if he had not been on the train at all, he would not have been affected by this collision. Under these circumstances, we think, as a matter of law, he was guilty of such gross contributory negligence as to preclude a recovery. While contributory negligence, where the facts are fairly debatable, is a question which under proper instruction should be determined by the jury, yet, where the facts are incontrovertible, the question then becomes one for the court. *Chatanooga Light & Power Co. v. Hodges*, 109 Tenn. 333, 70 S. W. 616, 60 L. R. A. 459, 97 Am. St. Rep. 844.

In *Warden v. Louisville & Nashville R. Co.* (Ala. 1891) 10 South. 276, 14 L. R. A. 553, the plaintiff was a front brakeman, and received the injury which he complained of while sitting on the crossbeam in front of an engine with his legs hanging over in front of the pilot while the train was in motion. The record failed to show that he had any duty to perform, or that any duty could be performed by him while so riding, or that it was in any sense necessary for him at that time to be on the crossbeam.

In that case, after a full citation of authorities, and an able discussion of the rule of law involved, the court held the plaintiff's act in being at that place when the accident occurred "was negligence in se on his part, to be so declared as a matter of law." To this point the court said: "The investigations of the court and counsel have failed to disclose a single case to the contrary, while many courts are on record as holding, either by analogy or directly, that to ride upon the pilot or crossbeam in front of an engine while proceeding along its line of track, without justifying necessity therefor, involves per se such negligence as will defeat an action counting upon injuries received while so riding, and which would not have been received but for the plaintiff's being there. Even the assumption of less dangerous, but at the same time improper, positions on moving trains, voluntarily and unnecessarily has been many times held to be contributory negligence, as a matter of law, neutralizing the negligence of the defendant, and destroying an otherwise good

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cause of action, as illustrated in the following cases: *Martin v. B. & O. R. Co.* (C. C.) 41 Fed. 125; *Judkins v. Maine Central R. Co.*, 80 Me. 417, 14 Atl. 735, 6 New Eng. Rep. 715; *Hickey v. Boston & L. R. Co.*, 14 Allen, 429; *Penn. R. Co. v. Langdon*, 92 Pa. 21, 37 Am. Rep. 651; *Kentucky Central R. Co. v. Thomas' Adm'r*, 79 Ky. 160, 42 Am. Rep. 208; *Lehigh Valley R. Co. v. Greiner*, 113 Pa. 600, 6 Atl. 246; *Atlanta & C. R. Co. v. Ray*, 70 Ga. 674; *Martensen v. Chicago, R. I. & P. R. Co.*, 60 Iowa, 705, 15 N. W. 569."

In *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506, the plaintiff, the employee of a railroad company, left the box car provided for his accommodation, and while returning from his work rode on the pilot or bumper of the engine, and was injured from a collision with some cars standing on the track in a tunnel. On these facts, denying his right to recovery, the court said: "His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit." These cases involved claims arising out of injuries received when the parties so injured had voluntarily assumed positions dangerous in their nature while the trains were in motion. The parties so injured were employees of the roads upon which the injuries occurred but we can see no reason, and certainly none has been suggested, why a mere intruder upon the train, in no sense a passenger, and in no degree entitled to the care that the carrier owes a passenger, should stand on any higher plane, or be permitted to invoke any other principle for the maintenance of his action, than an employee injured or killed under like conditions. That there is no distinction was the evident opinion of the court in *Wilcox v. San Antonio & A. P. R. Co.* (Tex. Civ. App.) 33 S. W. 379, where the right of one who was not an employee to a recovery for an injury received while riding on the footboard of an engine was considered. It was there held that a party riding on the front footboard of a switch engine, even at the invitation of the engineer in charge thereof, was guilty of such contributory negligence as to prevent his recovery for injuries received as the result of the running of the engine at a reckless rate of speed by the engineer.

But it is contended by the defendant in error that, though it be granted the intestate was without any right on the engine, and was guilty of contributory negligence in choosing the footboard, yet, it appearing the collision and his injuries might have been avoided by the exercise of ordinary and reasonable care on the part of the railroad employees, his representative is entitled to recover. It is said in argument the lack of such care is shown in the unusual rate of speed at which this train was moving (in violation of the city ordinance) in its approach to the much-used, and under existing conditions an extremely dangerous, crossing, and but for this lack the accident might have been avoided notwithstanding the negligence of Owen.

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Let it be conceded that the collision might have been avoided if the speed had been within the limit prescribed by the ordinance, and running at the greater rate under these conditions was negligence on the part of the crew in charge of the engine, then we have a case where both parties by their negligence contributed to the injury which would bar this action. For, though theretofore recognized as sound doctrine, yet in the year 1809, for the first time, in *Butterfield v. Forrester*, 11 East, 60, decided by the Court of King's Bench, it was distinctly announced as a rule that the want of ordinary care on his part, proximately contributing to an injury, would prevent the injured party from maintaining an action against another whose negligence also directly resulted in the injury. This rule has never since been doubted or denied, and that case has been cited with approval in every jurisdiction where the common law prevails. It rests upon the ground, first, that it would be a violation of correct principle and sound policy to visit the consequences of the plaintiff's own recklessness upon the defendant where both are directly at fault, and, second, the impracticability in such a case of apportioning the effects of the concurrent negligence so the plaintiff will recover alone for that of the defendant.

However it may have been applied theretofore, at least in *Butterfield v. Forrester*, 11 East, 60, the doctrine was first formulated, and in a distinct form announced that the want of ordinary care on his own part proximately contributing to his injury will prevent the injured party from maintaining an action against another who also directly contributed to the injury. This doctrine announced in 1809 by the Court of King's Bench has never since been doubted or denied, and this case has been cited with approval and followed in every jurisdiction where the common law prevails. The wisdom of the rule has commended itself to both English and American courts which have had occasion to speak with regard to it.

In 1842, in the case of *Davies v. Mann*, 10 Mees. & Wel. 546, what has been called a qualification of the rule in *Butterfield v. Forrester* was announced, and it is this qualification which, at the instance of the plaintiff's counsel, the trial judge gave to the jury. The rule in *Davies v. Mann* has been often applied where that case has not been mentioned as authority, and as often where the decision was rested entirely upon its authority. In the Supreme Court of the United States it is cited with approval in *Inland & Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, and other cases as well as in the decision of many of the state Supreme Courts and of the United States Circuit Courts in different circuits. It is to be observed, however, that the *Davies* Case did not attack the rule announced in *Butterfield v. Forrester*. To the contrary, it expressly conceded its soundness, but held that it had no application to the case before the court, on the ground that the plaintiff's want of ordinary care did not constitute, because of its remoteness, a bar

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to the action, while that of the defendant's did proximately operate to bring about the injury. In other words, the defendant's negligence was there held the sole proximate cause of the injury sustained by the plaintiff, in that it arose subsequently to that of the plaintiff, and, the plaintiff's negligence being so obvious that the defendant could by the exercise of ordinary care have discovered it in time to avoid inflicting the injury, his failure to discover and avoid it was actionable. This was but the application of the doctrine, well settled, that, where the negligence of the defendant is proximate and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not altogether without fault. *Trow v. Vermont R. R. Co.*, 24 Vt. 487, 58 Am. Dec. 191. A reading of the opinion in the *Davies Case* makes it entirely clear that the facts raised the question of remote negligence on the part of the plaintiff and proximate negligence on that of the defendant, so plaintiff was given a recovery.

So far as we can discover, no court which has applied the rule there announced has gone further than the authority of the original case. It is true that there is to be found occasional obscurity of statement, so as to raise a doubt as to the limits within which the rule is to be confined, and it may be, and often is, that there is practical difficulty both for courts and juries in determining what is the remote, and what the proximate, cause of an injury; but where once settled that the plaintiff's negligence directly contributed thereto, we assume no well-considered case can be found which holds that the plaintiff can avoid the effect of his negligence and maintain his action against the defendant on the ground that the matter has not exercised reasonable care.

The counsel for the defendants in error in his argument relied with much confidence upon the opinion in *B. & O. R. Co. v. Hellenthal*, 88 Fed. 116, 31 C. C. A. 414, in which there was applied the principle of *Davies v. Mann*. The case at bar, however, was evidently considered by the court as one of remote and proximate causes, and as such proper for its application. That it was not conceived by the court delivering this opinion that this rule would control where the contributory negligence of the plaintiff was a proximate cause of the injury, is apparent from the fact that the same court, speaking through Day, J., now of the Supreme Court of the United States, in the case of *Gilbert v. Erie Co.*, 97 Fed. 747, 38 C. C. A. 408, after referring to *Coasting Co. v. Tolson*, supra, *B. & O. R. Co. v. Hellenthal*, supra, and other cases, said, "We do not think the principle settled in these cases applies to the case where it clearly appears that the injury is the result of the concurrent negligence of the plaintiff and defendant."

The doctrine of the *Davies v. Mann* case has been applied in this state in a number of cases, notably in *Whirley v. Whiteman*, 1 Head, 610, though without reference to the decision itself. It is a sound and reasonable qualification of the general rule. For no party should be excused from the liability for an injury which

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he inflicts on another on the ground of the earlier negligence of the latter, when, aware of the latter's exposure to peril, he omits ordinary and reasonable care to avoid the injury. When the observance of this care would have prevented the hurt, failure in that regard is actionable wrong. It is so, not only because such negligence is the proximate occasion of the injury, but for the stronger reason that it indicates wantonness, and for this the law affords no excuse. As was said by the Supreme Court of Alabama in *Ga. Pac. R. Co. v. Lee*, 9 South. 233: "Such failure with such knowledge of the situation, and the probable consequences of the omission to act upon the dictates of prudence and diligence to the end of neutralizing plaintiff's fault and averting disaster, notwithstanding his lack of care, is, strictly speaking, not negligence at all; but it is more than any degree of negligence, inattention, or inadvertence; it is that recklessness or wantonness or worse which implies willingness to inflict the impending injury, or willfulness in pursuing a course of conduct which will naturally or probably result in disaster, or an intent to perpetrate a wrong."

This intent, however, cannot be imputed to one who is without consciousness that his conduct will probably lead to wrong or injury. Nor can it be assumed, from the general fact that in some particular prior to, but in legal sequence one of the circumstances leading up to, the injury, the party has been guilty of negligence, when it appears he was unconscious of the perilous position of him who is subsequently injured. Nothing short of actual knowledge of the situation, and an omission of preventative effort after such knowledge, and where there is a reasonable prospect that such effort will avail, "can suffice to avoid the defense of contributory negligence on the part or imputable to the injured party." *Ga. Pac. R. Co. v. Lee*, supra.

The case at bar in no sense calls for the application of the rule of *Davies v. Mann*. The facts repel all suggestion of wantonness. Though absolutely unconscious of the extremely exposed position of the deceased, yet, when the emergency appeared involving a menace to the team, wagon, and driver, as well as to the train itself and those on it, the record shows the utmost energies of the engineer, with the best appliances at hand, were unavailingly exerted to avoid the collision.

Upon the facts proven and well-settled legal principle, we are constrained to hold that there was no evidence to support this action. It was a proper case for the trial judge to instruct the jury to return a verdict in favor of the defendants.

It results that the judgment is reversed, and the case is remanded for a new trial.

HULSEY'S ADM'R v. LOUISVILLE, H. & ST. L. RY. CO.

(Court of Appeals of Kentucky, May 25, 1905.)

[87 S. W. Rep. 302.]

Railroads—Persons on Track—Trespassers—Death—Care Required.*—Where deceased was walking on defendant's railroad track some 75 yards from a public crossing at the time he was killed, he was a trespasser, as to whom the railroad company was not bound to keep a lookout, and for whose death it was not liable, in the absence of proof that he was discovered by the company's servants in time to have saved him from injury.

Appeal from Circuit Court, Daviess County.

"Not to be officially reported."

Action by Mid. Hulsey's administrator against the Louisville, Henderson & St. Louis Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

R. G. Hill and *Miller & Todd*, for appellant.

Helm, Bruce & Helm, for appellee.

NUNN, J. In the month of March, 1902, Mid. Hulsey, appellant's intestate, was run over and killed by a freight train of the appellee. He was killed within about half a mile of Worthington's Station. He was under the influence of liquor, and was walking on the track of the railroad where the railroad passed through the county, and within about 75 yards of a public crossing. The track was straight for several miles. Upon trial, after appellant introduced his evidence, the court gave to the jury a peremptory instruction to find for the appellee, and appellant is here on appeal.

The appellant contends that under the principles announced in the case of *L. & N. R. R. Co. v. Logsdon's Adm'r*, 78 S. W. 409, 25 Ky. Law Rep. 1657, the lower court erred in giving this instruction. That opinion is not authority, for on a petition for rehearing in that case this court, by a majority opinion, withdrew that opinion, and wrote the opinion in 81 S. W. 657, 26 Ky. Law Rep. 457. Applying the principles announced in the last opinion in the Logsdon Case, supra, it necessarily results in an affirmance of the action of the lower court. As stated, the deceased was on the track of the appellee in the country not upon a public highway, and therefore he was a trespasser, and those in charge of the train were not required to keep a lookout

*As to the care due licensees and trespassers on railroad tracks, see foot-notes appended to *Anderson v. Seattle-Tacoma Interurban Ry. Co.* (Wash.), 14 R. R. R. 380, 37 Am. & Eng. R. Cas., N. S., 380; foot-notes appended to *Central of Georgia Ry. Co. v. Williams Buggy Co.* (Ga.), 14 R. R. R. 171, 37 Am. & Eng. R. Cas., N. S., 171; foot-note appended to *Maysville & B. S. R. Co. v. McCabe* (Ky.), 13 R. R. R. 459, 36 Am. & Eng. R. Cas., N. S., 459; foot-notes appended to *Jordan v. Grand Rapids & I. Ry. Co.* (Ind.), 13 R. R. R. 397, 36 Am. & Eng. R. Cas., N. S., 397; foot-notes appended to *Koegel v. Missouri Pac. Ry. Co.* (Mo.), 11 R. R. R. 358, 34 Am. & Eng. R. Cas., N. S., 358.

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for him, and owed him no duty except to use every effort to avoid killing him after the discovery of his peril. There was no proof that they discovered him in time to have saved him from injury and death.

Wherefore the judgment of the lower court is affirmed.

COHEN v. PHILADELPHIA & R. R. Co.

(Supreme Court of Pennsylvania, March 20, 1905.)

[60 Atl. Rep. 729.]

Accident at Crossing—Question for Jury.—Where, in an action for death at a crossing, the measure of duty is ordinary and reasonable care, and the degree of care varies with the circumstances, the question of negligence is for the jury.

Same—Stop, Look, and Listen.*—Failure to stop, look, and listen after going on the tracks at a crossing may or may not be negligence, according to the circumstances.

Same—Question for Jury.—In an action for the death of plaintiff's husband at a crossing, evidence held to make the question of defendant's negligence and decedent's contributory negligence one for the jury.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Sarah Cohen against the Philadelphia & Reading Railroad Company. From an order refusing to take off a nonsuit, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and DEAN, FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Charles H. Edmunds, Samuel Scoville, Jr., and John Sparhawk, Jr., for appellant.

Gavin W. Hart, for appellee.

ELKIN, J. This is an action of trespass to recover damages by reason of the injury and death of Jonas Cohen, husband of plaintiff, alleged to have been caused by the negligent act of defendant. The learned trial judge granted a nonsuit, which he refused to take off on motion made, and these rulings have been assigned for error.

A motion for a nonsuit admits all the facts which the jury might have fairly inferred from the testimony. *Maynes v. Atwater*, 88 Pa. 496; *Miller v. Bealer*, 100 Pa. 583.

As applied to negligence cases, the rule has been stated by this court to be that where there is a doubt as to the inference to be drawn from the facts, or where the measure of duty is ordinary and reasonable care, and the degree of care required varies with the circumstances, the question of negligence is necessarily for the jury. *Pennsylvania Railroad Co. v. White*, 88 Pa. 327; *Pennsylvania R. Co. v. Peters*, 116 Pa. 206, 9 Atl. 317; *Ruster-*

*See foot-note appended to *Chicago City Ry. Co. v. Barker* (Ill.), 14 R. R. R. 190, 37 Am. & Eng. R. Cas., N. S., 190.

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holtz v. N. Y., etc., Railroad Co., 191 Pa. 390, 43 Atl. 208. Here, then, is the rule which applies, and we must inquire into the facts in order to determine if the proper application of these principles has been made in this case. Is there a doubt as to the inference to be drawn from the facts? Is the measure of duty ordinary and reasonable care? Do the facts present a case where the degree of care required varies with the circumstances? If these questions can be answered in the affirmative, then the learned court below was in error in granting the nonsuit.

On the evening of October 18, 1901, Jonas Cohen, the deceased, in company with Henry Weil, started from his home and walked down Susquehanna avenue. This avenue is crossed by the tracks of the defendant company at grade. The approaches to the crossing are protected by safety gates at both sides. When within half a square of the crossing a train was passing, and the safety gates were down. By the time they reached the crossing the safety gates had been raised. Before they started over the tracks they stopped, looked, and listened. Their view was obstructed by freight cars standing on the first track to the north of Susquehanna avenue, and also by some cars to the south of the same avenue. They did not see or apprehend any danger while crossing over the first track. Before leaving the first track they stopped again near the end of the freight cars, which obstructed their view and prevented them from seeing approaching trains or engines. They then started on their journey, taking a couple of steps toward the second track, when they were run into by a shifting engine, which the testimony tended to show was running at a rate of from 20 to 30 miles per hour. No bell was rung nor whistle blown as the engine approached, until about the time Cohen was struck. He was severely injured, from which injuries he subsequently died. These were the facts immediately connected with the accident, as testified to by Henry Weil, who was walking with the plaintiff, and corroborated in many particulars by Glauseman and Bonner, who saw the accident from different points of view. Upon these facts the plaintiff relied to show the negligent acts of the defendant.

The plaintiff contends that these facts, having been proven by her witnesses and not contradicted, must be accepted as true, and that they show negligence on the part of the defendant in three particulars: First, in that the safety gates were raised at a time when a shifting engine was approaching the crossing; second, in permitting the freight cars to stand on the tracks to the north and south of the crossing so as to obstruct the view of the deceased; and, third, in permitting a shifting engine to run over the crossing at a high rate of speed when the safety gates were raised, without ringing a bell, blowing a whistle, or giving any other danger signal. If the case rested here, it cannot be doubted that the question of negligence should have been submitted to the jury. Under these facts the plaintiff is entitled to recover damages unless the deceased contributed to the accident by his own negligence.

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The learned counsel for appellee contends that these facts show such contributory negligence on the part of the deceased as to prevent the plaintiff from recovering in this action. This brings us to the consideration of the vital question in the case. The testimony clearly shows that the deceased stopped, looked, and listened before stepping upon the first track, and therefore was not guilty of negligence per se. He was upon a crossing where he had a right to be. His view northward was obstructed by a freight car or cars standing on the first track, and very near to the crossing at the point where he was walking over. He again stopped, but did or could not see or hear any danger. He then proceeded but a step or two, when he received the injuries complained of.

It was the duty of the deceased, even after he was safely on the first track, to keep a lookout for trains and engines; and if he did see any danger, or could have seen it by the exercise of ordinary care, it was his duty to see it and avoid it, or, if he did not see it when by the exercise of reasonable care he could have seen it, the defendant would not be liable to damages in this case. The fact that the safety gates were raised, thus inviting him to cross over, did not relieve him from the exercise of ordinary care after he got on the first track. In the application of the stop, look, and listen rule, the distinction has been made that, if a person fails to observe it before reaching the tracks, he is guilty of negligence per se, but failure to do so after getting on the tracks is not negligence per se, but may or may not be negligence according to the circumstances. *Ayers v. Pittsburg, etc., Ry. Co.*, 201 Pa. 124, 50 Atl. 958. The rule in the case cited, applied to the facts in this case, requires the jury to determine whether, under the circumstances, the deceased exercised ordinary and reasonable care.

The defendant further contends that it was the duty of the deceased to have stopped in the space between the first and second tracks after he had passed beyond the freight cars that obstructed his view, and that he could have stopped at that place in safety until the shifting engine passed by. The learned counsel for appellee assumes that the space between the two tracks is eight feet, and that this was sufficient to permit the plaintiff to stand there in safety. The exact width of space between the two tracks was not proven, but it may be assumed for the purposes of this case that it is correctly stated in the argument of defendant. The plaintiff answers this contention by testimony which tends to show that the overhang of the freight cars was from 2 to 3 feet, and the overhang of the shifting engine from 3 to 4 feet, thus leaving a space of about 1½ feet in which to stand. It was not negligence per se for the deceased to have failed to stop at that point, but may or may not have been negligence, according to the circumstances; and hence the case should have been submitted to the jury to determine whether there was a place of safety between the first and second tracks at which the deceased could have stopped, and whether, under all the circumstances, he

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was negligent in not so stopping. In this respect *Gray v. Pennsylvania Railroad Company*, 172 Pa. 383, 33 Atl. 397, rules the case. Mr. Justice Dean, delivering the opinion in that case, said: "The exact width of space between the main and side tracks is not given, but from all the evidence the inference is they were only sufficiently distant from each other to allow for safe passage of trains. That there was room for safe observation by a foot traveler outside of the projection of the freight car over the side track, and that of a coming locomotive over the main track, does not appear. Whether, under the circumstances, it was the duty of the deceased to peep around the end of the freight car and look before venturing across the track, the court could not say, as matter of law, for that manner of looking may have been attended with danger. This, however, appears clear: That less than two ordinary steps of a man from safety behind the box car put him in front of death from a locomotive following sixty feet in the rear of the coal train."

The deceased was invited upon the tracks by the raised safety gates. He was not warned of the approach of the shifting engine, and did not see any danger. The raised gates had "dulled the edge of his caution," but the testimony shows that he was proceeding cautiously even after getting on the first track, and up to the very moment when he was run down by the engine. We cannot say, as a matter of law, it was his duty to have looked around the overhang of the freight cars to see the approach of the shifting engine or any other danger, under the circumstances. These facts should have been submitted to the jury to determine whether the deceased had exercised that ordinary and reasonable care under the circumstances which the law requires. This is clearly a case for the jury, and the court erred in granting the nonsuit.

Judgment reversed and a procedendo awarded.

CHATTANOOGA SOUTHERN R. CO. v. WHEELER.

(Supreme Court of Georgia, May 13, 1905.)

[50 S. E. Rep. 987.]

Railroads—Negligence—Care of Station.*—A railway company is not, relatively to one who has no business to transact with it, but who goes to its station at the instance of a third person to look after some private property, which he has without the company's permission stored in a warehouse which it has practically abandoned and al-

*As to the care due persons, other than passengers, at stations and depots on business, see foot-notes appended to *Anderson v. Seattle-Tacoma Interurban Ry. Co.* (Wash.), 14 R. R. R. 380, 37 Am. & Eng. R. Cas., N. S., 380.

As to the care due licensees and trespassers on railroad premises, see foot-note appended to *Kendall v. Louisville & N. R. Co.* (Ky.), 11 R. R. R. 771, 34 Am. & Eng. R. Cas., N. S., 771.

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lowed to become out of repair, under any duty to keep the building and its approaches in a safe condition for use by persons entering or leaving the same.

(Syllabus by the Court.)

Error from Superior Court, Chattanooga County; W. M. Henry, Judge.

Action by W. T. Wheeler against the Chattanooga Southern Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. M. Bellah and Pritchard & Sizer, for plaintiff in error.
Wesley Shropshire, for defendant in error.

EVANS, J. A suit for damages was brought by W. T. Simmons against the Chattanooga Southern Railroad Company, the plaintiff alleging that he had sustained personal injuries by reason of having fallen through a platform built around a station house belonging to the defendant company, which platform the company had failed to keep in repair or in a safe condition for use by the public. Pending the action the plaintiff died, and his administrator, J. V. Wheeler, was made a party plaintiff in his stead. The case was three times tried, the last trial resulting in a verdict against the railroad company. It is here complaining of a judgment overruling its motion for a new trial, and also of the refusal of the court to grant a nonsuit.

The plaintiff based his right to a recovery upon the following allegations of fact: At Chelsea the defendant company had a depot and warehouse wherein goods were stored whilst awaiting shipment from that station or delivery after shipment to its patrons. It maintained a platform attached to the building, over which ingress to and egress from the building was had by members of the public who had business to transact with the company. On or about May 8, 1900, plaintiff "was superintending the sale or delivery of guano for one Tom Knox, which had been shipped to said Knox over defendant's said road and stored for delivery in said warehouse." He entered the warehouse, as he had the right and privilege to do, for the purpose of attending to his duties in connection with the delivery of this guano, and also "for the purpose of seeing after some other goods or freight in said warehouse in which petitioner was interested." After attending to the matters in hand, he started out of the warehouse and went upon and along the platform. The supports under the platform had become rotten or decayed, the floor suddenly gave way beneath plaintiff, and he received a violent fall and serious injury. The plaintiff's petition undoubtedly stated a case showing liability on the part of the company. The proof offered in his half, however, fell far short of proving his case as laid. The following facts were brought to light: The depot and warehouse at Chelsea had been erected by the company a number of years before Simmons met with his injury, but at that time the company had no agent at that station, and had practically aban-

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done all use of the building, which had fallen into a dilapidated condition. Patrons of the road still used the platform when they had freight for shipment, and the trainmen unloaded freight upon it. Occasionally, when the consignee was not at the station to receive freight, or when it was raining, goods were placed inside the warehouse, and there left to their fate by the trainmen. Some agricultural implements which had been shipped over the railroad were for some time stored in the warehouse, which was allowed to remain open and uncared for; but whether this was with the knowledge and acquiescence of the company did not appear. One of its patrons stored some guano in the warehouse. Knox inquired of him if he had the company's permission to store it there, and he said he had, and "it would be all right" for Knox to put his in there. Knox had received a carload of guano at Chelsea, which had been delivered to him on a side track. Part of it he unloaded from the car into the wagons of customers to whom he had sold some. The car was afterwards rolled down to the warehouse by him, the rest of the guano unloaded and placed in the building, and the car then rolled back to the point at which the company had delivered it to him. All this was done without permission from the railroad authorities. Knox afterwards sold the guano from time to time to customers, delivering it to them at the warehouse, and he had employed Simmons to look after the guano and make delivery of it to customers when he (Knox) was not there.

It will thus be seen that, in so far as Simmons figured as the representative of Knox, the plaintiff's case was not made out. The company owed to neither Knox nor his agent, under the circumstances, any duty to keep in a safe condition the platform built around its abandoned warehouse. Knox does not appear to have been even a licensee. Delivery to him of the guano had been made by the company at a point removed from the building, and he subsequently used the warehouse for his private ends, without its permission, and, presumably, without its knowledge. No implied invitation was held out to Simmons, or to the public generally, to use the premises in carrying on a commercial enterprise wholly disconnected with the business in which the company was engaged, and it cannot be held accountable for its failure to keep its building and appurtenances in a state of repair. The evidence also failed to support the allegation in the petition that Simmons went into the warehouse "for the purpose of seeing after some other goods or freight" therein, in which he was personally interested. It appears that he was the owner of a cowhide which he had tried to sell; that it had been left in one of the rooms of the depot, without any permission from the company; and that he had gone into this room to see if it was still there, but did not find it. There was no pretense that he had any intention of offering the cowhide to the company for shipment, or had any business dealings with the company in connection therewith. Our conclusion is that the evidence did not support the verdict returned in favor of the plaintiff, and that a new trial should, for this reason, have been granted.

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Exception is taken to a number of charges by the court whereby the jury were left to determine whether or not, under the evidence, the company owed to Simmons the duty of keeping its premises in a safe condition. In the view we take of the evidence, the giving of these charges was erroneous; they not being warranted by the undisputed facts of the case.

Judgment reversed. All the Justices concur, except CANDLER, J., absent.

BOUDWIN v. WILMINGTON CITY RY. CO.

(Superior Court of Delaware, New Castle, June 18, 1903.)

[60 Atl. Rep. 865.]

Street Railways—Collision with Team at Crossing—Negligence and Contributory Negligence.*—A street railway company is liable for collision with a team at a crossing if its employees in charge of the car fail to exercise ordinary care, considering the circumstances of the place and occasion, and this is the proximate cause of the accident, and the person in charge of the team does not, by failure to exercise such care, contribute to the accident.

Action by Charlotte M. Boudwin against the Wilmington City Railway Company. Verdict for defendant.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

John H. Rodney, for plaintiff.

Walter H. Hayes, for defendant.

PENNEWILL, J. (charging jury). In this action Charlotte M. Boudwin, the plaintiff, seeks to recover from the Wilmington City Railway Company, the defendant, damages for injury to her nervous system, and pain and suffering, alleged to have been caused by the negligence of the defendant company on August 8, 1901, at Eighth and Poplar streets, in this city, in running one

*As to the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-notes appended to *Lightfoot v. Winnebago Traction Co. (Wis.)*, 14 R. R. R. 1, 37 Am. & Eng. R. Cas., N. S., 1; *Rhymes v. Jackson Electric Ry., L. & P. Co. (Miss.)*, 14 R. R. R. 7, 37 Am. & Eng. R. Cas., N. S., 7; *Christy v. Des Moines City Ry. Co. (Iowa)*, 14 R. R. R. 42, 37 Am. & Eng. R. Cas., N. S., 42; *O'Brien v. Blue Hill St. Ry. Co. (Mass.)*, 14 R. R. R. 806, 36 Am. & Eng. R. Cas., N. S., 806; *Butler v. Rockland, etc., St. Ry. (Me.)*, 14 R. R. R. 778, 37 Am. & Eng. R. Cas., N. S., 778; *Dunkle v. City Passenger Ry. Co. (Pa.)*, 14 R. R. R. 776, 37 Am. & Eng. R. Cas., N. S., 776; *Kennedy v. Consolidated Traction Co. (Pa.)*, 14 R. R. R. 635, 37 Am. & Eng. R. Cas., N. S., 635; foot-notes appended to *Indianapolis St. Ry. Co. v. Schomberg (Ind.)*, 14 R. R. R. 627, 37 Am. & Eng. R. Cas., N. S., 627; *Greene v. Louisville Ry. Co. (Ky.)*, 14 R. R. R. 589, 37 Am. & Eng. R. Cas., N. S., 589; foot-notes appended to *Richmond P. & P. Co. v. Allen (Va.)*, 14 R. R. R. 566, 37 Am. & Eng. R. Cas., N. S., 566; foot-note appended to *Indianapolis St. Ry. Co. v. Taylor (Ind.)*, 14 R. R. R. 356, 37 Am. & Eng. R. Cas., N. S., 356; *Searles v. Elizabeth, etc., Ry. Co. (N. J.)*, 13 R. R. R. 781, 36 Am. & Eng. R. Cas., N. S., 781.

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of its cars at an excessive rate of speed, and without giving any proper warning of its approach by ringing the bell or otherwise, by reason of which said negligence said car ran into the wagon in which the plaintiff was riding, and caused the injury complained of. Such is the contention of the plaintiff. The plaintiff claims that the defendant company was negligent, first, in running the car which caused the accident at an excessive rate of speed; and, secondly, in not giving any timely or proper warning of its approach. The defendant company, on the other hand, contends that it was not guilty of the negligence which caused the injury to the plaintiff, that it exercised all reasonable and proper care and diligence to prevent the accident, and that the injury was caused by the negligence of the plaintiff. The defendant therefore denies any and all liability for the injury.

It is admitted in this case that the defendant is a corporation, as alleged in the declaration, and that at the time of the accident it was operating the car in question. You have heard the evidence, gentlemen, and it is now for your consideration and determination, applying thereto the law as we shall declare it to you.

The principles of law applicable to this case have been clearly settled by the courts of this state. This suit is based on negligence, and it is proper that we should explain to you what negligence, in legal contemplation, is. It has been defined to be the want of ordinary care; that is, the want of such care as a reasonably prudent and careful man would exercise under similar circumstances. What constitutes negligence is a question of law for the court, but whether negligence exists in the particular case is a question of fact for the determination of the jury. It is for you to determine whether there was any negligence that caused the injury complained of, and, if there was, whether it was the negligence of the defendant or the plaintiff. And we say to you that the defendant can be held liable only for such negligence as constitutes the proximate cause of the injury. Negligence is never presumed, but must always be proved, and the burden of proving it rests always upon the plaintiff. Ordinary care and diligence, when applied to the management of railways, must be understood to import all the care, circumspection, prudence, and discretion which the peculiar circumstances of the place or occasion reasonably require of the servants of the defendant company; and this will be increased or diminished according as the ordinary liability to danger and accident, and to do injury to others, is increased or diminished in the movement and operation of the cars. But on the other hand, it is equally well settled as a principle of law that the plaintiff was also bound at the same time to use ordinary prudence, care, and diligence to avoid the accident and injury which occurred to her on that occasion, and the care and diligence which she is bound to exercise must be in proportion to the danger to be avoided; that is to say, she was bound to use such care, prudence, and diligence as a reasonably prudent person, under the peculiar circumstances

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Exception is taken to a number of charges by the court whereby the jury were left to determine whether or not, under the evidence, the company owed to Simmons the duty of keeping its premises in a safe condition. In the view we take of the evidence, the giving of these charges was erroneous; they not being warranted by the undisputed facts of the case.

Judgment reversed. All the Justices concur, except CANDLER, J., absent.

BOUDWIN v. WILMINGTON CITY RY. CO.

(Superior Court of Delaware, New Castle, June 18, 1903.)

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Street Railways—Collision with Team at Crossing—Negligence and Contributory Negligence.*—A street railway company is liable for collision with a team at a crossing if its employees in charge of the car fail to exercise ordinary care, considering the circumstances of the place and occasion, and this is the proximate cause of the accident, and the person in charge of the team does not, by failure to exercise such care, contribute to the accident.

Action by Charlotte M. Boudwin against the Wilmington City Railway Company. Verdict for defendant.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

John H. Rodney, for plaintiff.

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PENNEWILL, J. (charging jury). In this action Charlotte M. Boudwin, the plaintiff, seeks to recover from the Wilmington City Railway Company, the defendant, damages for injury to her nervous system, and pain and suffering, alleged to have been caused by the negligence of the defendant company on August 8, 1901, at Eighth and Poplar streets, in this city, in running one

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of its cars at an excessive rate of speed, and without giving any proper warning of its approach by ringing the bell or otherwise, by reason of which said negligence said car ran into the wagon in which the plaintiff was riding, and caused the injury complained of. Such is the contention of the plaintiff. The plaintiff claims that the defendant company was negligent, first, in running the car which caused the accident at an excessive rate of speed; and, secondly, in not giving any timely or proper warning of its approach. The defendant company, on the other hand, contends that it was not guilty of the negligence which caused the injury to the plaintiff, that it exercised all reasonable and proper care and diligence to prevent the accident, and that the injury was caused by the negligence of the plaintiff. The defendant therefore denies any and all liability for the injury.

It is admitted in this case that the defendant is a corporation, as alleged in the declaration, and that at the time of the accident it was operating the car in question. You have heard the evidence, gentlemen, and it is now for your consideration and determination, applying thereto the law as we shall declare it to you.

The principles of law applicable to this case have been clearly settled by the courts of this state. This suit is based on negligence, and it is proper that we should explain to you what negligence, in legal contemplation, is. It has been defined to be the want of ordinary care; that is, the want of such care as a reasonably prudent and careful man would exercise under similar circumstances. What constitutes negligence is a question of law for the court, but whether negligence exists in the particular case is a question of fact for the determination of the jury. It is for you to determine whether there was any negligence that caused the injury complained of, and, if there was, whether it was the negligence of the defendant or the plaintiff. And we say to you that the defendant can be held liable only for such negligence as constitutes the proximate cause of the injury. Negligence is never presumed, but must always be proved, and the burden of proving it rests always upon the plaintiff. Ordinary care and diligence, when applied to the management of railways, must be understood to import all the care, circumspection, prudence, and discretion which the peculiar circumstances of the place or occasion reasonably require of the servants of the defendant company; and this will be increased or diminished according as the ordinary liability to danger and accident, and to do injury to others, is increased or diminished in the movement and operation of the cars. But on the other hand, it is equally well settled as a principle of law that the plaintiff was also bound at the same time to use ordinary prudence, care, and diligence to avoid the accident and injury which occurred to her on that occasion, and the care and diligence which she is bound to exercise must be in proportion to the danger to be avoided; that is to say, she was bound to use such care, prudence, and diligence as a reasonably prudent person, under the peculiar circumstances

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of the case, would exercise to preserve himself from being injured. Due care in the case of a railway company means ordinarily the timely employment of sufficient signals or warnings giving notice of the approach of cars at crossings, etc., the employment of competent motormen or other servants, and the running of cars at a proper and reasonable rate of speed. And we will say to you that, the greater the peril to the individual, the greater the care required of the company, and of prudent and due caution on the part of the individual also. At places of great danger great care must be taken by both parties. This, after all, is but common sense, the force of which must be evident to every one. If the defendant company failed to make use of such usual and appropriate means to warn the plaintiff at the time of the accident, it would be negligence on its part; and, if the accident occurred by reason of its failure to do so, the defendant would be liable for the injury to the plaintiff, provided the plaintiff did not by her own negligence or want of care contribute in some degree to her injury. For it is a general rule of law that persons crossing railway tracks are bound to the reasonable use of all their senses for the prevention of accident, and also to the exercise of all such reasonable caution as ordinarily careful and prudent persons would exercise under like circumstances. A person approaching a railway crossing with which he is familiar must avail himself of his knowledge of the locality, and act accordingly. If, as he approaches the crossing, his line of vision is unobstructed, it is his duty to look for approaching cars in time to avoid collision with them; and if he does not look, and for this reason does not see an approaching car until it is too late to avoid a collision, and he is therefore injured, he is guilty of contributory negligence, and cannot recover therefor. When the view at the crossing is obstructed, greater care is necessary than in places where the view is unobstructed. If a person drives up to a railway crossing, and upon it, not only without stopping, but without looking out or listening to ascertain if any cars are approaching, and a collision and injury occur to him from a passing car, which would have been prevented, had the person so injured exercised the proper and ordinary prudence, care, and caution mentioned, such person would be guilty of contributory negligence, and could not recover from the railway company for such injury.

If you should believe from the preponderance of the evidence in this case that at the time of the accident the defendant company was not exercising ordinary care and diligence, such as we have defined it (that is, all the care and circumspection, prudence and discretion, that an ordinarily prudent and careful person would have exercised under the circumstances), and that the want of such care and diligence was the proximate cause of the injury to the plaintiff, and shall also believe that the plaintiff was free from any negligence that contributed in any way to her injury, then your verdict should be for the plaintiff. But if you should believe that it has not been shown by the preponderance

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(that is, the weight) of the testimony that the negligence of the defendant was the proximate cause of the injury to the plaintiff, or if you should believe that the negligence of the plaintiff herself contributed to the injury complained of, your verdict should be for the defendant company.

If you find for the plaintiff, your verdict should be for such sum as you believe from the testimony will reasonably compensate her for any injury to her nervous system and pain and suffering shown by the testimony to have been caused by the accident.

Verdict for defendant.

HALL v. WESTERN & A. R. Co.

(Supreme Court of Georgia, June 14, 1905.)

[51 S. E. Rep. 311.]

Railroads—Trespasser on Right of Way—Evidence.*—The only duty which a railroad company owes to a trespasser on its right of way is to observe ordinary diligence to avoid injuring him after his presence thereon becomes known to the employee in charge of the train. Consequently, in a suit by a widow for the homicide of her husband, where it appeared from the undisputed evidence that the deceased was a trespasser; that he went upon the railroad track in an intoxicated condition; that shortly thereafter his dead body was found near the track, wounded in such a manner as to indicate that he had been struck by a passing train while lying down on or near the track; and that the employees of the defendant in charge of the train which was supposed to have struck him never at any time saw him on the track or right of way, and did not learn until a considerable time afterwards that he had been killed—it was not error to direct a verdict for the defendant.

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by Elizabeth Hall against the Western & Atlantic Railroad Company. Affirmed.

W. C. Martin and Cantrell & Ramsaur, for plaintiff in error.

R. J. & J. McCamy, for defendant in error.

CANDLER, J. There is no dispute as to the material facts brought out by the evidence. The plaintiff's husband, for whose homicide she sued, went upon the right of way of the defendant company in an intoxicated condition, and proceeded to walk

*As to the care due trespassers on railroad tracks, see foot-note appended to *Central of Georgia Ry. Co. v. Williams Buggy Co.* (Ga.), 14 R. R. R. 171, 37 Am. & Eng. R. Cas., N. S., 171; foot-note appended to *Maysville & B. S. R. Co. v. McCabe* (Ky.), 13 R. R. R. 459, 36 Am. & Eng. R. Cas., N. S., 459; foot-notes appended to *Jordan v. Grand Rapids & I. Ry. Co.* (Ind.), 13 R. R. R. 397, 36 Am. & Eng. R. Cas., N. S., 397; foot-note appended to *Koegel v. Missouri Pac. Ry. Co.* (Mo.), 11 R. R. R. 358, 34 Am. & Eng. R. Cas., N. S., 358.

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along the track. This was between 2 and 3 o'clock in the afternoon. His condition was such as to attract the attention of persons who saw him from a distance. Some time afterwards his lifeless body was found by the side of the track. His skull was crushed, but there were no wounds on the body. There were no eyewitnesses to the occurrence, but apparently the unfortunate man had lain down on the side of the track and gone to sleep, when he was struck in the head by the pilot, or some other part of a passing engine, and killed. The place where the body was found was not at or near a public crossing. The track at that point was straight for a distance of from a quarter to a half mile in the direction from which the train approached that is supposed to have struck the deceased. The engineer and fireman of that train testified that they knew nothing whatever of the occurrence until that night or the following morning, when they were informed of it by others. When they passed the place where the deceased was afterwards found, each was attending to his customary duties on the engine. It was the duty of the engineer to keep a lookout ahead all the time, and it was also the fireman's duty to look ahead when he was not firing the engine. The fireman could not say whether he was firing the engine at this point or not; but both he and the engineer were positive that a lookout was kept all the time by one or both, and that neither of them saw the deceased on or near the track. At the conclusion of the evidence the judge directed a verdict for the defendant, and the plaintiff excepts.

We find no error in the direction of a verdict for the defendant. It is well settled that the only duty that a railroad company owes to a trespasser upon its right of way is to observe ordinary care to avoid injuring him after his presence has become known to the employees of the train. *Atlanta R. Co. v. Leach*, 91 Ga. 419, 17 S. E. 619, 44 Am. St. Rep. 47; *Atlanta R. Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145; *Hambright v. Western & Atlantic R. Co.*, 112 Ga. 36, 37 S. E. 99. In one important respect this case differs from that of *Parish v. Western & Atlantic R. Co.*, 102 Ga. 285, 29 S. E. 715, 40 L. R. A. 364, in which Mr. Presiding Justice Lumpkin and Mr. Justice Atkinson dissented from the majority opinion. In the *Parish Case* a nonsuit was granted, and it was the opinion of the dissenting justices that, in the absence of any evidence as to the facts surrounding the death of the deceased, the presumption raised by the law upon proof that she was killed by the running and operation of the defendant's train was sufficient to carry to the jury the question of negligence. In the present case that presumption was fully met by the evidence for the defendant, which was not contradicted in the smallest material particular. As was said in the case of *Holland v. Sparks*, 92 Ga. 753, 18 S. E. 990, section 2321 of our present Civil Code of 1895 "imposes the burden of proving the observance of such diligence as was due, not the burden of proving that none was due." The defendant company in this case even went to the extent of proving

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that no diligence was due, for it was clearly shown that neither the engineer nor the fireman ever saw the plaintiff's husband on the track or right of way. The fact that the track was straight at this point for more than a quarter of a mile does not alter the principle involved, for the engineer and fireman had no reason to expect the presence of a trespasser on the track, and, relatively to him, it was not negligence even if they failed to keep the usual lookout at this point. Besides, in view of the evidence as to the manner in which the deceased was struck by the passing train, it is quite conceivable that the engineer and fireman may have been looking ahead in the full performance of their duties and yet not have seen a man lying on or near the track. Certainly a lookout for such objects cannot be exacted from railroad companies as the measure of diligence due to trespassers. A verdict for the plaintiff would have been contrary to law, under the evidence in the record, and it was therefore not error to direct a contrary finding.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent.

STRODE v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Division No. 1, May 24, 1905.)

[87 S. W. Rep. 976.]

Personal Injuries—Disease—Liability.—The fact that an injured person was, prior to his injuries, afflicted with the disease of which he subsequently died, and that his injuries merely hastened his death, does not preclude a recovery by the persons entitled thereto for his death.

Trespassers—Driving on Street Railway Tracks—Care Required.*—The driver of a wagon is not a trespasser, nor guilty of negligence, in driving on a street railroad track, but is merely bound to use reasonable care to avoid interfering and colliding with the cars.

Collision with Street Car—Contributory Negligence—Discovered Peril—Duty of Motorman.—Conceding that one driving a wagon on a railroad track should have driven away from the track on hearing the gong of a car approaching from the rear, yet the fact that he disregarded his duty in that regard did not authorize the motorman of the car to run the wagon down and knock it off the track.

Actions—Death—Effect of Release by Person Injured.—A husband or father, who suffers injuries through the negligence of another, cannot, by executing a release, deprive his widow or children, in case he dies from such injuries, of the right of recovery given them by Rev. St. 1899, §§ 2864, 2865.

*See foot-notes appended to *Richmond Passenger & Power Co. v. Allen* (Va.), 14 R. R. R. 566, 37 Am. & Eng. R. Cas., N. S., 566; *Sullivan v. Boston Elevated Ry. Co.* (Mass.), 11 R. R. R. 512, 34 Am. & Eng. R. Cas., N. S., 512; *Haas v. New Orleans Rys. Co.* (La.), 11 R. R. R. 442, 34 Am. & Eng. R. Cas., N. S., 442; *McGauley v. St. Louis Transit Co.* (Mo.), 11 R. R. R. 247, 34 Am. & Eng. R. Cas., N. S., 247; *Hogan v. Winnebago Traction Co.* (Wis.), 11 R. R. R. 232, 34 Am. & Eng. R. Cas., N. S., 232.

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Appeal from Circuit Court, St. Charles County; E. M. Hughes, Judge.

Action by Gerrard Strode, curator of the minor children of John D. Dill, against the St. Louis Transit Company. From an order granting a new trial, defendant appeals. Affirmed by divided court.

Boyle, Priest & Lehmann, Geo. W. Easley, and Edward T. Miller, for appellant.

Gerald Griffin and A. R. Taylor, for respondent.

VALLIANT, J. Plaintiffs are the minor children of John D. Dill, deceased, suing by their curator to recover damages for the death of their father, which they allege was caused by the negligence of defendant. The petition alleges negligence as at common law and also a violation of the vigilant watch ordinance. The answer was a general denial, contributory negligence on the part of the deceased, and a release by the deceased.

The plaintiffs' evidence tended to prove as follows: John D. Dill, the father of plaintiffs, was the driver of a wagon of the Walton-Knost Express Company. Defendant operated a double-track street railroad in Laclede avenue. On the night of the accident, December 14, 1899, Dill was driving a wagon in defendant's south track between Sarah street and Vandeventer avenue going east. A street car of defendant, going in the same direction in the same track, approached the wagon from the rear, running at the usual speed, about 8 miles an hour. When the car was at a distance of 75 or 100 feet from the wagon, the motorman commenced sounding his gong, and continued doing so as he continued to come forward until the car struck the rear end of the wagon and turned it over, throwing the driver to the street. The wagon was struck with such force that it was badly broken. The car struck the wagon just as the driver began to turn to get out of the track. It was downgrade going east. The street was not well lighted at that point, but a wagon in front of the car could have been seen by the motorman for a distance of 500 feet or more. The car could have been stopped within a space of 40 to 50 feet, and by the use reverse within a shorter space. There was no effort to stop this car until it struck the wagon. The driver of the wagon did not seem at the time to have been seriously hurt. He continued his usual occupation for 10 or 12 days, when he gave up his work and went home, after which he rapidly declined in health, and died February 6, 1900, 54 days from the date of the accident. The death certificate was that it resulted from "heart trouble, attributing traumatic injury," and his attending physician testified that the disease was attributable to the accident.

On the part of the defendant the evidence tended to show as follows: The point of the accident was 300 to 400 feet east of Sarah street. There was a street light at Sarah street and one at Vandeventer avenue; the distance between the two being 1,200

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or 1,400 feet. There was no light between them. A policeman arrived on the scene a few minutes after the accident, and proposed to take Dill to the hospital; but he declined, saying he was not hurt, and stood around there until another wagon came and assisted in transferring the contents of his wagon to the other. There was also expert testimony tending to show that the disease of which Dill died could not have been caused by the hurt he received in the accident. A few days after the accident, and while Dill was still at work for the express company, a claim agent of the defendant called at the office of the express company and offered to settle the claim for \$37.50, the estimate of the damage to the wagon, which the express company was willing to accept; but the defendant's representative said he would not settle with the express company unless Dill would also join in the settlement, so that it would be a release of the claims of both Dill and the express company. Dill was called into the office and informed of the proposition. Mr. Walton, the president of the express company, said to Dill: "You haven't lost anything by this accident, have you?" Dill replied: "No." But when Mr. Walton read the release, which it was proposed they were to sign, and saw that it purported to discharge the railroad company from liability to Dill, he asked Dill if he was hurt, and Dill said his back was hurt. Walton then said, if that was the case, he (Walton) would not sign it, and explained to Dill that, if he should sign it, he could not recover for his injury of the railroad company; but Dill said he would sign it, and did so, and the money, \$37.50, was paid to the express company, no part of which went to Dill.

The case was given to the jury on instructions the correctness of but one of which is questioned, and that one we will presently consider. There was a verdict for the defendant. The court sustained the plaintiffs' motion for a new trial, on the ground that it was error to have given the instruction referred to. Defendant appeals.

I. The instruction referred to was that if the jury believed, from the evidence, that at the time of the accident John Dill was afflicted with the disease of which he afterwards died, "and that whatever injuries he received in the accident only hastened his death and were not the cause of the same, the plaintiffs are not entitled to recover, and your verdict must be for the defendant; and this is true, without regard to whether or not the defendant was negligent at the time of said accident." That instruction was clearly erroneous. *Fetter v. Fidelity & Casualty Co.*, 174 Mo. 256, 73 S. W. 592, 61 L. R. A. 459, 97 Am. St. Rep. 560. The learned counsel for appellant concede that it was error to have given it, and therefore we deem it unnecessary to further discuss it.

II. But it is urged that the verdict of the jury was so clearly for the right party that the court erred in setting it aside. This position is defended on three grounds: First, that the negligence of the deceased contributed to the accident; second, the hurt

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received in the accident was not the cause of the death; third, the release in evidence discharged the claim.

1. The deceased was not a trespasser, and was not guilty of negligence in driving in the track of the street railroad. It was his duty to use reasonable care to avoid such an accident as this, which he knew was liable to occur; but whether the conditions that surrounded him at the time were such that demanded that he should remain in the track as he did, apparently refusing to respond to the gong which the motorman was sounding, the evidence does not show. But, conceding that he ought to have driven out of the track when he heard the gong, it was plain to be seen that he was making no effort to do so, and this disregard of the duty, if it was a duty, did not give the motorman the right to drive his car against the wagon and knock it off the track. The conduct of the motorman seems very much like willful wrong. It was at least reckless disregard of the consequences. In this particular this case is different from *Zumault v. Railroad*, 175 Mo. 288, 74 S. W. 1015, *Ries v. Transit Co.*, 179 Mo. 1, 77 S. W. 734, and *McGauley v. Transit Co.*, 179 Mo. 583, 79 S. W. 469, to which we are referred, in each of which there was no evidence to show that the engineer or motorman saw the person in time to avert the accident.

2. The testimony, which was of a scientific character, on the question whether or not the accident caused the death of the deceased, was conflicting. The jury could have found either way with good reason, and, finding either way, the verdict would be sufficiently sustained to place it beyond the province of an appellate court. The evidence on this question was so conflicting that, if the trial court had seen fit to set it aside on the ground that it was against the decided preponderance of the evidence, an appellate court would not disturb his ruling.

3. We come, now, to a consideration of the last and main defense: that is, the release. Although it appears with reasonable certainty from the evidence that neither John Dill nor the agent of the railroad company had any idea when the release was signed that he had received any serious injury, and therefore that fact might perhaps have been made the foundation in equity for an attack on the release to set it aside on the ground of mutual mistake, if John Dill had lived to realize the situation and had sought to set it aside, yet we may in this case assume, without so deciding, that the release would have been a sufficient defense to an action at law by John Dill against the defendant for damages for the injuries received by him, still there is a question that goes deeper into the case; that is, conceding that the plaintiffs' father could and did release his right of action, did he or could he release the plaintiffs' right of action?

This question has been before the courts of several of the states, has been much discussed, and the decisions are much in conflict. In 8 Am. & Eng. Ency. L. (2d Ed.) p. 870, it is said: "When the right of action given by the statute is merely such as the deceased would have had, if he had survived the injury, a

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release properly executed by him in his lifetime is a complete defense to an action by his personal representative or others to recover damages for his death. The same rule is true where the statute is not a survival statute, but creates a new and distinct cause of action in favor of certain beneficiaries, if it provides that the right of action shall exist only in cases where the deceased himself might have maintained the action, had he lived." In a note to the text the author cites a number of cases which show a great diversity of opinions on the question. In 13 Cycl. L. & P. p. 325, the author says: "Upon the question as to whether a release, executed by the deceased for the injury received by him, will continue a bar to an action by his representative or heir for his death, there is considerable conflict of authority. However, the better rule is that, where the party injured has compromised for the injury and accepted satisfaction previous to his death, there can be no further right of action, and consequently no suit under the statute, unless it be shown that such compromise or release was procured by fraud or duress." In a note to that text there is a long array of authorities on both sides of the question. Of all the cases cited we think that one from the Supreme Court of Georgia (*Southern Bell Tel. Co. v. Cassin*, 111 Ga. 575, 36 S. E. 881, 50 L. R. A. 694) is the most instructive and contains the most thorough review of the authorities. It is also the latest case in point of date that has come under our observation. We refer to both the majority opinion and to that of the dissenting judges.

We will not here attempt a review of the authorities, but for that purpose we deem it sufficient to refer to the Georgia case above mentioned. After reading the cases referred to, we are led to say that much can be said, and much has been well said, on both sides of this question, but that it is not settled by a decided weight of authority, and therefore we must give our statute our own interpretation. In going through these various decisions, we discover that there are sufficient differences in the statutes of the different states to account, in a measure, for the differences in the conclusions reached. Each court giving emphasis to the peculiarity of its own statute, yet they all keep in view the English statute and express their opinions of it. In those states where it is held that the release by the person injured precludes his widow and children, the thought runs through the opinions that the right of action given by the statute is the same right that the deceased person would have had if he had lived, transmitted or suffered to survive for the benefit of his wife and children. In some states the language of the statutes express or imply that thought. For example, in Pennsylvania, where it is so held (*Hill v. R. R.*, 178 Pa. 223, 35 Atl. 997, 35 L. R. A. 196, 56 Am. St. Rep. 754), the statute is that, if the injured person dies while his suit is pending, the suit does not abate, but may be revived and prosecuted by his personal representatives, and, if no suit had been begun in his lifetime, it might be begun and prosecuted to his personal representatives after his death for the benefit of

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his widow and children. The foundation on which those courts, who hold, under statutes like ours, more closely resembling the English statute, that the release of the person injured releases the right of action given by the statute, base their conclusion, is that one satisfaction for the injury is all that justice requires, and they say that to allow the injured man to receive compensation for what he has suffered, and then to allow his widow and children to recover for the same injury, is to authorize double damages for the same wrongful act. But that view of the case overlooks the fact that these are two parties, who suffer each an independent wrong by the same negligent act—the husband or father, who suffers the injuries to his person, and the wife or child, who suffers the loss of her husband or father. Wrongs of that kind were suffered before the statute was enacted, but the common law gave a remedy to the one only, and it required the statute to give a remedy to the other. It was to meet that defect in the machinery of the law that the statute was enacted. The wrong to the wife or child, through the negligent act that deprived the one of her husband and the other of its father, was as grievous before the statute was enacted as it is now; but there was no remedy then for that particular wrong. Now the statute gives the remedy, and that is the only essential change in the legal situation.

Ours is modeled after the English statute (86 Stat. at Large, c. 93). Its language is: "Sec. 2864 (Rev. St. 1899). Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee whilst running, conducting or managing any locomotive, car or train of cars, * * * the corporation, individual or individuals in whose employ such officer, agent, servant or employee * * * shall be at the time such injury is committed, shall forfeit and pay for every person or passenger so dying the sum of five thousand dollars." The statute then goes on to say who may sue, among whom, as in this case, are the minor children when there is no widow, or if she fails to sue, as is the fact here, within a given time. In an early case this court, construing this statute, held that it gave a right of action to the widow of an employee of the railroad company who was killed through the negligence of a fellow servant. *Schultz v. R. R.*, 36 Mo. 13. But the question came up again in *Proctor v. R. R.*, 64 Mo. 112, and then the *Schultz Case* was overruled; the court holding that the statute, though using the term "any person," did not mean a fellow servant, and it was held that, to entitle one to maintain a suit under that statute, it was necessary that the facts of the case would have given to the person killed a right of action if he had not died, and, since the servant could not have recovered of his master damages for injuries received through the negligence of a fellow servant, his widow had no right of action growing out of his death; and that is the doctrine that this court has since held. *Miller v. R. R.*, 109 Mo. 350, 19 S. W. 58, 32 Am. St. Rep. 673. The contention in

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behalf of the widow in the Proctor Case was that the statute created in her favor a totally new and independent cause of action, not in any sense dependent on any other consideration; and that was the view of the law taken by the court in the Schultz Case. But this court in the later case said that this section of the statute did not stand alone, but was a part of an act of which the next succeeding section was also a part, and the two sections must be read together and construed as if *pari materia*. The next section there mentioned is section 2865: "Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured." Then follows a section designating the parties who may sue for the damages and the measure of the damages, which should be any sum, not exceeding \$5,000, as the jury "may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default." Construing those sections together, the court held in the Proctor Case that the only difference in the right of action given in the one section and that given in the other was that the damages in the one was fixed at a certain sum, while in the other they were to be estimated by the jury under the measure given; and hence it was held that no right of action was given in either section, unless the person killed could have maintained a suit for damages under the same facts, if he had been only injured and not killed. That is the only point really adjudicated in that case. In the opinion, Judge Norton, answering the argument of the counsel for the widow that the statute gave her a new and independent cause of action, said that it was not a new and independent right, but it was a transmitted right.

In the connection in which the term "transmitted right" was there used, it was correctly used; but in that sense and in that connection it does not answer the question we now have for decision. The right given by the statute is not an independent right, because it depends for its existence on the right that would have existed in the deceased person, if he had not died, and it is a transmitted right in the sense that it came to the widow through the death of her husband, and through circumstances that would have given him a right of action, if he had lived. In the same sense in which it is used in the Proctor Case, this court has since in several other cases used the term "transmitted right," or its equivalent. *White v. Maxcy*, 64 Mo. 552; *Elliott v. R. R.*, 67 Mo. 272; *Gray v. McDonald*, 104 Mo. 303, 16 S. W. 398; *Miller v. Ry.*, 109 Mo. 350, 19 S. W. 58, 32 Am. St. Rep. 673; *Hennessy v. Brewing Co.*, 145 Mo. 104, 46 S. W. 966, 41 L. R. A. 385,

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68 Am. St. Rep. 554. But the question now before us this court has never before been called to decide. The same cause of action which would have accrued to the deceased person is not transmitted to her widow or children. In that action, if he had lived, he could have recovered for the impairment of his body and mind, his suffering, physical and mental, his surgeon's bills, his lost earnings; but no such right of recovery is given here. All liability for his suffering is buried in his grave, and the person or corporation who caused it can never be called to respond in damages for it. Even his surgeon's bills must be paid by his executor, and his estate must bear the loss of his unearned wages. That is not the right of action that the statute gives to the widow or minor children of the deceased. Theirs is the right to recover the pecuniary interest which they lost by the death of their husband and father. The very language of the statute points out the difference. It is that, if the person is killed under such circumstances as "would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof," then the person or corporation shall be liable, not for those damages, but "shall be liable in an action of damages"; that is, in an action of another sort and for damages to be computed on a totally different basis. Such right of action did not accrue until after the death of the person who suffered the injuries. It was not given for his benefit. He could have no pecuniary interest growing out of his own death. He could not, even by his will, have disposed of the proceeds of the suit. How, then, could he, before his death, have relinquished the claim? It is a provision made for the widow and children, and the statute does not put it at the disposal of any one else.

Whilst the statute, as we have heretofore construed it, means that the facts of the case must be such that the person injured would have had a cause of action, if he had lived, it does not say that such cause of action must have continued in him unreleased and unsatisfied at the time of his death. That would be a new condition that we would add to the statute, if we should now hold that he had the power to forestall the action which the statute gives to his widow and minor children. The evidence tends to show that the facts of this case are such as that the father of these plaintiffs, if he had lived, could have maintained an action against this defendant and recover damages for his injuries; and that is all that the statute in terms requires to enable these plaintiffs to maintain this action. Of course, after a compromise or accord and satisfaction of his claim, he could not maintain a suit; but that does not alter the fact that a cause of action accrued to him. If a man's minor son is injured through the negligence of another person, so that the son is subjected to physical and mental suffering, impairment of his body and mind, a right of action accrues to the father for the loss of his son's services; and the expense of his medical treatment, etc., and a right of action also accrues to the son for his own injuries. In such case the father may compromise or release, or recover satisfaction for,

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his claim without affecting in any way the claim of the son. Is there any difference in principle between that case and this? Or can it be said in such case that, because the father and son could each maintain a suit and recover damages, the law allowed double satisfaction for the same injury? Before the enactment of our married woman's statutes, if a married woman, a passenger, was injured by the negligence of a carrier, an action accrued to the husband to recover for her personal injuries, and also for his loss of her services, his expenses incurred, etc. Now the wife in her suit alone may recover for the injuries to her person, and she may by her contract release the carrier from liability for the same; but she cannot release the carrier from its liability to her husband for his loss, neither can the husband by his contract with the carrier deprive the wife of her right of action. We perceive no difference in principle, as affecting the question in hand, between such cases and the case at bar.

In 8 Am. & Eng. Ency. L. (2d Ed.) pp. 858, 859, discussing the English statute known as "Lord Campbell's Act," the law writer says: "This statute does not merely remove the operation of the maxim 'actio personalis moritur cum persona,' but gives a new cause of action"—and cites in support of the text a case decided in the House of Lords. *Seward v. The Vera Cruz*, L. R. 10 App. 59. There, referring to the various American statutes, the author says they are divisible into two classes: "(a) In some of the states the statute provides merely for a survival of the right of action which the deceased had. In such cases the damages recoverable are confined to the loss sustained and the pain and suffering endured by the deceased. The loss to his relations cannot be considered. * * * (b) Lord Campbell's act and the statutes of most of the states create in favor of certain beneficiaries surviving the deceased an entirely new cause of action, distinct from and independent of any right of action the deceased may have had during his lifetime, or would have had if he had survived the injury. In actions under this class of statutes, the injury is as to the extent of the damages sustained by the beneficiaries in consequence of the wrongful death, and the loss to the deceased or his pain and suffering are not to be considered." Our statute, as we have seen, falls within the second class mentioned by the text writer. We hold that under our statute the husband or father who suffered the injuries cannot by his contract deprive his widow or children of the right which the statute gives them. The release in evidence in this case was no defense to the action.

The court was right in sustaining the motion for a new trial. The judgment is affirmed.

BRACE, P. J., concurs. LAMM, J., dubitante as to subdivision 3 in paragraph II. MARSHALL, J., not sitting. There being no majority, the cause is transferred to court in banc.

MARGO *v.* PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, Jan. 2, 1906.)

[62 Atl. Rep. 1081.]

Execution—Property Subject—Railroad Property.*—Property essential and necessary to the existence of a railroad company and in actual use cannot be sold under an ordinary writ of fieri facias.

Same.*—Materials used for repairs of bridges, tracks, siding, and other like emergency purposes belonging to a railroad company, cannot be levied on and sold under an ordinary writ of execution.

Appeal from Court of Common Pleas, Cambria County.

Action by Annie Margo against the Pennsylvania Railroad Company. Rule to set aside sale of personal property discharged, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

H. W. Storey, for appellant.

P. J. Little, for appellee.

ELKIN, J. The plaintiff recovered a verdict in the court below in an action of trespass for injuries resulting in the death of her husband. On February 10, 1905, after a new trial had been refused, judgment was entered on the verdict. On March 4th a fieri facias was issued thereon, returnable the first Monday of June following. A levy was then made on some personal property in the office of the superintendent of the defendant company. On March 13th the defendant took an appeal to the Supreme Court. On the following day the levy was stricken off by order of the court. On May 22d another levy was made on the personal property in and around the superintendent's office. On the same day a levy was also made on seven separate parcels

*For the authorities in this series on the question whether railroad property can be sold on execution, etc., see note appended to *Simmons v. Worthington* (Mass.), 10 Am. & Eng. R. Cas., N. S., 771; foot-note appended to *Ozark & C. Cent. Ry. Co. v. Moran B. & N. Mfg. Co.* (Ark.), 15 R. R. R. 784, 38 Am. & Eng. R. Cas., N. S., 784; *Fulkerson v. Taylor* (Va.), 10 R. R. R. 184, 33 Am. & Eng. R. Cas., N. S., 184 (where a railway company has acquired a portion of its right of way by a defective title, of which it had constructive notice, a court may decree that the land be sold, with the portion of the roadbed thereon, to satisfy a judgment against the company's vendor); *Connor v. Tennessee Cent. Ry. Co.* (C. C. A.), 3 R. R. R. 417, 26 Am. & Eng. R. Cas., N. S., 417 (when property of a public service corporation, such as a railroad company, cannot be sold under process separately and apart from its franchises); *Illinois Cent. R. Co. v. Le Blanc* (Miss.), 12 Am. & Eng. R. Cas., N. S., 877; *St. Louis, etc., R. Co. v. Nyce* (Kan.), 16 Am. & Eng. R. Cas., N. S., 798 (to permit a part of a railroad company's roadbed and track to pass by sheriff's sale to an individual, with absolute dominion and ownership in the purchaser, would destroy it as an instrument of commerce, take away all power of regulation or control by the state, and divert it from the purposes for which it was built).

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of land, which were formerly a part of the right of way of the old portage road, and notice was served on defendant that inquisition proceedings would be held thereon June 5th. The defendant then presented a petition asking that the sale of the personal property be set aside on the ground that the writ was invalid. On the return day of the writ, the sheriff made another levy on the railroad ties, rails, lumber, and other materials used by the defendant company for emergency purposes, and advertised the same to be sold on June 22d. On June 14th defendant presented a petition asking that the levy on the personal property and the inquisition proceedings on real estate be set aside. A rule to show cause was granted, returnable June 19th, at which time testimony was taken and the court discharged the rule. Thereupon the sheriff again advertised the sale of the personal property to take place July 6th. On July 3d, on petition to the Supreme Court, a rule to show cause why the appeal, when taken, should not be a supersedeas, was granted, and an order was made staying the proposed sale and all other proceedings; the rule being made returnable to the western district October 14, 1905. On July 5th this appeal was taken from the orders of the court below as above indicated.

A little forbearance and professional courtesy, which should always be shown by members of the bar to each other, would have saved this vexed and complicated record. The fieri facias was issued a few days before the appeal was taken, without notice to the defendant or its counsel, and a levy was made on certain personal property; but on the day following the appeal this levy was stricken off by the court. Notwithstanding that the appeal was pending, counsel for plaintiff caused the sheriff to make a new levy and proceed to a sale thereon for the purpose of satisfying the judgment appealed from. It is contended that his right to thus proceed is justified by the act of May 19, 1897 (P. L. 67), relating to appeals to the Supreme and Superior Courts, wherein it is provided that an appeal shall not be a supersedeas to an execution issued on a judgment, unless taken and perfected within three weeks from the entry of the judgment. More than three weeks elapsed from the entry of the judgment until the appeal was taken. Counsel for defendant, within a few days from the time he had notice of the entry of the judgment, took an appeal and proceeded at once to perfect it. He has been diligent in resisting the claims of the plaintiff at every stage of the proceedings since that time. This record discloses a somewhat anomalous situation. The plaintiff has caused a fieri facias to be issued, levy to be made, and the sheriff has actually sold personal property belonging to the defendant in partial satisfaction of the judgment entered in the court below, while the validity of that judgment was still pending in the Supreme Court. This court at No. 65, October Term, 1905 (62 Atl. 1079), reversed the judgment, and as the record now stands there is no judgment to support an execution. It would have been wiser for the learned

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counsel for appellee to have waited the final determination of the questions involved on the appeal.

Another question has been raised by this appeal, which it is necessary to consider. The levy of June 5th was made on railroad ties, rails, lumber, water pipe, iron pipe, and other personal property which the defendant alleges is used for emergency purposes. It is contended that this property is exempt from levy and sale under the ordinary writ of *fi. fa.* On grounds of public policy the law does not permit the seizure and sale on execution of the property of a railroad company necessary to enable it to perform its duties to the public. This is the settled rule of our cases. *Foster v. Fowler*, 60 Pa. 27; *Youngman v. Railroad Co.*, 65 Pa. 278; *Mausel v. Railway Co.*, 171 Pa. 606, 33 Atl. 377; *Bell v. Wood*, 181 Pa. 175, 37 Atl. 201. In a number of cases it has been held that property essential and necessary to the existence of a railroad company and in actual use cannot be seized and sold under ordinary writ of *fi. fa.* In such cases the special writ provided by the act of April 7, 1870 (P. L. 58), is the proper remedy. It has also been held that property, real or personal, necessary to the exercise of a public franchise, is to be regarded as part thereof, and is not subject to execution by the ordinary writ. *Bank v. Tanning Co.*, 170 Pa. 1, 32 Atl. 539. The testimony taken on the rule in the court below clearly shows that the materials levied on were all intended to be used for emergency purposes; that it was necessary to keep in stock a large amount of these materials in order to insure the proper maintenance and operation of the railroad; and that the materials on hand were not more than were necessary for these purposes. No evidence was offered in contradiction of the testimony of the witnesses produced by the defendant. Their testimony stands unimpeached. It clearly established the fact that the materials levied upon were used for repairs of bridges, tracks, sidings, and other like emergency purposes, wherein the very highest standard of care is required in the discharge of the defendant's duties to the public. The learned court was in error in disregarding the testimony offered and drawing its own conclusions that the materials levied on did not hinder the defendant in the performance of those acts authorized under its charter.

The order of the court of July 19, 1905, discharging the rule to show cause why the levy and inquisition should not be set aside, is reversed, and it is ordered that a writ of restitution be issued by the court below for the property sold.

WESTERN MARYLAND R. CO. v. BLUE RIDGE HOTEL CO. OF WASHINGTON COUNTY.

(Court of Appeals of Maryland, Dec. 8, 1905.)

[62 Atl. Rep. 351.]

Railroads—Powers—Ultra Vires Contract.*—Where the charter of a railroad company (Acts 1852, c. 304, §§ 14, 15, 18; Acts 1872, p. 102, c. 71; Acts 1884, p. 209, c. 153) conferred power to operate a railroad, to erect warehouses and other works necessary to the road, to erect all buildings, stations, other works, and accommodations necessary or convenient for the operation of the road, to aid any other company "in the construction of its road," to consolidate with any other corporation owning a railroad, or a railroad and any other property, and to guaranty the obligations of other railroad companies, a contract by which it contracted to pay out of certain of its earnings such "commissions" on its receipts as would make good to a hotel company a deficit in the hotel company's earnings sufficient to enable the hotel company to pay dividends on its stock and interest on its bonds was ultra vires and void.

Same—Executed Contract.*—Where a railroad company made an ultra vires contract by which it guarantied the payment of interest

*For the authorities in this series relating to the ultra vires act and contracts of railroad companies, see *Graham v. Macon*, D. & S. R. Co. (Ga.), 16 R. R. R. 47, 39 Am. & Eng. R. Cas., N. S., 47 (validity of contract by which railroad acquired possession of and right to operate steamboat); *Doherty v. Arkansas & O. R. Co.* (Ind. Terr.), 14 R. R. R. 90, 37 Am. & Eng. R. Cas., N. S., 90 (railroad aid, estoppel of subscriber to claim that railroad's agreement to construct extension of road to point beyond state was ultra vires, etc.); *Harrill v. South Carolina & G. E. R. Co.* (N. Car.), 12 R. R. R. 725, 35 Am. & Eng. R. Cas., N. S., 725 (that partnership agreement between railroads was ultra vires did not relieve one of the members from contractual liability to individuals); *State v. Pittsburg*, etc., Ry. Co. (Ohio), 9 R. R. R. 168, 32 Am. & Eng. R. Cas., N. S., 168 (not ultra vires in railroad to establish relief association for benefit of employees); *Atkins v. Shreveport & R. R. V. Ry. Co.* (La.), 1 R. R. R. 651, 24 Am. & Eng. R. Cas., N. S., 651 (estoppel of railroad to claim that stipulation requiring it to operate towboats was ultra vires); *Texarkana & N. O. R. Co.* (Tex.), 4 R. R. R. 631, 27 Am. & Eng. R. Cas., N. S., 631 (that the act of a railroad company in building a certain spur track was ultra vires did not justify entry on track by another company); *Pennsylvania R. Co. v. Inhabitants of Hamilton Tp.* (N. J.), 2 R. R. R. 506, 25 Am. & Eng. R. Cas., N. S., 506 (right of street railway in highway, as against another company, under ultra vires ordinance); *Rothchild v. Memphis & C. R. Co.* (C. C. A.), 2 R. R. R. 397, 25 Am. & Eng. R. Cas., N. S., 397 (state alone can question railroad's power to hold a purchased road); *State v. Morgan's L. & T. R. & S. S. Co.* (La.), 2 R. R. R. 679, 25 Am. & Eng. R. Cas., N. S., 679 (authority of company to carry on warehouse business); *Missouri, K. & T. Ry. Co. of Texas v. Carter* (Tex.), 3 R. R. R. 538, 26 Am. & Eng. R. Cas., N. S., 538 (validity of contract to maintain side track for convenience of sawmill owner); *Hart v. Piedmont & C. R. Co.* (W. Va.), 8 R. R. R. 108, 31 Am. & Eng. R. Cas., N. S., 108 (power of corporation to dedicate land for street); *State v. New Orleans Warehouse Co.* (La.), 7 R. R. R. 334, 30 Am. & Eng. R. Cas., N. S., 334 (power to transfer land not used in railroad business); *State v. New Orleans Warehouse Co.* (La.), 7 R. R. R. 334, 30 Am. & Eng. R. Cas., N. S., 334 (power of company to sell or let warehouse); *Orient Ins. Co. of Hartford, Conn. v. Northern Pac. Ry. Co.* (Mont.), 16 R. R. R. 207, 39 Am. & Eng. R. Cas., N. S., 207 (Mont. Civ. Code,

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and dividends on the bonds and stock of a hotel company to aid in the improvement of the latter's property, and thereafter received nothing of benefit from the hotel company except increased earnings

§ 393, providing that a corporation may be formed for the transaction of any commercial business, authorizes a corporation for warehousing goods for shipment); foot-note appended to *Rodefer v. Pittsburg, etc., R. Co. (Ohio)*, 15 R. R. R. 815, 38 Am. & Eng. R. Cas., N. S., 815 (right to maintain and operate tracks and sidings); note, 13 Am. & Eng. R. Cas., N. S., 855 (right to construct branch railroads); note, 13 Am. & Eng. R. Cas., N. S., 374 (implied powers as to contracts of suretyship and guaranty); note, 14 Am. & Eng. R. Cas., N. S., 825 (power to hold stock in other corporations); note, 17 Am. & Eng. R. Cas., N. S., 257 (purposes for which railroad can, and can not acquire land); note, 21 Am. & Eng. R. Cas., N. S., 770 (power of rival to enjoin ultra vires construction of railroad); note, 17 Am. & Eng. R. Cas., N. S., 676 (estoppel to set up ultra vires as defense to executed contract); note, 17 Am. & Eng. R. Cas., N. S., 676 (liability for ultra vires torts); note, 7 Am. & Eng. R. Cas., N. S., 346 (power of railroad to purchase competing line); *Bigelow v. Chicago, B. & N. Ry. Co. (Wis.)*, 17 Am. & Eng. R. Cas., N. S., 341 (carrier estopped to plead that contract for carriage of freight was ultra vires, in action to recover for its failure to carry out such contract); *Chesapeake & O. Ry. Co. v. Howard (U. S.)*, 17 Am. & Eng. R. Cas., N. S., 660 (carrier liable for servant's negligence though he was performing an ultra vires agreement of the carrier); *Nichols v. Oregon Short Line R. Co. (Utah)*, 23 Am. & Eng. R. Cas., N. S., 654 (contract to furnish foreign cars, whether ultra vires); *Hicks, Atty. Gen. v. Smith (Wis.)*, 20 Am. & Eng. R. Cas., N. S., 694 (conveyance in fee to railroad authorized to acquire easement only is valid until directly assailed by the government); *City of Chicago v. Union Stock Yard & Transit Co. (Ill.)*, 7 Am. & Eng. R. Cas., N. S., 491 (effect of ultra vires acts of plaintiff upon bill in equity); *Union Pac. Ry. Co. v. Chicago, etc., Ry. Co. (U. S.)*, 6 Am. & Eng. R. Cas., N. S., 1 (general rule as to validity of ultra vires contracts; and power of railroad to allow joint use of tracks); *New England R. Co. v. Central Railway & Elec. Co. (Conn.)*, 8 Am. & Eng. R. Cas., N. S., 26 (power of rival street railway to enjoin ultra vires acts); *Terre Haute & I. R. Co. v. Cox (C. C. A.)*, 19 Am. & Eng. R. Cas., N. S., 327 (ratification of ultra vires lease for remainder of term by subsequent legislation); *Eckman v. Chicago, B. & Q. R. Co. (Ill.)*, 9 Am. & Eng. R. Cas., N. S., 309; *Maine v. Chicago, B. & Q. R. Co. (Iowa)*, 9 Am. & Eng. R. Cas., N. S., 299 (power of railroad to establish relief association for benefit of employees); *Pittsburg, etc., R. Co. v. Altoona, etc., R. Co. (Pa.)*, 19 Am. & Eng. R. Cas., N. S., 614 (estoppel to plead that lease was ultra vires); *South Carolina & G. R. Co. v. Carolina, C. G. & C. Ry. Co. (C. C. A.)*, 15 Am. & Eng. R. Cas., N. S., 212 (power of receiver to lease and operate other roads); *East St. Louis Connecting Ry. Co. v. Jarvis (C. C. A.)*, 15 Am. & Eng. R. Cas., N. S., 459 (ultra vires leases cannot be recovered on); *State v. Southern Pac. Co. (La.)*, 15 Am. & Eng. R. Cas., N. S., 762 (doing of warehouse business by railroad is ultra vires); *Abraham v. Oregon & C. R. Co. (Ore.)*, 17 Am. & Eng. R. Cas., N. S., 250 (maintenance of hotel not a railroad purpose as a matter of law); *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co. (U. S.)*, 6 Am. & Eng. R. Cas., N. S., 3 (powers of railroad corporations); *Louisville, N. A. Ry. Co. v. Louisville Trust Co. (U. S.)*, 15 Am. & Eng. R. Cas., N. S., 345 (power to guaranty bonds); *Metropolitan Trust Co. v. Railroad Equipment Co. (C. C. A.)*, 22 Am. & Eng. R. Cas., N. S., 144 (railroad had power to issue lease warrants where deferred payments for equipment, under Rev. St. Ohio, sec. 3287; *Lake St. El. R. Co. v. Ziegler (C. C. A.)*, 23 Am. & Eng. R. Cas., N. S., 1 (ultra vires issue of stock in violation of Const. Ill. art. 11, sec. 13); *Sioux City O. & W. Ry. Co. v. Manhattan*

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for transportation of passengers and freight over its road, it was not precluded from subsequently claiming that the contract was ultra vires and void.

Appeal from Baltimore City Court; Henry Stockbridge, Judge.

Action by the Blue Ridge Hotel Company of Washington County against the Western Maryland Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

Leon E. Greenbaum and Benjamin A. Richmond, for appellant.
William S. Thomas, for appellee.

PEARCE, J. This is an action of covenant, brought by the Blue Ridge Hotel Company of Washington County, a corporation organized under the general incorporation laws of Maryland, against the Western Maryland Railroad Company, a corporation created by an act of the General Assembly of Maryland (chapter 304, Acts 1852) under the name of the "Baltimore, Carroll, and Frederick Railroad Company"; the name being changed by chapter 37 of the Acts of 1853 to the "Western Maryland Railroad Company." The covenant sued upon is contained in a sealed agreement between the parties, made October 23, 1883. This agreement recites the making of a previous agreement between the parties on April 2, 1883, whereby the said railroad company, in consideration of anticipated advantages to it from the construction by said hotel company of a summer hotel near Pen Mar Station on the line of said railroad, had agreed to secure the payment of a dividend not exceeding 5 per cent. per annum on the capital stock of said hotel company of \$100,000. The agreement sued on then further set forth that, since the erection of said hotel, the railroad company had in fact derived large receipts from travel and traffic to and from the station used for said hotel, known as the "Blue Mountain Station," and that its receipts from travel and traffic to and from an adjoining station, known as "Pen Mar Station," had, by reason of the attractions of said hotel and its neighboring property, increased to an amount exceeding the utmost liability to be assumed by it under the contract then made, and that it was believed these receipts would be largely augmented by increasing the capacity of the hotel, and by the improvement of the grounds of the hotel company, and of its other property near Pen Mar Station; that the hotel company had already expended in the undertaking more than its whole capital, and an additional amount, not less than \$125,000, was necessary to complete improvements begun, and others contemplated, which could not be procured without the assistance to the credit of the hotel company as thereafter stipulated in said agreement; that the

Trust Co. (C. C. A.), 15 Am. & Eng. R. Cas., N. S., 430 (validity of stock issued in good faith in exchange to effect reorganization); St. Joseph, etc., R. Co. v. St. Louis, etc., R. Co. (Mo.), 5 Am. & Eng. R. Cas., N. S., 696 (power of railroads to contract with each other).

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hotel company was about to issue its bonds to an amount not exceeding \$125,000, bearing interest at the rate of 6 per cent. per annum and to be secured by a first mortgage upon the said hotel and its revenues, and such other property as should be described in said mortgage. The agreement then further set forth that in consideration of the advantages expected to accrue to the railroad company from the said improvements to the hotel and its other property, and of certain privileges secured to the railroad company by the terms of said agreement for the benefit of its excursionists, the said railroad company covenanted with the said hotel company, as follows: "That if in any one year the actual net earnings of said hotel company from said hotel and other sources shall not suffice to pay 5 per cent. dividend upon its capital stock of \$100,000, and the interest at the rate of 6 per cent. semiannually upon such amount of said first mortgage bonds as may be issued for the purposes herein stated, not exceeding \$125,000, the said railroad company will in that event allow and pay to said hotel company, for its stockholders and the holders of said bonds, such commissions upon its receipts for traffic to and from Blue Mountain and Pen Mar Stations, or any other station or stations which may be hereafter substituted for either or both of the above, at which the business hereby contemplated may be done, as will be sufficient to make up said deficit to 5 per cent. upon its capital stock, and 6 per cent. per annum upon its bonded debt"; and the hotel company upon its part entered into a covenant designed to protect the railroad company in the proper application of the revenues of the hotel company to its economical and successful management, and of the net earnings to the dividends and interest due to its stockholders and bondholders. The declaration averred that, in reliance upon this covenant of the railroad company, it issued its bonds to the amount of \$125,000, of which \$122,000 were still outstanding, which sum was expended in the improvements contemplated by the agreement, and that at the close of the fiscal year of the hotel company ending October 1, 1903, the net earnings of the hotel company were not sufficient to pay the interest then due on said bonds, by the sum of \$3,660, and there was nothing available for payment of the \$5,000 dividend then due to its stockholders; that demand had been duly made on defendant for said sums; and that payment had been refused.

It will only be necessary to consider the defendant's fourth plea, which averred that the agreement sued on was ultra vires on the part of the railroad company, and void, and could not be enforced by suit such as was brought against it. To this plea the plaintiff demurred, and, the demurrer being sustained, the case went to trial on issues joined on the other pleadings, resulting in a verdict for the plaintiff for \$9,433.68, and judgment thereon. The defendant offered six prayers, of which the first and second raised the same question raised by the demurrer, and were refused by the court; no prayers being offered by the plaintiff. The

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question raised by the demurrer, and by the defendant's first and second prayers, is the vital question in the case, and will now be considered.

The agreement was drawn with much care and skill, and evidently with a view to the avoidance of the question raised, as is suggested by the phraseology of the covenant "to allow and pay such commissions upon its receipts to and from" the stations named as would make good the deficit which was the subject of the covenant; but we do not think the use of this language can disguise the real character of the transaction, or control the validity of the obligation assumed by the railroad company. If the contract would be declared ultra vires if the deficit were to be made good from the general receipts of the company, it could not be rescued from invalidity by calling the payments to be made commissions from traffic receipts from the particular stations named. There is no limit to the rate of commission to be paid. The full amount of the gross receipts from these two stations was pledged by that covenant, if required to make good this deficit. This appears not only from the language of the covenant, but even more explicitly from the recital of the mortgage from the hotel company to the trustees of its bondholders, which assigns to said trustees "the benefit of the contract between the hotel company and the railroad company, dated October 23, 1883, by which the payment of the interest on the said bonds is guaranteed by the said railroad company to be paid of the receipts from the traffic at Blue Mountain and Pen Mar Stations." A contract, which in effect pledges the total gross receipts from any source, cannot be regarded as a contract for commissions on, or a rebate from, those gross receipts, and this contract must be regarded as an absolute guaranty to the stockholders and bondholders of the hotel company of their dividends and interest, to the extent to which the receipts from the stations named should be adequate for that purpose, since in the language of the contract the payment was to be made "to the hotel company for its stockholders and bondholders." The promise thus made was a promise "to answer for the payment of some debt, or the performance of some duty, in case of the failure of another, who is himself, in the first instance, liable to such payment or performance." 14 Amer. & Eng. Enc. of Law (2d Ed.) 1128. Its object, as declared in the recitals of the agreement, was to furnish to the hotel company "assistance to its credit," and it was at least twice designated in said agreement as a "traffic guaranty," and we think it could not be accurately otherwise designated. It is therefore necessarily a collateral contract, but there is no question here of the statute of frauds, and it would make no difference so far as its validity is here concerned, if it had been an original contract to pay the hotel company a lump sum upon the consideration stated. The question of ultra vires would still remain for consideration.

Corporations, being mere creatures of law, possess only such

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powers as are expressly granted, together with such incidental and implied powers as are necessary to carry into effect those expressly granted. "An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has only a slight or remote relation to it. * * * It can in no case avail to enlarge the express powers, and thereby warrant the corporation to devote its efforts or its capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises not directly but only remotely connected with its specific corporate purposes." 10 Cyc. 1097, 198. And it is equally well settled that "a corporation has no power to enter into a contract of suretyship or guaranty, or otherwise lend its credit to another, unless the power is expressly conferred by its charter, or unless such a contract is reasonably necessary, or usual in the conduct of its business." 7 Amer. & Eng. of Law (2d Ed.) 788.

The original charter powers of the Western Maryland Railroad Company are found in sections 14, 15, and 18 of chapter 304 of the Acts of 1852. In addition to the mere power to construct a railroad from Baltimore to Westminster and thence to some point on the Monocacy river in the direction of Hagerstown, the additional powers given are to erect warehouses or other works necessary to said road and to contract with the Susquehanna Railroad for intersecting its road, to carry the mail, and to borrow money not exceeding \$200,000. Chapter 71, p. 102, Acts 1872, gave the power to construct a railroad from the western end of the tunnel of the Baltimore & Potomac Railroad to Williamsport or to Cumberland, together with all buildings, stations, other works, and accommodations necessary or convenient for the operation of said road, and to execute mortgages upon its property for building the road. Section 8, p. 107, of that act, which is specially referred to by the court below in the ruling upon the demurrer, set out in the record, gives power to aid any other company in the construction of its railroad, by means of subscription to its capital stock, or otherwise, for forming a connection therewith, and to consolidate with any other corporation owning a railroad, or a railroad and any other property; and chapter 153, p. 209, of the Acts of 1884, gives the only power of guaranty it possesses, and limits this power to the obligations of other railroad companies.

In none of these acts do we find any power, express or implied, either to engage directly in the construction and operation of a summer hotel, or to lend its credit to any other corporation engaged therein, while the acts of 1872 and 1884, *supra*, seem to us, by their express limitation of the powers granted to dealing with railroad companies, or companies "owning a railroad and other property," to exclude the power to engage in any other business than that of a railroad, or to guaranty the obligations of any other corporation than a railroad corporation. However, the strict rules which we have cited above may have been relaxed or evaded elsewhere under the influence of competition in trade and com-

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merce and of the modern theories of expansion of power in every direction, they are still approved by text writers of the highest authority and have been always observed and enforced by the court in this state.

Judge Seymour D. Thompson, in 10 Cyc. 1146, says: "Perhaps the most general statement which can be made of the doctrine of *ultra vires* is to say that the contract of a corporation which is unauthorized by, or in violation of, its charter or other governing statute, or entirely outside the scope of the purposes of its creation, is void, in the sense of being no contract at all, because of a total want of power to enter into it"; and Mr. France, in his recent excellent work on the Elements of Corporation Law (section 72) says: "The transaction may be beyond the powers of the corporation, simply because it is foreign to the purposes expressed or implied in the charter; it may invoke the exercise of a power, not forbidden, but simply ungranted, as, for example, where a railroad company undertakes to guaranty the expenses of a public festival. In the better usage, the term '*ultra vires*' is limited to acts of the latter class, and many of the courts make a distinction between transactions which are illegal, because forbidden, and those which are simply in excess of the granted powers."

In *Steam Navigation Company v. Dandridge*, 8 Gill & J. 318, 29 Am. Dec. 543, the court said: "In *Angell & Ames on Corporations* it is justly observed that a corporation and an individual stand upon very different footing. The latter, existing for the general good of society, may do all acts and make all contracts which are not, in the eye of the law, inconsistent with the great purpose of his creation; whereas, the former, having been created for a specific purpose, can not only make no contract forbidden by its charter, which is, as it were, the law of its nature, but in general can make no contract which is not necessary, either directly or incidentally, to enable it to answer that purpose. In deciding, therefore, whether a corporation can make a particular contract, we are to consider, in the first place, whether its charter or some statute binding upon it forbids or permits it to make such a contract; and, if the charter and valid statutory law are silent upon the subject, then, in the second place, whether a power to make such a contract may not be implied on the part of the corporation as directly or incidentally necessary to enable it to fulfill the purpose of its existence, or whether the contract is entirely foreign to that purpose." It was accordingly there held that the navigation company, being incorporated only for the purpose of conveyance of passengers and freight, could not lawfully enter into a contract for breaking ice upon the waters navigated by its vessels, and towing other vessels through the track so made. And in *Abbott v. Baltimore & Rappahannock Steamboat Company*, 1 Md. Ch. 542, where the company was incorporated solely for the same purpose between Baltimore and Fredericksburg, but entered into an obligation in aid of an enterprise to improve the navigation of the river near Fredericksburg upon its own route, which

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would result to the great advantage of the company, it was held that the contract was not within its express or implied powers, and could not be enforced against it, though the obligee had incurred large expenses upon the faith of the contract. In the latter case the Chancellor followed the decision in the Dandridge Case, *supra*, and that case has been repeatedly approved in this court, upon the point here involved; the latest instance being in *Boyce v. Trustees M. E. Church*, 46 Md. 373. In *State v. B. & O. R. R.*, 48 Md. 49, one of the questions was whether the receipts from certain hotels built and owned by the railroad company were subject to the gross receipts tax imposed by the act of 1872 upon such railroad companies, and the court, in construing the language employed in the power granted "to erect warehouses and other works necessary and expedient for the completion and operation of the road," said, on pages 76 and 77: "Hotels, or buildings for the accommodation of passengers over the road, are, we think, necessary to its business and therefore within its charter. * * * The gross receipts, therefore, from these hotels are exempt from taxation. The Oakland and Deer Park Hotels, however, appear to have been built and are now used primarily as places of summer resort, and, although as such they may attract travel over the road, they are not in any sense necessary to its operation. But the receipts from these hotels are not liable to the tax imposed by the act of 1872, because they are not derived from the exercise of any franchise granted by the state, and they must be taxed according to valuation as other property." The court had previously said upon the same page: "It is hardly necessary to say that the original charter does not authorize the appellee to build and conduct hotels in the usual and ordinary manner in which hotels are kept—that is for the accommodation of the public generally." The power to build and conduct such hotels was not actually before the court under any of the pleadings in that case, and the language last cited therefore may perhaps be regarded as obiter, but the application of the gross receipts tax to such hotels was before the court, and it was held not to apply to them, because "the receipts were not derived from the exercise of any franchise granted by the state"—in other words, because the charter did not, either expressly or by implication, grant the power to engage in that business.

The cases we have cited from our own courts sufficiently show how the law has been held in this state, and they are in accord with the best considered cases elsewhere in this country, and in England. Thus, in *Davis v. Old Colony R. R.*, 131 Mass. 258, 41 Am. Rep. 221, in which the subject was exhaustively considered by Judge Gray, it was held beyond the power of a railroad corporation chartered by the Legislature, or of a corporation organized under the general law for the manufacture and sale of musical instruments, to guaranty the expenses of a musical jubilee and festival, and that no action could be maintained against either corporation upon such a guaranty, though made with rea-

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sonable belief that the holding of such festival would be of great pecuniary advantage to such corporations by increasing their proper business, and though the festival had been held and expenses incurred in reliance upon the guaranty. In *Elevator Co. v. Memphis & Charleston R. R. Co.*, 85 Tenn. 703, 5 S. W. 52, 4 Am. St. Rep. 798, the charter of the railroad gave it power "to do all lawful acts properly incident to a corporation, and to the transaction of the business for which it was incorporated, and also such additional powers as may be convenient for the due and successful execution of the powers granted in the charter." The railroad company guarantied 8 per cent. dividends upon the stock of an elevator company which built a grain elevator upon the line of the railroad, but the court held the guaranty could not be enforced, saying: "In no part of the grant of power is that of guarantying the success of another institution, person, or corporation to be found, either in expression or implication." In *Pearce v. Madison & Indianapolis R. R. Co.*, 21 How. 441, 16 L. Ed. 184, the Supreme Court of the United States held that two corporations created to construct distinct lines of railroad leading to Indianapolis had no right, without authority from the Legislature, to consolidate into one corporation, and thereby to subject the capital of the one to answer for the liabilities of the other. The managers had also established a steamboat line to run in connection with these railroads, and the court held this to be "a departure from the business they were authorized to conduct, thereby diverting their capital from the objects contemplated by their charters, and exposing it to perils for which they afforded no sanction." In *Coleman v. Eastern Counties Railway*, 10 Beavan, 1, where the railway company proposed to guaranty the profits of a steam packet company to run in connection with the railway, Lord Langdale, Master of the Rolls, restrained the company by injunction, saying: "To look upon a railway company in the light of a common partnership, and as subject to no greater vigilance than these, would be greatly to mistake the functions they perform and the powers which they exercise, which are given by act of Parliament, and which extend no farther than is expressly stated in the act, or is necessarily and properly required for carrying into effect the undertaking and works which the act has expressly sanctioned. * * * But it has been contended that they have a right to pledge without limit the funds of the company for the encouragement of other transactions, however various and extensive, provided the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders. There is, however, no authority for anything of that kind." And in *East Anglian Railways v. Eastern Counties Railway Co.*, 11 C. B. 775, where a similar guaranty was under consideration, it was held *ultra vires*; the court declaring the question to be one exclusively of power, and asking the unanswerable question: "What additional power do they acquire from the fact that the undertaking

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may in some way benefit their line? For whatever be their object or prospect of success, they are still but a corporation for the purpose of making and maintaining their railway." These cases, which we have selected from the many that could be cited, sufficiently illustrate the principle which requires us to hold, as we do, that the agreement in this case is *ultra vires*.

But it is contended for the appellee that, as the contract has been partly executed by both parties, the railroad company is estopped to set up that defense. Let us see how far this contention can be justified. Judge Seymour D. Thompson, in continuation of the passage from which we have quoted above (10 Cyc. 1146), says: "Such a contract will not be enforced by any species of action in a court of justice; being void *ab initio*, it cannot be made good by ratification, or by any succession of renewals, and no performance on either side can give validity to the unlawful contract, or form the foundation of any right of action upon it." It is true that the same distinguished author says, on page 1156 of 10 Cyc.: "The great mass of judicial authority seems to be to the effect that, where a private corporation has entered into a contract in excess of its granted powers, and has received the fruits or benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make the contract." This must be understood to mean, however, that the fruits or benefits of the contract must have been received from the other contracting party, and not from outside parties. That this is the true meaning of the passage appears from the language of the same writer on page 1155 of 10 Cyc., where he says: "If the contract of a corporation is *ultra vires*, but not immoral or otherwise *malum in se*, and either party disaffirms it on the ground that it is *ultra vires*, and refuses further execution of it, then, while the other party cannot sue to recover damages or compensation in respect of the unexecuted portion of the contract, yet the law will afford him remedies for procuring from the other party a restoration of what he has lost under it. The governing principle is that, where money has been paid or property transferred to a corporation under a contract which is not *malum in se*, the party receiving may be made to refund to the party from whom it has received the value of that which it has actually received, and to this end he may maintain against the corporation the equitable common-law action for money had and received." In *Johnson v. Hines*, 61 Md. 131, where the question under consideration was what title passed to mortgagees under a mortgagor, from one whose title was derived from an unauthorized conveyance by a trustee, Judge Yellott, speaking for this court, said: "That nothing can emanate from nonentity, or, as more tersely enunciated, '*de nihilo, nil*,' is an axiom in the physical sciences which might be appropriately transferred to a judicial investigation of this nature." This is certainly sound logic, and a void contract can no more give rise to a right of

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action upon such contract than a void deed can create title in the grantee. In *Thomas v. West Jersey R. R.*, 101 U. S. 71, 25 L. Ed. 950, the railroad company made a 20-year lease of its road, which was acted under for five years and was then repudiated by the railroad, and the other party brought suit upon the contract. It was held void as ultra vires, but the doctrine of estoppel was invoked by the plaintiff on the ground that the contract had been partly performed. The court said: "It was the duty of the company to rescind or to abandon the contract. Though they delayed this for several years, it was nevertheless a rightful act when done. Can this performance of a legal duty, a duty both to the stockholders and the public, give the plaintiff a right of action? To hold that this can be done is in our opinion to hold that any act done under a void contract makes all its parts valid, and that the more you do under a contract forbidden by law, the stronger the claim to its enforcement in the courts." In *Central Transportation Co. v. Pullman Palace Co.*, 139 U. S. 62, 11 Sup. Ct. 488, 35 L. Ed. 55, under a contract held ultra vires, the Supreme Court again held that part performance was no ground for enforcing further performance of an unlawful contract, though the Pullman Company was required to account in an independent proceeding for the value of what it had received from the plaintiff under the contract, saying: "In such case the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract to return, or, failing to do that, to make compensation for the property or money which it had no right to retain. To maintain such an action was not to affirm, but to disaffirm, the unlawful contract." This is the doctrine of the majority of the state courts of highest repute. In *Morville v. American Tract Society*, 123 Mass. 137, 25 Am. Rep. 40, the court said: "The plaintiff's money was taken and is still held by the defendant under the agreement which it is contended it had no power to make. * * * The plaintiff is not seeking to enforce the contract, but only to recover his own money and prevent the defendant from unjustly retaining the benefit of his own illegal act." In *Day v. Spiral Springs Buggy Co.*, 57 Mich. 147, 23 N. W. 628, 58 Am. Rep. 352, in a suit upon a speculative contract which was held ultra vires, the defendant pleaded in estoppel on the ground of part performance, but the court, through Judge Cooley, said: "There are some decisions which give plausibility to the position of the defendant, but we know of none that is adequate to the exigencies of this case. * * *

The power on the part of such corporation to enter into contracts of speculation, being withheld on reasons of public policy, for the protection of shareholders and the general good of the community, the act neither of one party nor of both in entering into it can work an estoppel against setting up the invalidity. A rule of law established for the public good cannot be thus defeated. A corporation cannot, by the mere act of individuals, be given a power which the state for general reasons has withheld from it.

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Steam Navigation Co. v. Dandridge, 8 Gill & J. 248, 319, 29 Am. Dec. 543. Parties may be estopped in some cases from disputing the validity of a corporate contract, when it has been fully performed on one side, and when nothing short of enforcement will do justice. To quote the language of Comstock, C. J., in *Parish v. Wheeler*, 22 N. Y. 508, 'The executed dealings of corporations must be allowed to stand for and against both the parties when the plainest rules of good faith so require.' But this is not such a case. The contract has only been performed in part. * * * No valid ground for estoppel is therefore found to exist in the case."

Our own decisions have distinctly recognized the principle of the cases we have cited above. In *Maryland Hospital v. Foreman*, 29 Md. 524, the hospital had received money from Foreman under a contract which the court said was not authorized by the powers conferred in its charter, and was therefore "simply ultra vires and not binding upon the parties"; and Judge Bartol said: "The contract in all such cases will be regarded as void, and the party who delivered the property or advanced the money to the corporation will be entitled to his legal remedy, not founded upon, but in repudiation of, the contract, to recover the property or the money from the corporation, upon the principle that it had acquired no right or title to either under the contract." So, in *Lester v. Bank*, 33 Md. 563, 3 Am. Rep. 211, the appeal was from an order ratifying an auditor's account and allowing a claim for a debt due upon a loan made by the bank in violation of its charter, and the order was affirmed; the court saying that, "in cases arising under contracts made in violation of a statute, it has been repeatedly held that an action would lie against a party receiving money under such a contract upon a promise implied by law to refund it." In *Weckler v. First Nat. Bank*, 42 Md. 582, 20 Am. Rep. 95, the bank sold bonds on commission in violation of its charter powers, but paid over the proceeds to the owners of the bonds, and it was held that, not having any of the plaintiff's money obtained by means of the sale of the bonds, the defense of ultra vires was open to it. In *United German Bank v. Katz*, 57 Md. 141, where the bank discounted a note in excess of its charter powers, a recovery was allowed upon the note, though the plea of ultra vires was made, but the principle upon which it is allowed was stated to be "that it is inequitable to permit one who has received the benefit of the contract to repudiate it on the ground that the corporation from which he received the benefit had no power to make the contract"; so that the form of recovery, and not the substantial right of recovery, was the thing in question there. This is the only case in Maryland to which we have been referred in which a recovery directly upon the void contract has been allowed at law. The case of *Heironimus v. Sweeney*, 83 Md. 146, 34 Atl. 823, 33 L. R. A. 99, 55 Am. St. Rep. 333, like *Lester v. Howard Bank*, was an equity case, and, where the defendant has retained the fruits of the void contract,

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the plaintiff may either resort to the common-law action for money had and received, or to an accounting in equity. The case of *Bank v. Katz*, supra, was cited in *Black v. Bank of Westminster*, 96 Md. 429, 54 Atl. 88, but in the latter case the declaration contained the common counts as well as a special count on the note, and the recovery of the bank might be properly attributed to those counts, even if the note had been held to be purchased instead of discounted as it was held to be; and both those cases were cases of fully executed contracts in which the defendant sought to retain the fruits of the contract.

In this case, there is but one count in the declaration, and that is upon the void contract, and the proof is clear that the railroad company never received from the hotel company, either directly or indirectly, any money or property whatever under this contract. The only money it has received as a result of the contract is that paid by passengers for transportation over its own road, or for freight carried over the road. The hotel company has paid nothing and parted with nothing under this contract, and is therefore, under all the authorities, without any right of action.

It follows from what we have said that the demurrer to the defendant's fourth plea should have been overruled and the defendant's first and second prayers should have been granted; and, for the error in sustaining the demurrer and refusing those prayers, the judgment must be reversed. As there can be no recovery under our view of this case, it is unnecessary to consider the other rejected prayers of the defendant.

Judgment reversed without a new trial. Costs above and below to be paid by the appellee.

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(Supreme Court of Appeals of West Virginia, Jan. 23, 1906.)

[52 S. E. Rep. 724.]

Eminent Domain—Compensation—Elements.*—In a condemnation proceeding, every element of value which would be taken into consideration between private parties in a sale of property should be considered in arriving at a just compensation for the land proposed to be taken, and it is proper to consider, not only the use for which the land may be maintained at the time, but its adaptability to any and every useful purpose to which it might be put.

*For the authorities in this series on the subject of the measure and elements of the damages recoverable in condemnation proceedings, see foot-note appended to *Simons v. Mason City & Ft. D. R. Co.* (Iowa), 17 R. R. R. 469, 40 Am. & Eng. R. Cas., N. S., 469; *Union Ry. Co. v. Raine* (Tenn.), 17 R. R. R. 465, 40 Am. & Eng. R. Cas., N. S., 465; *Big Sandy Ry. Co. v. Dils* (Ky.), 17 R. R. R. 441, 40 Am. & Eng. R. Cas., N. S., 441; *Louisiana Ry. & Nav. Co. v. Xavier Realty* (La.), 17 R. R. R. 104, 40 Am. & Eng. R. Cas., N. S., 104; foot-note appended to *Illinois, etc., Ry. Co. v. Freeman* (Ill.), 16 R. R. R. 360, 39 Am. & Eng. R. Cas., N. S., 360.

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Same.—As a general rule, compensation to the owner is to be estimated by reference to the uses for which the appropriated lands are suitable, having regard to the existing business or wants of the community or such as may be reasonably expected in the immediate future.

Same.—As to the value of the property taken, the proper inquiry is, what is the value of the property for the most advantageous uses to which it may be applied?

Same—Assessment of Compensation—Appeal—Prejudicial Error.—In a condemnation proceeding, when a false, speculative, and conjectural basis of the value of the real estate proposed to be taken is permitted to go in evidence to the jury over the objections of a party, it will be presumed that the objecting party was prejudiced thereby. (Syllabus by the Court.)

Error to Circuit Court, Mingo County.

Action by the Norfolk & Western Railway Company against T. J. Davis and others. Judgment for defendants, and plaintiff brings error. Reversed.

Joseph I. Doran and Holt & Duncan, for plaintiff in error.

Simms & Enslow, for defendants in error.

McWHORTER, J. This is a proceeding by the Norfolk & Western Railway Company for the condemnation of a strip of land 2,567 feet in length, along the bank of the Tug Fork of Sandy river, in Mingo county, being the front of a tract of some 550 or 600 acres; the strip to be taken containing 5.02 acres, the property of T. J. Davis and others, for its use in the construction of a branch of its railroad. The applicant offered the owners \$500, which they refused to accept. It then applied to the circuit court of Mingo county for the appointment of commissioners, under the statute, to ascertain the compensation, who reported \$900 as a fair compensation for the land taken and damages to the residue of the property, which report was excepted to by the applicant, "because the amount fixed by said commissioners in their report as compensation for the land proposed to be taken and damaged is grossly excessive," and demanded that the question of compensation be ascertained by a jury. The defendants also excepted to said report, "because the amount fixed by said commissioners in their report as compensation for the land proposed to be taken and damaged is grossly inadequate," and likewise demanded a jury to ascertain the compensation and damages. Accordingly a jury was impaneled and sworn, and, after hearing the evidence, returned the following verdict: "We, the jury, find for the defendants the sum of \$2,350 as compensation and damages for the land proposed to be taken as shown and described in the petition and plat filed herein." During the trial the plaintiff objected to certain evidence offered by the defendants, and excepted to the ruling of the court in permitting the evidence to go in, and moved the court to set aside the verdict of the jury and grant it a new trial, because the same was contrary to law and without evidence to support it, which motion the court overruled and entered judgment requiring the plaintiff to pay said

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sum of \$2,350, to which plaintiff excepted and procured from one of the judges of this court a writ of error.

The questions presented for the consideration of this court are as to whether the amount of compensation found by the jury is so high that it must be attributed to prejudice partiality, passion, or mistake of law or judgment, and whether the court erred in permitting certain evidence to go to the jury, as claimed by plaintiff's counsel. It is conceded, as well as proved, that the land taken for the right of way, being a strip 80 feet wide, except for a distance where a fill was made it is enlarged to 140 feet, is rough hillside land, wholly unfit for cultivation, and the evidence shows that between the right of way and the river is a strip, the most of which is bottom land, of about 90 feet in width, which is, by the road, severed from the main body of the tract of land out of which the right of way is taken. There are two producing gas wells on the land outside of the right of way proposed to be taken, one within about 10 feet of the right of way, the other about 200 feet up Lower Burning creek from its mouth, so that the well must be within 100 feet or less of the right of way, but none upon the right of way. T. J. Davis, a witness in behalf of himself and the other owners, testified that the compensation and damages should be \$4,300, that he based his judgment upon an estimate that he had made; and testified that the two wells producing gas brought in rentals of \$600 per year, to which testimony of Mr. Davis, so far as it referred to the gas upon the land and the rentals accruing from the two producing wells, the counsel for the plaintiff objected, but the objection was overruled, and plaintiff excepted. Here was proof of actual development of the gas, the wells were bringing in certain definite rentals, and it was certainly competent to show to what extent developments had been made, and what was actually being done with the land. It seems to be a rule well established that every element of value which would be taken into consideration between private parties in a sale of property should be considered in a proceeding of this character in arriving at a just compensation for the land taken, and it is proper to consider not only the use for which the land may be maintained at the time, but its adaptability to any and every useful purpose to which it might be put.

In 15 Cyc. 724: "If a tract, of which the whole or a part is taken for a public use, possesses a special value to the owner, which can be measured by money, he is entitled to have that value considered in the estimate of the compensation and damages. Compensation is not to be estimated simply with reference to the value of the land to the owner in the condition in which he has maintained it, but with reference to what its present value is in view of the uses to which it is reasonably capable of being put"—and cases there cited. In *Harrison v. Young*, 9 Ga. 359, it is held: "The value of land taken for public use is not restricted to its agricultural or productive qualities, but inquiry may be made as to all other legitimate purposes to which the property could be appropriated."

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In *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206, it is held: "In determining the value of lands appropriated for public purposes, the same considerations are to be regarded as in a sale between private parties; the inquiry in such cases being, what, from their availability for valuable uses, are they worth in the market." And it is there further held: "As a general rule, compensation to the owner is to be estimated by reference to the uses for which the appropriated lands are suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." In that case the court adopts the language of the Supreme Court of New York in the *Matter of Furman Street*, 17 Wend. 669, where it is said the proper inquiry was: "What is the value of the property for the most advantageous uses to which it may be applied?" In *Muller v. Railway Co.* (Cal.) 23 Pac. 265, the court says: "In arriving at the value of the land, all its capabilities, all the uses to which it is adapted, should be taken into consideration. These capabilities are estimated by a purchaser, and we cannot see why evidence in regard to them is not admissible. The same considerations are to be regarded as in a sale of land between private parties." *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206. And in *Reed v. Railway Co.* (Ill.) 17 N. E. 807, it is held: "The price to be paid by a railway company for land taken under eminent domain is its value for any purpose for which it is shown by the evidence it is available, and not simply its value as land as it is at the time." *Railway Co. v. Moore and Others* (Ill.) 15 N. E. 764. A long line of decisions is cited to the same effect from the states of Illinois, Kentucky, Massachusetts, Mississippi, Missouri, New Hampshire, New York, Tennessee, Texas, Virginia, Washington, Wisconsin, and the United States. 18 Cent. Dig. cc. 1249-1257, § 356.

It is a fact that the property proposed to be taken in the case at bar for the right of way is a developed gas property, two producing wells almost immediately on the line of the right of way. Could any one for a moment say that in negotiations between private parties for the sale and purchase of said property they would not take into consideration the fact of the existence of gas under the property as an element in ascertaining the value of the property? Gas is an article of commerce, and the fact that it is now being piped to market from the premises is entirely proper to be taken into consideration as an element of value in fixing the amount of compensation, and it was proper to permit the witness to state what rental was being derived from the said gas wells, and it was competent evidence in estimating the value of the property. "The particular use to which the property is devoted, and in consequence of which it has an intrinsic value to the owner, is a fact which he has a right to have considered." 15 Cyc. 727, and cases there cited. See, also, 2 Lewis, Em. Dom. par. 479. The court did not err in admitting testimony in relation to the actual gas production, and the fact that the land to be

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taken was gas territory, in view of the fact of its development as such. Said witness, on cross-examination, was asked just how much he embraced for this five acres in his estimate of \$4,300, and answered: "I told you that I regarded the coal under the right of way to be worth about \$800. I put the land at \$500." He then stated that he put the gas territory taken at \$3,000—making up his estimate of \$4,300. Counsel for plaintiff moved the court to instruct the jury to disregard the witness' answer to the question propounded by counsel for defendants as to his estimate of damages of \$4,300, which motion was overruled, and plaintiff excepted, and counsel for plaintiff insist that the court erred therein to its prejudice, in permitting speculative and fictitious estimates of values to go to the jury and not the market value of the property to be taken, which was not stated by the witness. *Dorlan v. Railroad Co.*, 46 Pa. 520, was an action for damages to a mill property by the construction of the road, where it was held that: "The injury to the unused and surplus water power of the plaintiff is a legal ground of claim, and the measure of damages is its actual market value for any useful purpose; the mill property remaining as it was when the road was constructed. Hence, evidence as to the power that could be gained by erecting a new dam further down the stream, making a shorter race and other alterations, was irrelevant and inadmissible." In *Canal Co. v. Archer*, 9 Gill & J. 479, it is held that, in estimating the value of property condemned for public use, the jury should give the owner what in their judgment it would actually, at the time, sell for, and not what it might bring, or perhaps ought to produce, at some future time; that possible or probable profits resulting from the enjoyment of the property are not proper to be considered by the jury in making up their verdict, but they should limit themselves to the direct loss sustained by the owner. And in *Railroad Co. v. Hildebrand*, 136 Ill. 467, 27 N. E. 69, syl., point 2, it is held: "Error to instruct the jury that in estimating the compensations to be paid they should take into consideration all appreciable injuries and inconveniences caused by the taking, to the land not taken, 'although such injuries and inconveniences may be largely conjectural,' since the jury might infer that speculative damages were recoverable." *La Mont v. Railway Co.*, 62 Iowa, 193, 17 N. W. 465; *Railroad Co. v. McDermott* (Neb.) 41 N. W. 648; *U. S. v. Taffe* (C. C.) 86 Fed. 830. And in *Railway Co. v. Holmes* (Ga.) 11 S. E. 658, it is held that: "Evidence of what plaintiff could have made by putting the land to other uses, had defendant's tracks and buildings not been there, is inadmissible on the question of damages." "Where land is appropriated for a public use, a compensatory, not a speculative, remuneration is guaranteed by the law for lands taken and for the damages occasioned thereby to the remainder of the premises." *Powers v. Railway Co.*, 33 Ohio St. 429.

The defendants, over the objections and exceptions of plaintiff in case at bar, had been permitted to prove by witness H. M. Payne, a civil and consulting engineer and mining engineer, the

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probable number of tons of coal per acre underlying the land proposed to be taken and the value thereof per ton, as measured by the usual price of royalty paid to landowners per ton for coal when the coal was leased and being produced, which doubtless formed the basis of the estimate of the witness Davis of the value of the coal under the land taken, when there was no evidence that coal was leased or mined or any royalties paid anywhere near the land taken, or that coal operations would affect that neighborhood or section in any reasonable time in the future; no works were opened near it, the land was not leased for operation, nor any near it as far as the evidence shows. There seemed to be no effort to prove the market value of the land to be taken. It was shown that there was some good coal under the land, but when it might be mined and removed does not appear. The coal is of no value while it must remain in the earth; it is the prospect of its production which gives it value. The early prospect of its development is what adds to its value; it is true it has a value now as an investment to be held for future development, and has, as such, a market value, and this market value is the true basis of compensation to be allowed. Coal lands are sold by the acre and have a market value by the acre, and the price is controlled by the various elements of value—the quality of the coal, the thickness of the seam, as well as conveniences and the facilities for conveying it to market. The estimate made by witness Davis was made upon a false basis, conjectural and speculative, and should have been excluded from the jury as well as all testimony fixing the basis of value upon the price per ton paid as royalty in coal fields being operated; the value must be arrived at by ascertaining the true market value of the land proposed to be taken, taking into consideration all the elements of value as would be done in negotiations for the sale and purchase thereof between private parties. This principle is well settled in *Bodkin v. Arnold*, 48 W. Va. 108, 35 S. E. 980, where it is held, in syllabus, point 6: "The true measure of damages is compensation for the actual loss sustained by the plaintiff in being deprived of the use of his property, and speculative profits, founded on an exaggerated notion of the real value of the property, are not recoverable. Evidence tending to establish such speculative profits is inadmissible, as it may mislead the jury in arriving at the fair rental value of the property."

It is assigned as error that the court permitted to be propounded by counsel for defendants, to witness W. H. Hovey, the question, "Tell the jury what your experience is, and, from the experience you have had, as to the probability of oil in that neighborhood," and the same to be answered over the objection of plaintiff's counsel. Mr. Hovey was placed upon the witness stand as an expert oil man. His testimony would scarcely raise a suspicion in the mind of any one that there was oil in the tract of land from which the right of way is sought to be taken. If the land contained oil, the defendants had a right to show it by any evidence they could adduce that was practical, and not merely

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conjectural and speculative. Nothing was shown as to the presence of oil further than the fact of the development of gas, which is, at least to some extent, an indication of the presence of oil, and this fact was already and properly before the jury without the testimony of Hovey. In the absence of all development of oil or the presence of oil, all testimony relative thereto was mere guesswork and liable to confuse or mislead the jury, and, the question being purely speculative, and any answer thereto necessarily so, the same should not have been permitted to be answered.

The first error assigned is in refusing to set aside the verdict of the jury and grant a new trial: "because the amount of compensation found by the verdict is so high that it must be attributed to prejudice, partiality, passion, or mistake of law or judgment"—citing, in support of this assignment, *Railway Co. v. Nighbert*, 46 W. Va. 202, 32 S. E. 1032, where it is held: "A verdict finding an amount of compensation, in a proceeding by a railroad company to condemn land, that is so high that it must be attributed to prejudice, passion, bias, partiality, or mistake of law or judgment will be set aside." It is true the verdict is very high compensation for the property proposed to be taken, and damages to the residue of the tract, when we consider the character, nature, and quality of the land taken, as well as the residue of the tract. How far the verdict of the jury was influenced by the speculative evidence permitted to go to the jury cannot be known, and, as the case must again be tried before another jury, it is not deemed proper to discuss the evidence.

It is claimed by defendants that, the jury having viewed the premises in the course of the trial, such view is a part of the evidence in the case; that what they see relevant to the issue to be decided by them is always evidence in a primary sense, and what is detailed to them concerning the same subject-matter by witnesses is evidence merely in a secondary sense; and that the view of the premises was conclusive, and that the verdict should not be disturbed—citing several authorities. The purpose of a personal inspection by the jury is to enable them to view the whole situation and see for themselves the property to be taken, its character, and quality, and its relation to the residue of the tract from which the right of way is taken, and thereby obtain a more intelligent grasp of the evidence adduced before them, by which, taken in connection with their view, they are the better enabled to arrive at a just and proper conclusion as to the amount to be paid. In *Washburn v. Railroad Co.*, 59 Wis. 364, 18 N. W. 328, it is held: "In assessing the compensation to be made to the owner of land taken by a railroad company, the jury may resort to their own knowledge of the premises, obtained from a view thereof, and to their general knowledge of the elements which affect the assessment, in order to determine the relative weight of conflicting testimony as to value and damages; but their assessment must be supported by the testimony or it cannot stand. Instructions from which the jury might reasonably

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have understood that they were to assess the compensation according to their own knowledge, judgment, and good sense, aided by their view of the premises, and that they might do so without regard to the testimony or in opposition thereto, are held erroneous." In the absence of inadmissible testimony, or erroneous instructions, a verdict rendered by a jury should not be disturbed, unless it was so high, or so low, that it must be attributed to prejudice, partiality, passion, or mistake. When a false and illegal basis of values has been permitted to be placed before the jury, over the objections of a party, it will be presumed that the objecting party was prejudiced thereby.

For the reasons herein stated, the judgment is reversed, the verdict of the jury set aside, and the case remanded to the circuit court of Mingo county, there for a new trial to be had therein.

ENFIELD MFG. CO. v. WARD.

(Supreme Judicial Court of Massachusetts, Hampshire, Feb. 26, 1906.)

[76 N. E. Rep. 1053.]

Railroads—Rights in Land—Effect of Abandonment.—Where a railroad is deeded the fee to land by warranty deed, its abandonment of the land for railroad purposes does not operate to divest it of the fee.

Same—Abandonment—Intent.*—Abandonment of land for railroad purposes is, in part at least, a question of intention.

Same—Evidence of Abandonment.—The fact that trustees under a mortgage of a railroad and its franchises pay no taxes on certain land belonging to the railroad, and do not know of its existence, and pay no attention to it, does not tend to prove an abandonment of such land by them or by the railroad company.

Exceptions from Superior Court, Hampshire County; Elisha B. Maynard, Judge.

Action by the Enfield Manufacturing Company against Arthur J. N. Ward. A verdict was ordered for defendant, and plaintiff excepted. Exceptions overruled.

The mortgage referred to in the opinion was a mortgage on the franchise and property of the Massachusetts Central Railroad Company, which mortgage was foreclosed and constituted a link in defendant's chain of title.

Otis E. Dunham and H. M. Coney, for plaintiff.

John C. Hammond and J. H. Schoonmaker, for defendant.

MORTON, J. This is an action of trespass quare clausum, and the matter in dispute relates to the title of the locus. The plaintiff claims title through one Tebo, who entered and took

*For the authorities in this series on the question what constitutes an abandonment of a railroad right of way, see foot-note appended to *Canton Co. v. Baltimore & O. R. Co.* (Md.), 13 R. R. R. 708, 36 Am. & Eng. R. Cas., N. S., 708.

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possession of the premises in July, 1903, and a few days after executed a warranty deed of them to the plaintiff. One Caswell afterwards surveyed them for the plaintiff and put in pins. The defendant claims title, through its predecessors, from the Minot Manufacturing Company, which formerly owned the premises, and in 1873 conveyed them by warranty deed to the Massachusetts Central Railroad Company. The railroad company began work upon its location, and a part of the roadbed across the locus was graded. This work ceased in 1874, and the locus never was used for railroad purposes. The railroad was built over another location several miles distant. The plaintiff contends that the locus had been abandoned, and that Tebo's entry gave him a seisin which his deed operated to convey to the plaintiff and under which the plaintiff itself also entered. At the close of the evidence the plaintiff asked the court to rule that the locus had been abandoned. The defendant asked for a ruling that there was no evidence for the jury on the question of abandonment. The court ordered a verdict for the defendant, and the case is here on the plaintiff's exceptions.

It does not appear on what ground the court ordered the verdict for the defendant, but we think that the ruling was right. The abandonment of the location for railroad purposes by the railroad company and its successors did not divest it or them of the fee. The case would have stood very differently if the interest of the railroad company had been limited to a right of way acquired by the location of its road under the statute. In that case the fee would have remained in the landowner, and an abandonment of the location would have operated as an extinguishment of the easement. But in this case the fee was in the railroad company, and still remained in it, notwithstanding the abandonment of the location for railroad purposes by it and its successor, the Central Massachusetts Railroad Company, and passed under the deed of the latter to the Boston & Maine Railroad, and from it, by deed of release, and quit-claim, to the plaintiff. Whether there could be an abandonment by the owner of the fee that would operate to divest him of his title short of possession continued for such a length of time as to bar an action by him for the recovery of the premises we need not consider. We think that there was no evidence of such an abandonment in this case. Abandonment is, in part at least, a question of intention, and, so far from there having been an intention on the part of the Massachusetts Central Railroad Company to abandon the locus, the vote of the directors passed in May, 1880, authorizing the president to take such action as he should deem expedient in regard to the disposition of land acquired by the company upon that part of the line which had been abandoned in the towns of Hardwick, Greenwish, Enfield (where the locus was), and Belchertown, indicated directly the contrary. The fact that the trustees under the mortgage paid no taxes on the land and did not know of it and paid no attention to it had no tendency to prove an abandonment of it either on their part or

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that of the railroad company, even if we assume that an abandonment by the mortgagee could affect the title of the mortgagor. The question of ultra vires is not involved. The railroad company acquired the property rightfully, and there is nothing in the original act of incorporation (St. 1869, p. 590, c. 260), or in St. 1880, p. 113, c. 169, or the other amendatory acts, which rendered its continued ownership of the property unlawful after the location had been abandoned. Besides, it is doubtful, to say the least, whether if there were any question of ultra vires it could be raised by the plaintiff. There is nothing to show any interruption by the defendant of the plaintiff's right of way over the locus. And, as already observed, the action relates to the title and not to the right of way.

Exceptions overruled.

 LOUISIANA & A. RY. CO. v. MOSELEY.

(Supreme Court of Louisiana, Jan. 29, 1906.)

[40 So. Rep. 37.]

Eminent Domain—Jury—Qualifications.—The persons selected by the clerk of court and the sheriff to serve as jurors in matters of expropriation should be taken, not only from parties having no pecuniary interest in the issue to be tried, but from men who have taken no specially active steps towards the accomplishment of the object sought to be obtained by the expropriation. The wide scope given for selection, the narrow margin left for objection by the owner, and the great weight attached to the verdict of the jury in such cases, make it the duty of courts to rigidly construe and enforce the requirements of the law touching the competency of jurors.

Same.—The owner of the property has the right to have the issues he has raised tried before a jury legally constituted.
(Syllabus by the Court.)

Appeal from Thirteenth Judicial District Court, Parish of Rapides; Wilbur Fisk Blackman, Judge.

Action by the Louisiana & Arkansas Railway Company against M. C. Moseley. Judgment for plaintiff, and defendant appeals. Reversed.

Madison C. Moseley and Robert P. Hunter (William Wirt Howe, of counsel), for appellant.

White & Thornton & Holloman (Henry Moore, of counsel), for appellee.

NICHOLLS, C. J. Petitioner alleged that it is proceeding to build a line of railroad from Stamps, Ark., through various parishes of Louisiana, and through Rapides parish, into Alexandria, La., and that, as a necessary part of its right of way and terminal facilities in the city of Alexandria, certain property, together with all buildings and improvements thereon, belonging to M. C. Moseley, a resident of Rapides parish, La., are required to be expropriated and purchased by petitioner in accordance

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with the laws of Louisiana respecting compulsory sales for public purposes; said property being more particularly described as follows, to wit: (Giving description.)

Petitioner shows that said property is necessary for the work and purposes of petitioner, to enable it to properly fulfill its functions in behalf of the needed public improvement; that petitioner cannot agree with the owner of said land to make an amicable purchase thereof; that it is necessary to expropriate the same by judgment of this honorable court and according to law; and that petitioner has offered to tender to defendant more than the full and just price for said property, to wit, the sum of \$2,700, for that first described, and the sum of \$1,500 for that second described, which offer or tender has been peremptorily refused by defendant, said tender having been made, not as an admission that the said sums mentioned were the true value of the respective portions of property herein sought to be expropriated, but having been made with a view of amicable purchase and to avoid litigation, said sums being far in excess of the true value of said property.

In view of the premises petitioner prays that said needed lands as above described, together with all buildings and improvements situated thereon, all as designated on the plan hereto annexed, with the depth, length, and width therein expressed, be adjudged to petitioner, the Louisiana & Arkansas Railway Company, for its uses and purposes, upon payment to the owner of the value of said property and all such damages as he may sustain in consequence of the expropriation thereof as herein prayed for, and that the necessary order and notice to the said owner of said land and improvements thereon be indorsed hereon, and that the honorable court grant such orders for listing, drawing, and summoning a jury of freeholders to assess such damages as the owner may suffer, and the value of the lands and the buildings and improvements thereon herein prayed to be expropriated as may be necessary and proper in order to legally expropriate the same, and for judgment upon such verdict as may be rendered herein according to law, for costs, and such general, and special relief as the nature of the case may require.

Defendant answered, pleading first the general issue. He specially denied that there was any necessity for the plaintiff to have and to take away from defendant his ground, which plaintiff seeks to expropriate. He specially denies, further, that plaintiff needs as much as 150 feet in width for a right of way, when 50 feet would be amply sufficient; and he also specially denies that plaintiff needs at all the quarter of a square fronting on Third street, which is located 200 or 300 feet south of or below the Watkins right of way, and the plaintiff having already acquired a right of way 150 feet wide fronting on Third street, and now owning the lots bought from Mr. Plunket, and also those bought from Lurcey & Reason, all fronting on Third street, it already has amply sufficient ground for a depot, without

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taking away from defendant without his consent still more ground, and for which there is no such necessity as to justify an expropriation. He further shows that on this quarter of a square, as well as on the other ground adjacent to Watkins Railway, defendant has a dwelling house, yard, garden, etc., and therefore said property is not subject to expropriation.

That the plaintiff is trying to force him to give up his property without giving him full value in compensation for same. That property in this city is, and has been for many years, and especially for the last few years, constantly rising in value. He further shows that even five years ago the Red River Valley Railway Company paid to Dr. Thompson and wife \$5,000, which was \$10,000 per acre, for one-half of an acre, and to Mr. Jonas Rosenthal and wife \$5,000 for less than two-thirds of an acre, which was \$8,250 per acre, and to this defendant \$9,500 for $3\frac{1}{4}$ acres, which was about \$3,000 per acre, and yet this plaintiff refused to pay to this defendant \$6,000 for 2 acres, with dwelling houses on same, located in same part of the city, below the Southern Pacific Railroad, and even tried to make this defendant accept \$2,700 for that part of the ground now sought to be taken by force, when it is well worth \$6,000, besides the injury to the adjacent part of the ground, by cutting it into a narrow strip and in the form of an acute angle, too narrow to build houses on same and shutting it off from any front, and almost destroying its value, then injuring defendant's other property to the extent of \$3,000, which said plaintiff should pay to defendant additionally. He further shows that the quarter of a square on Third street has one dwelling house on same, but is large enough for three of the kind now there, which rents for \$15 per month, making the monthly rental \$45 per month, or \$540 per year, a sum to produce which would require \$9,000 at interest at 6 per cent., or \$5,750 at 8 per cent. Therefore this property, or one-fourth of a square, is worth at least \$5,000, and yet this plaintiff offered only \$1,500 for it.

Defendant prays that plaintiff's demands be rejected, and that there be no expropriation of defendant's property, for the reason that it is not necessary, and for the further reason that, being dwelling houses, yards, gardens, etc., the property is not subject to expropriation; and, in the event that his property is taken away from him without his consent, then he prays that the plaintiff be required to pay him full value for same, and that he have in compensation \$6,000 for the ground claimed for a right of way adjacent to the Watkins Railway, and \$3,000 additional for the injury to defendant's other property, and the sum of \$5,000 for the quarter of a square fronting on Third street, the coming most important street of the city, already paved to the Valley depot, on which the electric street cars are to run, aggregating the sum of \$14,000, with legal interest from judicial demand.

The jury before whom the case was tried returned the following verdict:

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"We, the jury, find for the plaintiff and fix the value of the Third street property at eighteen hundred (\$1,800) dollars, and of the acreage (1.41) property in the rear at twenty-four hundred and twenty-five dollars, in full settlement.

"[Signed] S. Warshauer, Foreman."

The jury being polled, ten jurymen replied that the verdict returned was their verdict, while two replied that it was not.

The district court rendered judgment in conformity to the verdict, and defendant appealed.

While the jury in the case were being impaneled, defendant challenged for cause L. A. Stafford and C. C. Gremillion, two of the jurors drawn to try the case. The court overruled the objection and a bill of exception was taken. The bill recites that:

"When these jurors were offered, they were asked if they had contributed to the citizen's fund, the object of which was to raise a portion of the money necessary for the purchase of the right of way and terminals for the plaintiff company, and, when both answered that they had contributed \$125 to said fund, defendant challenged both of the said jurors for cause. Having no peremptory challenge, when the court overruled the challenge, both of said jurors were sworn and served as jurors. The reason assigned by the judge for his ruling was that the jurors were unprejudiced and not interested in any personal way in the result of the controversy."

Defendant cites Lewis on Eminent Domain, vol. 2, § 405, and cases cited in that connection.

Of the correctness of this bill, at the place referred to, Lewis declares that:

"Persons who are interested or active in promoting the work or improvement for which the condemnation is made are generally held to be disqualified from acting as jurors or commissioners."

He quotes, in a foot-note, *Michigan Air Line Ry. Co. v. Barnes*, 40 Mich. 383, and *Kundinger v. Saginaw*, 59 Mich. 355, 26 N. W. 634, but refers to *Somerville v. Wimbish*, 7 Grat. (Va.) 205, as questioning this doctrine.

Plaintiff's counsel urge that the interest which should disqualify a juror is the same which would disqualify a judge; that the interest which a judge may have in a case, in order to disqualify him, is not the kind of interest which one feels in public proceedings or public measures. It is a pecuniary or property interest, or one affecting the individual rights of the judge. The judge must have such an interest in the suit that, in the event of the decision, he will either gain or lose in a pecuniary way.

They refer the court to *Ellis v. Smith*, 42 Ala. 349, 353; *Bennett v. State*, 4 Tex. App. 72; *Higgins v. City of San Diego*, 58 Pac. 700, 702, 126 Cal. 303; *Foreman v. Town of Marianna*, 43 Ark. 324, 329; *State v. Sutton*, 74 Vt. 12, 52 Atl. 116; and *Detroit Ry. Co. v. Crane*, 50 Mich. 182, 15 N. W. 73.

Section 1481 of the Revised Statutes makes it the duty of the

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clerk of the court and the sheriff to select a list of 48 freeholders, residents of the parish in which the land lies and not interested in the issue to be tried, from which list 24 shall be drawn and summoned to attend, and from the 24 freeholders a jury shall be impaneled, in which at least three-fourths of their number shall concur, to determine after hearing the evidence what is the value of the land described in the petition with its improvements, and what damages, if any, the owner would sustain in addition to the loss of the land by expropriation. The section provides that in impaneling the jury any challenge for cause, but no peremptory challenge, shall be allowed.

The only knowledge we have of the facts which would go to show what interest the particular jurors named would have (and the extent of the interest) in the issues to be tried in the case is derived from the recitals of the bill. Whether any questions besides those which the bill discloses were asked of the jurors on their voir dire we do not know.

Appellant states in a motion for a new trial that counsel of the plaintiff pressed upon the jury in their closing argument that the suit was "not one by a corporation against a citizen, but a suit against an individual citizen by a committee of citizens who had granted to the corporation the right of way and terminal grounds at not more than \$16,000."

The new trial was refused, and no bill of exceptions was taken thereto, and therefore the facts stated in the motion for a new trial are not brought before us in a way which would authorize the court to consider them.

The only fact upon which we can deal in considering the question of the competency is that these jurors "subscribed \$125 to a citizens' fund, the object of which was to raise a portion of the money necessary to purchase the right of way and terminals for the company."

That fact indicates unquestionably that they were much interested in the construction of the road, with its terminals, but does not of itself show any pecuniary interest in the road or its construction. The exact character of the fund raised by the committee and the circumstances under which it is to be paid out are not disclosed. It is asserted that the committee of citizens, as an inducement to the railroad company to make its terminus in Alexandria, guarantied it that the terminals in the town should not cost it more than \$16,000, but that assertion is not made good by any evidence. As matters stand, we only know that the two subscribing jurors had subscribed \$125 towards the purchase of the terminals. That amount would neither be increased nor lessened by the price which would have to be paid for any particular property. Their competency is dependent, therefore, upon the decision of the question whether the special interest which they have manifested in having the terminal of the road established in Alexandria furnishes a legal ground for challenging them on the ground of interest, in the sense of bias or partiality.

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The wide scope given to the clerk and sheriff for the selection of jurors, the narrowness of the margin accorded to the owner for objection, and the great weight attached to the verdict of the jury, make it our duty to rigidly construe and enforce the requirements of the law touching the competency of jurors. We are of the opinion that the jury should be composed, as far as possible, of men not only without pecuniary interest in the object sought to be carried out, but also of men taking no special active steps towards its accomplishment. The owner is entitled to have his case submitted to a jury legally constituted.

For the reasons assigned it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and the same is, hereby annulled, avoided, and reversed, the verdict of the jury on which it was based be set aside, the cause be reinstated on the docket of the district court, and it is now remanded to that court for further proceedings according to law; costs of appeal to be paid by the appellee.

BLUMER v. IOWA R. LAND CO.

(Supreme Court of Iowa, Nov. 17, 1905.)

[105 N. W. Rep. 342.]

Adverse Possession—Public Land—Grant to Railroad—Prescription.*—Where public land was granted to a railroad company, and the company had earned the land, and all contests pending before the Land Department had been disposed of, its ownership was such as to be subject to the doctrine of adverse possession, notwithstanding certification by the Land Department to the railroad was omitted.

Same—Good Faith of Person in Possession.—Where an application to enter public land under the timber culture act was granted, and a receipt issued to the applicant, under which he took possession and cultivated the land, as required by the act of Congress, having had the assurance of his attorney that he might take possession and proceed to comply with the timber culture laws, it cannot be said that his possession was not in good faith, as against another claimant to the land, although a former application by him for the same land had been denied.

Same—Title of Occupant of Public Land.—As against a railroad company entitled to public land under a grant, the statute of limitations begins to run in favor of an occupant under the timber culture act from the time such occupant enters into possession under the receiver's receipt.

Appeal from District Court, Woodbury County; J. F. Oliver, Judge.

*For the authorities in this series on the question whether title can be acquired against a railroad company by adverse possession to lands acquired by it for railroad purposes, see foot-note appended to *Harman v. Southern Ry.* (S. Car.), 17 R. R. R. 145, 40 Am. & Eng. R. Cas., N. S., 145; foot-note appended to *Aikens v. New York, etc., R. Co.* (Mass.), 17 R. R. R. 100, 40 Am. & Eng. R. Cas., N. S., 100; foot-notes appended to *St. Louis & S. Ry. Co. v. Lindell Ry. Co.* (Mo.), 16 R. R. R. 281, 39 Am. & Eng. R. Cas., N. S., 281; foot-notes appended to *Oregon Short Line R. Co. v. Quigley* (Idaho), 16 R. R. R. 1, 39 Am. & Eng. R. Cas., N. S., 1.

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Action to quiet title. Decree as prayed, from which the defendant appeals. Affirmed.

Chas. A. Clark & Son and Wm. G. Clark, for appellant.
Lohr, Gardner & Lohr, for appellee.

LADD, J. The 40 acres of land in controversy is located within the place limits of the grant for the benefit of the Dubuque & Sioux City Railroad Company, afterwards transferred to the Iowa Falls & Sioux City Railroad Company, under the act of Congress approved May 15, 1856. The road was completed prior to 1872, and, though this tract was included in the list certified to the state, approval was delayed by the assertion of title to it under the swamp land act until 1878. In 1883 John Carraher applied to the local land office at Des Moines to enter it under the timber culture act, but his application was rejected, owing to conflict with the grant to the railroad company, and the decision was affirmed by the Commissioner of the General Land Office in December of the same year. He then appealed to the Secretary of the Interior, by whom the previous decisions were approved June 17, 1891. In the meantime the company had filed (1885) selections of land, including this, in the local land office, as inuring to it, under the grant, and these were accepted by the register and receiver and certified to the Commissioner, but, under the practice of the department, could not be passed on until Carraher's appeal had been disposed of, and when reached in January, 1893, this land, through oversight or other cause, was omitted from the certification to the company. In 1888 Carraher presented a second application for the same land to the register and receiver, and procured the following receipt:

"Timber Culture.

"Receiver's Receipt No. 607. Application No. 607.

"Receiver's Office, Des Moines, Iowa.

"May 31st, 1888.

"Received of John Carraher the sum of nine dollars — cents, being the amount of fee and compensation of register and receiver for the entry of northeast of N. E. quarter of section one in township 89 of range 46, under the first section of the act of Congress approved June 14th, 1878, entitled 'An act to amend an act entitled "An act to encourage the growth of timber on the Western prairies."'

"\$9.00.

M. V. McHenry, Receiver."

This was forwarded to him by his attorney, accompanied by a letter:

"Sioux City, Iowa, June 8, 1888.

"Mr. John Carraher—My Dear Sir: I have the pleasure of handing you herewith your timber culture entry receiver's receipt No. 607 for N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, 1, 89, 46. Respectfully, Geo. W. Wakefield.

"P. S. You can take possession and proceed to comply with the timber culture laws."

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He proceeded at once to comply with the timber culture act, and was in possession of the land from that time until his death in 1901, since which time plaintiff, to whom Carraher conveyed it a few days before he died, has been in possession. Some question is made as to the character of this possession, but, without reviewing the evidence, it is sufficient to say that we think it such as is required to constitute adverse possession, provided it shall be construed to have been in good faith and under claim of right or color of title. The defendant acquired whatever interest in the land the railroad company had, or might obtain, in 1887, and the correspondence between the parties indicates that it had overlooked its claim thereto, and did not receive paper title until January, 1903. This action was begun October 23, 1902, and the ultimate issue to be determined is whether defendant has lost title through the adverse possession of the plaintiff and his grantors. It is conceded that the grant to the railroad company was in presenti, and, as the company had earned the land and all contests pending before the Land Department had been disposed of prior to 1892, its ownership for the 10 years preceding the commencement of the action was such as to be subject to the doctrine of adverse possession. *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 12 Sup. Ct. 158, 55 L. Ed. 999; *Toltec Ranch Co. v. Cook*, 191 U. S. 532, 24 Sup. Ct. 166, 48 L. Ed. 291; *Iowa Railroad Land Co. v. Fehring* (Iowa) 101 N. W. 120, and cases cited.

Some claim is made that this case is distinguishable from those first cited, in that before certification in 1903 the Land Department ascertained that the tract was not within six miles of mineral claims, and therefore asserted active jurisdiction in determining whether it was within an exception contained in the grant. This was a mere matter of detail in connection with the certification, and did not tend to show that the company had not acquired ownership under the grant 30 years previous, or that it might not have obtained the certificate at any time after 1891. On the contrary, the investigation resulted in confirming such ownership during this long period. As observed in *Barden v. N. P. R. Co.*, 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992: "The delay of the government in issuing a patent does not affect the power of the company to assert in the meantime, by possessory action, its rights to lands which are in fact nonmineral." This was a direct action by the railroad company to recover the lands under the grant, and is not otherwise in point. All held in *St. P., M. & M. R. Co. v. Olson* (Minn.) 91 N. W. 294, was that in computing the period of the statute of limitations the time a contest between the parties was pending before the Land Department of the government should not be excluded. The act of Congress approved March 3, 1887, providing for the adjustment of railroad grants, did not purport to disturb the ownership of lands already earned, and, moreover, there was no showing that any readjustment of this grant was attempted. The case is within

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the rule of the decisions cited, and the defendant's title has been such as to be subject to adverse possession at least since 1891.

2. Counsel for appellant first contend that the possession of Carraher was not in good faith. At the time he filed his last application under the tree culture act the appeal from the rejection of his first application had been pending nearly five years. His second application was received in 1888, and not until three years thereafter did the Secretary of the Interior affirm the decisions rejecting the first. At that time the filing of the second application was ordered to be canceled, but whether Carraher was advised of this is not disclosed. Not having been accorded a hearing nor given any previous notice of the department's intention to cancel his entry, it is not to be inferred that he was subsequently informed of what had been done. See *Wilbur v. Ry. Co.*, 116 Iowa, 65, 89 N. W. 101, and cases cited. He subdued the soil and undertook to plant and cultivate the trees as required by the act of Congress, and there is no ground for saying that he was not acting in good faith, save this knowledge of the adverse decision on his first application in 1891. But he was not claiming under that, but by virtue of the receipt which had been obtained in 1888, and under which, for all that appears, he supposed he might acquire the land. That he was mistaken can make no difference, so long as he honestly believed, though mistakenly, that he had the right to acquire the land under the tree culture act. He had the assurance of his attorney, who was a judge of the district court when the letter was written, and this, with the acceptance of his application at the local land office, might well have convinced him of such right. The entire doctrine of adverse possession is based upon the existence of defective titles; for where titles are good there is no occasion for invoking it. The case differs from *Litchfield v. Sewell*, 97 Iowa, 247, 66 N. W. 104, in that their defendant knew he had no right to the land, while here the fair inference to be drawn from the evidence is that Carraher supposed he had been accorded the right to earn it under the tree culture act. See *Coleman v. Billings*, 89 Ill. 183; *Barrett v. Stradl* (Wis.) 41 N. W. 439, 9 Am. St. Rep. 795. Good faith is to be presumed, and we think the evidence insufficient to justify a finding to the contrary.

3. The plaintiff's claim of right, for the time required to acquire title under the timber culture act at least, was subservient to that of the government, and since then the period of the statute of limitations has not run. The controlling question, then, is whether the statutory period shall be computed from the time possession was taken under the receiver's receipt or from the time he might have so complied with the laws which entitle the applicant to a patent. In other words, is the claim of right sufficient if against all, save the government, or must the claim be that of entire ownership, and therefore against the world? The possession of Carraher was taken for the purpose of divesting the government of title by complying with the provisions of the timber culture act, and was necessarily hostile to all others.

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In effect, he conceded ownership by the government, which, unless he executed his purpose, would continue. It was an admission that the United States, rather than himself, held the fee and was entitled to retain it for the eight years required by the law for him to earn it. See act of Congress approved June 14, 1878. His first occupancy was under the second entry, in 1888, at which time the land had been earned by the railroad company, and, as the grant was in *præsenti*, it or its grantee could have maintained ejectment against him at any time within the period of limitation. When, if ever, did this period, which is 10 years in this state, begin to run? If after Carraher might have earned and acquired title under the timber culture act, then the period had not expired when this action was begun; if when he entered into possession under the receiver's receipt then it has run, and plaintiff's title should be quieted. In *Cole v. Des Moines Valley R. Co.*, 76 Iowa, 185, 40 N. W. 711, title was quieted in the plaintiff, though his entry had been canceled, but he had been in adverse possession more than 10 years subsequent to the lapse of time within which he might have earned the homestead. The same is true of *Wilber v. C. R. & M. R. R. Co.*, 116 Iowa, 65, 89 N. W. 101. The Supreme Court of Nebraska, without deciding that the running of the statute might not begin sooner, held, in *Carroll v. Patrick*, 23 Neb. 834, 37 N. W. 671, that "a land officer's certificate, therefore, under our statute, is color of title. As between individuals, the statute of limitations begins to run from the time the party entering the land did all that was required of him to perfect his purchase." At such time the claim is that of ownership and apparently all lacking is the paper title. It has ceased to be subservient to and has become adverse to the government. See *Chicago, R. I. & P. R. Co. v. Allfree*, 64 Iowa, 500, 20 N. W. 779. If, in fact, earned, the government retains but the naked legal title, and the claimant has become the real owner. The land is then segregated from the public domain, and has become private property. *Durham v. Hussman*, 88 Iowa, 29, 55 N. W. 11; *Nichols v. Council*, 51 Ark. 26, 9 S. W. 305, 14 Am. St. Rep. 20; *Cavender v. Smith*, 56 Am. Dec. 541; *Cady v. Eighmey*, (Iowa) 7 N. W. 102; *Steele v. Boley* (Utah) 22 Pac. 311; *Wirth v. Branson*, 98 U. S. 118, 25 L. Ed. 86; *Stark v. Starr*, 6 Wall. 402, 18 L. Ed. 925. But it is not essential that the land be actually earned in compliance with the law. It is enough that the party in possession in good faith so believes and asserts claim of ownership against the government, as well as all others.

Up to this point we apprehend there can be no controversy, although language may be found in some decisions indicating that the legal title must have passed from the government. See *Arnold v. Woodward*, 14 Colo. 164, 23 Pac. 444; *Gibson v. Chonteau*, 80 U. S. 92, 20 L. Ed. 534. But the claim of one who enters land with the purpose of acquiring title from the government by compliance with its laws is quite as hostile as though patent had been issued to all others, though subservient to the

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government. And the weight of authority is to the effect that the claim of right may be subservient to the government if hostile to all others. *Clemens v. Runckel*, 34 Mo. 41, 84 Am. Dec. 69; *Mather v. Walsh*, 107 Mo. 121, 17 S. W. 755; *Moore v. Brownfield*, 7 Wash. 23, 34 Pac. 199; *Lord v. Sawyer*, 57 Cal. 65; *Alabama State Land Co. v. Kyle* (Ala.) 13 South. 43; *Francoeur v. Newhouse* (C. C.) 43 Fed. 236; *Northern Pac. R. Co. v. Kranich* (C. C.) 52 Fed. 911. See *Railway Co. v. Townsend*, 84 Minn. 152, 86 N. W. 1007, 87 Am. St. Rep. 342. The principle is well stated in the first-mentioned case: "The defendant, and those under whom he claims, did not enter or hold under the plaintiff. They did not recognize his title. They had no privity with him. They do not appear even to have known of the existence of his title. They recognized a title in another person, 'the United States,' who was supposed to be the proprietors, and as to the United States their possession was not hostile, but they did expect to acquire the title of the United States, believing themselves to have right of presumption to the exclusion of all other persons, and a present right to the use and possession of the land. The defendant has the actual possession, within the meaning of the statute of limitations, with a claim, not of absolute title, but of a right which was adverse to all other persons." The only decision we have discovered to the contrary is *Altschul v. O'Neill*, 35 Or. 202, 58 Pac. 95. But there the company under which the plaintiff held became entitled to the land in 1886, and, though defendant had occupied it since 1866, he had made no effort to acquire the land from the government as a homestead until 1894. His application was then rejected by the officers of the local land office, and their decision later confirmed on appeal. Suit was begun in 1898, and the statute of limitations of 10 years pleaded in bar. It is manifest that defendant was a mere trespasser throughout. His attitude was entirely different from that of a party whose application has been received by the officers of the government, and who has entered into possession in good faith and continues therein in what he supposes to be in conformity with the laws of Congress. Nevertheless, the court delivered an opinion exhibiting extended research to the effect that a claim of right upon which adverse possession may be based must be against the whole world, including the government. No doubt the judges have made all the statements attributed to them in this opinion, but it is to be said in extenuation that each had application to the particular facts of the case in hand, and that in none, save those the court declined to follow, was the question as to whether the fact that the claim was subservient to the government involved. Indeed, the character of the claim under a government entry does not appear to have been given due consideration. If effective, it is exclusive of others. It is an assertion of right to the land, which, if well founded, must defeat the claims of all others. It involves a right of possession as absolute as though the party owned the title. It purports to exclude every one from its enjoyment, and even as against the

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government to assert the right to divest its title by compliance with the law. The statute of limitations never runs in favor of or against the government, and we are inclined to hold, in harmony with the weight of authority, that the relation of the citizen's claim to the government's title ought not to interfere with the running of the statute against all others, and that the period should be computed from the time Carraher entered into possession under the receiver's receipt.

The decree was right, and is affirmed.

LICZNEKSKI v. WILMINGTON CITY RY. CO.

(Superior Court of Delaware, New Castle, Dec. 23, 1904.)

[62 Atl. Rep. 1057.]

Street Railroads—Speed—Ordinances—Application.* — Wilmington City Ordinance, c. 7, p. 376, § 12, providing that it shall be unlawful for any locomotive, railroad car, or other vehicle to be propelled or drawn on such part of any railroad as shall be within the limits of the city of Wilmington at a faster rate than six miles an hour, has no application to the cars of a street railroad operated in such city.

Action by Albert Licznanski against the Wilmington City Railway Company. On demurrer to the second count of the narr. Sustained.

The second count of the narr., after alleging that the defendant was a corporation of the state of Delaware, operating certain lines of street railway in the city of Wilmington and state aforesaid, further alleged: "That, being such corporation so engaged as aforesaid, the said defendant on the twenty-seventh day of November, A. D. 1903, at the city of Wilmington, county and state aforesaid, negligently and carelessly ran one of its cars operated by it on said railway at a high, dangerous, and unlawful rate of speed, to wit, upward of the speed of six (6) miles an hour, contrary to the ordinance of the city of Wilmington, along and over its tracks upon one of the public streets of the said city of Wilmington, to wit, on the street known as West Fourth street, between Scott street and Lincoln street, in the said city of Wilmington, said West Fourth street being then and there a public highway of the said city, whereby the said car did then and there run into a certain wagon which was then and there being driven by the said Alexander Licznanski, in the exercise of due care and caution on his part, upon said West Fourth street, whereby the said wagon was crushed, broken, and demolished, and the said Alexander Licznanski was struck, cut, and hurt in

*For the authorities in this series on the question whether a street railway is a railroad, within the meaning of statutes, see foot-note appended to *Daly B. & T. Co. v. Great Falls St. Ry. Co.* (Mont.), 16 R. R. R. 693, 39 Am. & Eng. R. Cas., N. S., 693; *McLeod v. Chicago & N. W. Ry. Co.* (Iowa), 14 R. R. R. 715, 37 Am. & Eng. R. Cas., N. S., 715.

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his head, back, limbs, and other parts of his body, and thereby the said Alexander Licznarski was greatly bruised, wounded, and injured," etc.

The first two paragraphs of section 12, c. 7, p. 376, of the Charter, Laws, and Ordinances of the City of Wilmington of 1902, referred to in said second count, are as follows:

"It shall be unlawful for any locomotive, railroad car, or other vehicle to be propelled or drawn upon such part of any railroad as shall be within the limits of the city of Wilmington at a faster rate than six miles per hour.

"The engineer, conductor, controller, owner or owners, or other person or persons, having for a time the command of any locomotive, railroad car, or other vehicle, who shall propel or cause to be propelled or moved, such locomotive, railroad car, or other vehicle, upon such part of any railroad as shall be within the limits aforesaid at a faster rate than six miles per hour, for every such offense shall forfeit and pay a fine of one hundred dollars."

Defendant filed a general demurrer to said second count; counsel for defendant contending that the above-quoted section 12 of chapter 7 of the Charter, Laws, and Ordinances of the City of Wilmington does not apply to street railway cars.

Argued before LORE, C. J., and SPRUANCE and GRUBB, JJ.

Robert H. Richards, for plaintiff.

Walter H. Hayes, for defendant.

LORE, C. J. While these questions have not been distinctly and separately passed upon formally, yet in the trial of cases again and again the question has been asked whether there was any ordinance governing the speed of electric cars in the city of Wilmington, and it seems to have been generally conceded that there was not. The ordinance seems to relate to railroad cars, but not to cars of city railways.

We sustain the demurrer.

BAIN v. PARKER.

(Supreme Court of Arkansas, Dec. 2, 1905.)

[90 S. W. Rep. 1000.]

Deeds—Construction—Conditions Subsequent.—Conditions subsequent that defeat the estate conveyed by a deed are not favored in law, and to create an estate on condition subsequent the words of the deed must clearly show the existence of such condition, and must not admit of any other reasonable interpretation.

Railroads—Interests in Land—Conveyances—Creation of Conditions—Construction of Clauses.*—A deed conveying land in consideration

*For the authorities in this series on the subject of the forfeiture of railroad right of way for failure to comply with terms of grant, see foot-notes appended to *Krueger v. St. Louis, etc., R. Co. (Mo.)*, 14 R. R. R. 459, 37 Am. & Eng. R. Cas., N. S., 459; *Lucas v. New York, etc., R. Co. (C. C. A.)*, 14 R. R. R. 85, 37 Am. & Eng. R. Cas., N. S., 85.

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of the building of a railroad, "to be completed by January 1, 1899," does not impose as a condition subsequent on the grant that the railroad be completed by the date named, but the quoted clause imports nothing more than a covenant by the grantee to complete the road by the date specified, a breach of which entitles the grantor to damages, but does not invalidate the deed.

Deeds—Waiver of Conditions.—A condition subsequent in a deed may be waived by acts, as well as by express release, and any acts on the part of the grantor which are inconsistent with the claim of forfeiture are evidence of such a waiver.

Railroads—Interests in Lands—Conveyances—Waiver of Conditions.—A condition in a deed to a railroad requiring the completion of a line of road by a certain date was waived, where at the time the deed was executed it was known that the road could not be completed by the date specified, and the grantor nevertheless delivered the deed to the depository, who was to hold the same until the completion of the road, and without making any protest permitted such depository to hold the deed while the road was being completed and deliver it to the grantee over 10 months after the date on which the road should have been completed.

Appeal from Ashley Chancery Court; Marcus L. Hawkins, Chancellor.

Suit by D. L. Bain against J. M. Parker, trustee. From a decree of dismissal, plaintiff appeals. Affirmed.

On the 2d day of December, 1898, D. L. Bain and wife executed a deed conveying to J. M. Parker, trustee, 240 acres of land in Ashley county. This deed was executed on a blank form, which recited that the grantors in consideration of the payment of \$1 "and in further consideration of the building, equipping and putting in operation a line of railroad from a point on the Mississippi river in Chicot or Desha county to Hamburg, Ashley county, Arkansas, have granted, bargained, sold, and conveyed and by these presents do hereby sell and convey unto the said J. M. Parker, trustee, and unto his heirs and assigns forever," the lands described in the deed. This deed, with a number of other deeds executed by other parties for the same purpose, was delivered to the Ashley County Bank, to be held in escrow and delivered to the grantee when he had performed his part of the contract and built the road. The road was completed, and afterwards, on the 8th day of November, 1899, the deed was delivered to the vendee. Afterwards Bain brought this action to cancel the deed, on the ground that it contained a condition that the road must be completed on or before the 1st day of January, 1899, and that, as the road was not completed until seven or eight months later, the deed was void. On the hearing there was testimony tending to show that the plaintiff at the time he executed the deed inserted therein immediately after the words "Ashley County, Arkansas," in the printed form, the following words in writing: "To be completed by January 1, 1899." There was also testimony to the contrary that no such words were in the deed, and after considering the evidence the chancellor found for the defendant, and dismissed the complaint for want of equity. The plaintiff appealed.

Bain v. Parker*Robert E. Craig*, for appellant.*Geo. W. Norman*, for appellee.

RIDDICK, J. (after stating the facts). This is an appeal from the judgment of the chancery court of Ashley county refusing to hold a deed void on account of the nonperformance of an alleged condition subsequent. The plaintiff alleged that the deed as executed contained a condition that made it void if a certain railroad from the Mississippi river to Hamburg, Ark., was not completed on or before the 1st day of January, 1899. The defendant denied that there was ever any such condition in the deed. If the deed contained the words "to be completed by January 1, 1899," which plaintiff says he interlined in the printed form, then that part of the deed would read as follows: The grantors, in consideration of \$1, "and further consideration of the building, equipping, and putting in operation a line of railroad from a point on the Mississippi river in Chicot or Desha county to Hamburg, Ashley county, Ark., *to be completed by January 1, 1899*, have granted, bargained, sold, and conveyed," etc. The words in italics are those which plaintiff alleges that he interlined in the deed, and which he claimed were subsequently erased by some one to him unknown. There are two questions presented: First. Were these words, "to be completed by January 1, 1899," in the deed when executed? Second. If so, do they, when taken in connection with the other provisions of the deed, amount to a condition subsequent?

The evidence bearing on the question as to whether the words referred to were in the deed is quite conflicting. But it is unnecessary for us to set this evidence out or to discuss it, for it is not shown that the grantee erased those words, and, if we treat them as in the deed, they do not amount to a condition subsequent. Conditions subsequent that defeat the estate conveyed by the deed are not favored by law. The words of the deed must clearly show a condition subsequent or the courts will take it that none was intended, and, when the terms of the grant will admit of any other reasonable interpretation, they will not be held to create an estate on condition. Now, if we treat the deed as containing the words referred to, there are still no words of condition in the deed, and no words indicating that the estate should be forfeited if the road was not completed at the date named. These words, then, impart nothing more than a covenant which upon the acceptance of the deed by the grantee became binding upon him and for the breach of which the grantor may recover damages suffered thereby, but the deed remains valid. *Stone v. Houghton*, 139 Mass. 175, 31 N. E. 719; *Episcopal Mission v. Appleton*, 117 Mass. 326; *Studdard v. Wells*, 120 Mo. 25, 25 S. W. 201; *Bray v. Hussy*, 83 Me. 329, 22 Atl. 220; *Stanley v. Colt*, 5 Wall (U. S.) 119, 18 L. Ed. 502; 1 *Jones on Conveyances*, § 632, and cases there cited. Again, if this provision be treated as a condition subsequent, the facts here show that it was waived. A condition may be waived by acts, as well as by

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express release. Any acts on the part of the grantor which are inconsistent with a claim of forfeiture are evidence of a waiver of the condition. Thus where lands were granted to a railroad company upon condition that the road should be completed by a certain time, and after the company's failure to do this the grantor suffered the company to go on and incur further expense in constructing the road without making objection, it was held that the condition was waived. *Ludlow v. N. Y. & H. R. R. Co.*, 12 Barb. 440; *Duryee v. Mayor, etc., of New York*, 96 N. Y. 477; *Sharon Iron Co. v. Erie*, 41 Pa. 341; 1 Jones on Conveyances, § 699.

Now the deed in this case was not executed until the 2d day of December, 1898, and the evidence shows that at that time it was known that the road could not be completed on the 1st day of January following. If plaintiff intended to insist on the condition which he claims was in his deed, that the road should be completed by the date named, it was strange that he put himself to the trouble and expense of executing the deed, for at the time he did so it was known that the road could not be completed by the date named in the deed. But plaintiff not only delivered the deed to the bank, but he made no complaint when the road was not completed, but allowed the bank to hold the deed, and without any protest on the part of plaintiff the deed was delivered to the defendant over 10 months after plaintiff claims that the estate conveyed by it had been forfeited. A great part of the work on the road was done after the date on which plaintiff claims that the forfeiture took place, without objection on the part of plaintiff, and without notice to the bank not to deliver the deed. These acts of the plaintiff are inconsistent with his claim of forfeiture, and tend strongly to show that, if there was any condition in the deed, it was waived.

On the whole case, we are of the opinion that the judgment of the chancellor is right, and should be affirmed. It is so ordered.

RAINEY v. RED RIVER, T. & S. RY. CO.

(Supreme Court of Texas, Feb. 19, 1906.)

[90 S. W. Rep. 1096.]

Railroads—Nuisances.*—Machine and repair shops "and the like" cannot, under Const. art. 1, § 17, and Rev. St. 1895, arts. 4424, 4445, be arbitrarily located by a railroad without reference to damage to property in the vicinity, as can its right of way.

On motion for rehearing. Denied.

For former opinion, see 89 S. W. 768.

GAINES, C. J. In this motion it is insisted on behalf of defendant in error, among other things, that we were in error in treating

*See generally, extensive note, 15 R. R. R. 519, 38 Am. & Eng. Cas., N. S., 519.

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the case as involving the maintenance and operation of machine and repair shops. The criticism is probably just. While the petition does complain of the erection and operation of machine and repair shops, as well of a roundhouse, coal bins and water tank, it would seem, from the charge of the court, that there was nothing to submit to the jury as to machine and repair shops. Such shops were probably not involved in the case. But, in our opinion, this can make no difference in the result of the case in this court. That the opinion was not confined to machine and repair shops is shown by the following extract: "We are of the opinion, however, that the case of machine and repair shops and the like stands upon a different footing." The charge of the court does submit the question of the operation of a switchyard and roundhouse and of water tanks and coal bins, some of which, at least, fall within the category of "the like."

With this explanation, the motion for a rehearing is overruled.

ST. LOUIS BELT & TERMINAL RY. CO. v. MENDONSA *et al.*

(Supreme Court of Missouri, Division No. 1, Feb. 22, 1906.)

[91 S. W. Rep. 65.]

Eminent Domain—Railroad Right of Way—Damages.*—In a proceeding by a railroad company to condemn land for a right of way, the depreciation in the value of the land not taken because of the risk of fire from passing locomotives may be considered, but the possibility of the destruction of buildings is not an element of damage.

Same—Instructions.—In a proceeding to condemn land for a railroad right of way, an instruction that in estimating the damages the jury should not consider any supposed inconvenience arising from the noise and smoke, or the liability of injury to plaintiff's property by fire set by passing trains, was not harmless as merely omitting to mention the question of the depreciation in the value of property not taken because of the danger of fires, but affirmatively precluded any consideration of that depreciation from that cause, and was erroneous.

Appeal from Circuit Court, St. Louis County; John W. McElhinney, Judge.

Condemnation proceedings by the St. Louis Belt & Terminal Railway Company against Julia F. Mendonsa and others. From an order granting defendants' motion for a new trial, plaintiff appeals. Affirmed.

*For the authorities in this series on the subject of the measure and elements of damages recoverable in eminent domain proceedings, see foot-note appended to *Simons v. Mason City & Ft. D. R. Co.* (Iowa), 17 R. R. R. 469, 40 Am. & Eng. R. Cas., N. S., 469; *Union Ry. Co. v. Raine* (Tenn.), 17 R. R. R. 465, 40 Am. & Eng. R. Cas., N. S., 465; *Big Sandy Ry. Co. v. Dils* (Ky.), 17 R. R. R. 441, 40 Am. & Eng. R. Cas., N. S., 441; *Louisiana Ry. & Nav. Co. v. Xavier Realty* (La.), 17 R. R. R. 104, 40 Am. & Eng. R. Cas., N. S., 104; foot-note appended to *Illinois, etc., Ry. Co. v. Freeman* (Ill.), 16 R. R. R. 360, 39 Am. & Eng. R. Cas., N. S., 360.

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J. E. McKeighan, for appellant.*Robt. L. Shackelford*, for respondents.

MARSHALL, J. This is a proceeding to condemn 2 43-100 acres of the defendants' land, lying in St. Louis county and about a mile west of the city limits, and being a portion of a certain tract of 18 acres owned by the defendants and heretofore laid out and platted for residence property, and known as "Maplewood Heights," for a right of way for the plaintiff railroad. The commissioners allowed defendants \$10,000 damages. The court sustained exceptions to the report of the commissioners and awarded a trial by jury. The jury assessed the defendants' damages at the sum of \$5,600. The defendants filed a motion for a new trial, alleging, among other grounds, that the court gave improper and illegal instructions at the request of the plaintiff and of its own motion. The trial court sustained the motion for a new trial on the ground that it had erred in giving the third instruction asked by the plaintiff, which was as follows: "The court instructs the jury that, in estimating defendants' damages, it should not take into consideration any supposed inconveniences arising from the blowing of whistles, or the noise and smoke of trains, nor the liability of danger or injury to defendants' property by fire set out by passing trains, not the possibility of animals on defendants' land becoming frightened by passing trains." Thereupon the plaintiff appealed to this court from the order granting a new trial.

1. The only error assigned by appellant is the action of the trial court in granting a new trial, for the reason that it held that the third instruction given by the court at the plaintiff's request was erroneous. This was the only instruction given in the case which in any manner referred to the liability of danger or injury to defendants' property by fire set out by passing trains. The defendants claim that the instruction was erroneous under the rules laid down by this court in *Railroad v. McGrew*, 104 Mo. 282, 15 S. W. 931, and *Mathews v. Railroad*, 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161. On the other hand, plaintiff contends that the instruction was proper under the ruling of this court in *Railroad v. Donovan*, 149 Mo. 93, 50 S. W. 286, and *Railroad v. Shoemaker*, 160 Mo. 425, 61 S. W. 205.

In *Railroad v. McGrew*, supra, the trial court instructed the jury, among other things, that, in estimating the damage to the defendant, the jury should not take into consideration "the risks of damage by fires from passing locomotives," and this was assigned as error. This court, speaking through McFarlane, J., said: "It is true, as a general proposition, damages should be assessed on the assumption that the road will be properly constructed and operated, and that it will comply with all the laws of the state regulating its construction, management, and operation. For failure of duty in these respects, it will be liable to an action at common law, or the landowner will have such remedy as may be provided by statute. [Citing cases.] Notwithstanding

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these settled principles which apply generally, we are of the opinion that the facts in this case are exceptional, and that the instructions as limited by the court were proper." The court then discussed the situation of the remaining portion of the land, the risks that would be incurred in the operation of the defendant's mining plant, and then said: "So it will be seen that the general rule cannot, in justice, be applied to its fullest extent, under the facts in this case. It would not be proper to estimate the possible damage from fires or injuries to persons. Neither may ever occur, and to take them into the estimate would be mere speculation. We think they may be properly considered, however, in so far as they tend to depreciate the value of the whole property, and to affect the proposed changes, but no further. [Citing cases.]"

Mathews v. Railroad, 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161, was an action for damages caused to the improvements on the plaintiff's property by fire escaping from passing trains. The petition was in two counts; the first a count at common law, and the second a count based upon a statute, now section 1111, Rev. St. 1899, making railroad companies responsible for all damages caused by fire communicated from locomotive engines. The defendant pleaded the unconstitutionality of the statute. Upon the trial the defendant offered to prove that, when the right of way was acquired by condemnation, the damages that might be caused by fire from locomotive engines were included in the compensation allowed plaintiff, and asked the court to instruct the jury that, if the commissioners in the condemnation proceeding took into consideration the danger to plaintiff's property by accidental fire, the plaintiff could not recover. Speaking to that question this court, per Gantt, J., said: "When a part of a tract of land is taken for railroad purposes under condemnation proceedings, the jury or commissioners may properly take into consideration the risk from fire to the buildings, fences, timber, or crops upon the remainder, in so far and to the extent only that it depreciates the value of the property, but compensation for a probable or future loss by fire is entirely too speculative and remote to be made the basis of damages." The court then cited and quoted from *Railroad v. McGrew*, supra, and then added: "The plaintiff's claim before the commissioners was damage from the risk of fire. In so far as that risk affected the value of the property not taken by depreciating it, it was a proper claim. There was nothing to show that it was unjustly extended to an estimate of damages that might accrue at some future time, or might never occur. The damages were assessed at \$3,000, and paid. After the assessment then the plaintiff held his property in its depreciated condition. How defendant can arrive at the conclusion that, if this property in its depreciated condition is subsequently destroyed, plaintiff is not entitled to recover whatever damages that shall accrue from such subsequent destruction, we cannot understand. The prior condemnation assessment has been made and settled. After that plaintiff owns what is left absolutely, as

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he owned the whole before a portion was appropriated by the road. The subsequent damages constitute no part of the first." The rule thus announced may be briefly stated to be this: That in the condemnation proceedings the risk of fire from passing locomotive engines may be considered by the commissioners in determining the damage to the remaining portion of the property not taken, and compensation may be allowed the defendant for the depreciation in value of his land by reason of such risk. That is, may take into account the difference in the value of the remaining part of the land caused by the risk aforesaid, and that difference would consist of the depreciation in value of the land from such cause.

But the commissioners in condemnation cannot take into consideration the possibility of the destruction of buildings that may be on the land at the time of the condemnation proceeding or that may be subsequently erected thereon and speculate as to the damage that may be done to the owner by the destruction thereof, for the buildings may never be destroyed, and therefore, that element of damage being purely speculative, the owner is afforded ample remedy under the statute to recover from the railroad any actual damage he may afterwards suffer by reason of the buildings on the land being afterwards destroyed, whenever such a loss occurs. Or, stated otherwise, the commissioners are authorized to take into account the depreciated value or salable value of the land caused by the risk to be apprehended from fires that may never occur. But for actual loss from the actual destruction of buildings or improvements on the land arising from fires communicated by locomotive engines the owner is not entitled to recover against the railroad until and unless such loss actually occurs. And after loss the owner's remedy is under the statute or at common law for the damage and loss which he will then have actually sustained. The rule so announced in the cases cited is the general rule of law. *Lewis on Em. Dom.* §§ 496 and 497, vol. 2.

The plaintiff contends that the subsequent cases of *Railroad v. Donovan* and *Railroad v. Shoemaker*, supra, announce a different rule. In *Railroad v. Donovan*, supra, the plaintiff contended that the court below had permitted defendant's expert to testify as to damages en gross, without specifying the elements that went to make up the whole, and that thereby witnesses included in their estimates improper elements of damages, such as danger from fires caused by locomotive engines, etc.; but this court, speaking through *Brace, J.*, pointed out that the trial court, "at the instance of the plaintiff, excluded from the jury by clear and pointed instruction" all such objectionable elements of damage, and instructed the jury as to the true measure of damages in plain and unmistakable terms. There is nothing in the decision in that case which in any manner militates against or modifies the rule laid down in *Railroad v. McCrew* and *Mathews v. Railroad*, supra. On the contrary, what is there said harmonizes with what was said in the cases cited, and the court in that case properly ex-

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cluded from the consideration of the jury, at the instance of the plaintiff, all consideration of possible future damage to the improvements on the land arising from fire communicated by locomotive engines. The question of whether or not the risk of fire from such causes would cause a depreciation in the value of the remaining land was not considered, discussed, or decided in that case. In *Railroad v. Shoemaker*, supra, the trial court, at the instance of the plaintiff, instructed the jury that they could not take into consideration any damages the defendant might sustain "by reason of destruction of property by fire which may be set or caused by the trains of the railroad company in operating its line, and any such damages, if any he ever sustained, will be the proper subject-matter of future actions, but in determining the amount of compensation which you will allow the defendant in this action you cannot take into consideration nor allow any sum or amount whatever on account of exposure or liability of property to damage or destruction by fire caused or set by the trains in the operation of the road." As this instruction was given at the instance of the plaintiff, the condemning party, and as the plaintiff was the appellant in that case, the correctness of that instruction was not called in question, discussed, or decided by this court, but the whole decision in that case was as to the correctness of other instructions given by the court at the request of the defendants, and as to which plaintiff assigned error. The court said: "Thus, in reaching their conclusion as to the market value of the portion of defendant's farm which was not appropriated, they may, in estimating the diminution in value of the part left, take into consideration the amount and value of the land taken for the right of way, the size and shape of the two tracts into which the farm is divided by the location of the road through it, the cuts and fills, the inconvenience in getting from one part of the farm to the other, any inconvenience in getting to water; and, on the other hand, they were instructed on the part of the plaintiff that in reaching the amount of the damages they would not consider any damage that might result from fires in the future, as such would be the subject-matter for future actions, nor should they consider the danger to life or limb from trains passing over the road, nor any damage from smoke or noise from passing trains over the road or from ringing of bells or sounding of whistles, and the court expressly advised them what was meant by market value. In a word, by a process of exclusion and inclusion, the jury were advised how to reach the amount of damages defendant had suffered by the appropriation of his land, both as to the part taken for right of way and the depreciation in the market value of the portion not taken." No one can fairly contend that what was said there states anything in conflict with the rules laid down in *Railroad v. McGrew* or *Mathews v. Railroad*, supra. The essence of what was said in the *Shoemaker* Case was that, in estimating the damages in the condemnation proceeding, the jury might take into consideration the diminution in the value of the land not taken caused by the

risk of fire, but could not take into consideration any damage to or destruction of property that might thereafter be actually done to the same, but which might never occur, as the latter would be properly the subject of future actions.

Instruction No. 3, given at the instance of the plaintiff, only partially stated the rule of law, and in the form given was calculated to mislead the jury, to the injury of the defendants. As drawn, the instruction complained of, and for the giving of which the new trial was granted, not only directed the jury to exclude from consideration any damage that might in the future accrue to the defendants from fires being communicated to buildings or improvements on the land by passing locomotive engines, but likewise forbade the jury to take into account the risk of such fires and the effect of such risk upon the remaining land and the depreciation thereof in consequence of such risk.

It is true that ordinarily mere nondirection in a civil case does not constitute error. But the instruction under discussion amounts to more than mere nondirection. It directs the jury not to take into consideration the liability of danger or injury to defendants' property by fire set out by passing trains. The liability is the risk of fire, which, under the rules stated in the cases cited, constitutes a legitimate element of damage in a condemnation case, for that risk may depreciate the value of the property. The instruction as drawn does not differentiate between the risk of fire and the actual loss after the fire has occurred. The former can only be taken into account in condemnation cases. The latter can only be compensated for in an action after the loss occurs. The tract of land owned by the defendants in this case had been platted for residence purposes, and was especially adapted to such purposes. The taking of a portion thereof for a railroad right of way by the plaintiff and the constant passing of trains by day and by night for the purposes contemplated by the defendant company might, to say the least of it, affect the value of the remaining land for residence purposes. On the other hand, the establishment and maintenance of a railroad through the land might make the land valuable for warehouse purposes but would not make this land any more valuable for such purposes than it would any other land abutting the railroad. That benefit, therefore, was such a benefit as was common to all the owners of land abutting the road, and was not a special benefit to the defendants' land, and therefore could not properly be taken into account in determining the amount of the defendants' damage. On the other hand, the presence of the railroad in such close proximity to residences that might be built on the remaining land, and for which the land was intended, might depreciate the value of the land for such purposes, and such depreciation was a legitimate element of damage, to be taken into account in the condemnation proceeding. True the amount of depreciation would depend upon the opinion of experts and upon the common sense and judgment of the jurors, and was not susceptible of accurate mathematical calculation, but it was,

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nevertheless, a proper element of the defendants' damage, and, though not possible of exact mathematical computation, it was not a mere speculative damage such as the cases cited speak of in reference to the possible destruction of improvements on the land that may or may not ever occur at some future time.

For the foregoing reasons, the circuit court committed no error in granting a new trial in this case, and its judgment is therefore affirmed.

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(Court of Appeals of Kentucky, March 7, 1906.)

[91 S. W. Rep. 255.]

Appeal—Presumptions—Joinder of Defendants.—Where, in an action in a state court against a railroad company and several of its servants for injuries, a peremptory instruction for the individual defendants was refused, in the absence of the evidence on appeal, it would be presumed that plaintiff did not join the servants as defendants without a reasonable expectation of recovering against them, merely to defeat federal jurisdiction.

Appeal from Circuit Court, Graves County.

"Not to be officially reported."

Action by Sallie A. Rutherford against the Illinois Central Railroad Company and others. From a judgment in favor of plaintiff, defendant Illinois Central Railroad Company appeals. Affirmed.

Robbins & Thomas, Trabue, Doolan & Cox, and *J. M. Dickinson*, for appellant.

Lee & Hester, for appellee.

HOBSON, C. J. On the former appeal of this case it was held that the case had not been properly removed from the state court to the Circuit Court of the United States. *Rutherford v. Illinois Central Railroad Company*, 85 S. W. 199, 27 Ky. Law Rep. 397. On the return of the case to the circuit court there was a trial resulting in a verdict and judgment in favor of the plaintiff against the railroad company for \$1,250. The railroad company appeals, insisting that, as there was no judgment against the resident defendants, the court should have made an order removing the case to the United States Circuit Court.

This does not follow. The circuit court on the trial overruled the defendant's motion for a peremptory instruction. We must therefore assume that the plaintiff made out a prima facie case against all the defendants. There is no ground for holding that the resident defendants were fraudulently joined in the suit when the plaintiff had no probable cause to believe that they were liable. The fact that the circuit court refused to give a peremptory instruction as to them, in the absence of the evidence which was

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heard in the circuit court, is sufficient to raise a presumption that the plaintiff did not join them as defendants without a reasonable expectation of recovering against them. *Kansas City Suburban Belt Railway Company v. Herman*, 187 U. S. 70, 23 Sup. Ct. 24, 47 L. Ed. 76.

Judgment affirmed.

CITY OF TYLER *et al.* v. ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS *et al.*

(Supreme Court of Texas, Feb. 15, 1906.)

[9L S. W. Rep. 1.]

Statutes—Construction—Adoption of Existing Law—Presumption.

—It may be presumed that the members of the Legislature, which enacted a law copied from the law of another country, were advised of the construction which the courts of that country had placed upon the language of the law, and used such language with the intent that it should receive the construction so placed upon it.

Frauds, Statute of—Agreements Not to Be Performed within a Year.—A contract between a railroad and a city and citizens of the city, whereby it was agreed that a certain street should be turned over to the railroad for its exclusive use, and that certain land should be secured for, and conveyed to, the railroad in consideration of the location of the railroad shops and general offices in the city, when performed by the city and the citizens on their part within a year from the making thereof, was not within Rev. St. 1895, art. 2543, subd. 5, requiring agreements not to be performed within a year from the making thereof to be in writing.

Railroads—Location of Offices—Right to Change.*—Under Rev. St. 1895, art. 4367, requiring railroads to keep their general offices at some place named in the charter, and, if no such place is named, at such place as the railroad has, for a valuable consideration, contracted to locate the same, and further requiring railroads to keep their machine shops and roundhouses at such place as they may have contracted to keep the same for a valuable consideration, a railroad which has located its general offices, machine shops, and roundhouses in the city which is designated by its charter as the place for its general offices, and, in consideration of such location, has received lands and other concessions from the city and citizens thereof, cannot by amending its charter remove its offices, machine shops and roundhouses to another city.

Specific Performance—Contracts Susceptible of Enforcement.*—The court may, by enjoining a railroad from removing its offices and machine shops from a city where it has contracted to maintain the same, enforce the specific performance of such contract.

Contracts—Validity—Public Policy.—Since Rev. St. 1895, art. 4367, requires railroads to maintain its general offices and machine shops at a city where it has contracted to maintain the same, the enforcement by the courts of such a contract is not against the public policy of the state.

Municipal Corporations—Contracts—Trusteeship for Citizens.—A

*For the authorities in this series on the subject of the obligations and liabilities of railroad companies under contracts by which they agree to locate and maintain station, depots, etc., at certain points, see foot-note appended to *St. Louis & N. A. R. Co. v. Crandall* (Ark.), 15 R. R. R. 837, 38 Am. & Eng. R. Cas., N. S., 837.

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city may be the depository, as trustee for its citizens, of a contract obligating a railroad to locate and maintain its general offices and shops in the city, and may enforce such contract by suit.

Error from Court of Civil Appeals of First Supreme Judicial District.

Action by the city of Tyler and others against the St. Louis Southwestern Railway Company of Texas and others. There was a judgment of the Court of Civil Appeals affirming a judgment for defendants (87 S. W. 238), and plaintiffs bring error. Reversed.

Johnson & Edwards, Horace Chilton and Ben B. Cain, for plaintiffs in error.

E. B. Perkins, Finley, Knight & Harris, Head, Dillard & Head, Glass, Estes & King, Daniel Upthegrove and Marsh & McIlwaine, for defendants in error.

BROWN, J. The city of Tyler, a municipal corporation organized under the laws of Texas, Johanah Pabst, and W. H. and Sue Cousins instituted this suit in the district court of Smith county against the St. Louis Southwestern Railway Company of Texas, the Tyler & Southwestern Railway Company, and a number of individuals not necessary to mention here, to establish a contract alleged to have been made with the St. Louis Southwestern Railway Company of Texas for the location and maintenance and perpetual operation of its general offices and main machine shops and roundhouses in the said city of Tyler. Plaintiffs sought and obtained an injunction from the said court restraining the St. Louis Southwestern Railway Company of Texas from removing its general offices, machine shops, and roundhouses from the said city of Tyler; and said petition sought a specific performance of said contract, compelling the railway company to continue the maintenance in the said city of its said general offices, machine shops, and roundhouses. The allegations of the petition need not be more specifically set out; they were sufficient to admit evidence to sustain the verdict of the jury and the conclusions of fact filed by the judge. The defendants answered by general demurrer, and by special exceptions to the petition and to the merits opposed a general denial and a special answer, in which it was alleged that the St. Louis Southwestern Railway Company of Texas acquired the said property by judicial sale free from all contracts and obligations of its predecessors as the owners thereof. And specifically denying the alleged contract the answer averred that, if any such contract was made as claimed in the petition, then it was verbal, and no memorandum in writing was made and signed by the said railway company, and that the said contract was incapable of being performed within one year from the date of the making thereof, wherefore it was void under the statute of frauds. It was also alleged by the railway company that it would be against public policy to enforce such a contract against it. We have only stated such parts of the pleadings as

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we deem necessary for the decision of the case under the view that we have taken of it.

From the special verdict, the additional findings of fact by the court, and the undisputed evidence, we make the following statement of the facts necessary to be considered in determining the issues upon which we think the case should be decided. In 1879 the city of Tyler was, and since that time has continued to be, a municipal corporation, organized under the general laws of the state of Texas, and each of the railroad companies hereinafter named was organized under the laws of this state at the several dates mentioned. On the 9th day of May, 1880, the Texas & St. Louis Railway Company (the first company), being engaged in constructing a line of railroad in Texas to run through the city of Tyler, entered into an agreement in writing with the city of Tyler and its citizens to the effect that the said railroad company would construct and operate its railroad through the said city and would establish and perpetually maintain in the said city its general offices and its main machine shops and roundhouses, in consideration whereof the citizens of the said city and the city of Tyler agreed to furnish the right of way through the corporate limits of the city, the citizens to pay in cash \$4,000 and to furnish eight acres of land, to be selected by the said railroad company, upon which the machine shops and roundhouses might be constructed. The city of Tyler and the citizens complied with the contract; the city giving the right of way over one of its streets and the citizens paying the \$4,000. Johanah Pabst, a feme sole, and W. H. Cousins and his wife, Sue Cousins, conveyed to the railroad company eight acres of land, all of which were accepted by the said railroad company. The railroad company constructed its road upon the street designated by the city, and its general offices, machine shops, and roundhouses were located in the said city in accordance with the said contract, and maintained the same until its property was sold. In 1886, in a suit pending in the United States Circuit Court against the Texas & St. Louis Railway Company, its property was placed in the hands of a receiver, and subsequently, by order of the court in that case, the said railroad and all property belonging to it were sold and purchased by Williams Mertens and others, styled "bondholders' committee," for the purpose of organizing another railroad company. Soon thereafter the Texas & Arkansas Railway Company of Texas (the second company) was organized under the general laws of the state of Texas. In the charter Texarkana was designated as the place at which the general offices of the company should be located. All of the property of the Texas & St. Louis Railway Company was then conveyed to the Texas & Arkansas Railway Company of Texas, which received the same and entered into possession thereof, operated and used the railroad tracks, the machine shops, and roundhouses situated in the said city of Tyler, but it maintained its general offices at the city of Texarkana during the time it owned the said property. The city of Tyler instituted a suit against the second company in the district

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court of Smith county and procured an injunction prohibiting the removal of the general office, machine shops, and roundhouses of the said road from the city of Tyler. This suit remained on the docket of the court during the time the second company owned and operated the said railroad. In the year 1889, in a suit instituted in the Circuit Court of the United States against the Texas & Arkansas Railway Company of Texas, all of the property of the said company was placed in the hands of a receiver, and, by order of the said court, all of the property of the said company was on the 23d day of October, 1890, sold by the receiver and purchased by Louis Fitzgerald, purchasing trustee. On the 12th day of January, 1891, the St. Louis Southwestern Railway Company filed its charter with the Secretary of State, and thereafter all of the property of the second company was conveyed to this, the third company, under which conveyance it received the railroad running through the city of Tyler, the machine shops, roundhouses, and the eight acres of land which had been conveyed originally to the first company, and the said third company took charge of and operated the said railroad, machine shops, and roundhouses from the time of the conveyance to the present time. On the 10th day of February, 1891, J. A. Edson, the vice president and general manager of the St. Louis Southwestern Railway Company, entered into a contract with the city of Tyler and with the citizens of the said city, with Johannah Pabst, and with W. H. Cousins and his wife, whereby the said Edson, on behalf of the third company, verbally agreed that the said company should carry out and perform all the provisions and stipulations of the contract of 1880, made with the first company, in consideration of which the city of Tyler and the citizens of the said city agreed that the said city would close up a certain street and turn the same over to the said railroad company for its exclusive use, and that the citizens of Tyler would upon the terms agreed upon secure for the said railroad company 20 acres of land in addition to the 8 acres before conveyed. In pursuance of that contract the city of Tyler did, within one year from the date of the said contract, dismiss the suits pending against the Texas & Arkansas Railway Company, and did close up the street agreed upon, and surrendered the same to the said railroad company for its exclusive use, and the citizens of Tyler did, by contribution of funds and the action of certain persons representing them as trustees, secure the 20 acres of land in addition to the 8 acres before conveyed, and did convey the said land to the said railroad company. The said railroad company took possession of the said street and the 20 acres of land, and continued to occupy and use the same from that time to the institution of this suit, and the said railroad company did in accordance with the said agreement remove the general offices of the railroad company and establish the same at the city of Tyler in accordance with the provisions of the charter of the said railroad company, and has since maintained the same at Tyler; but on or about the

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9th day of April, 1902, the third company gave notice of an intention to amend its charter so as to remove its general office from Tyler to Texarkana. The case was submitted to a jury on special issues, which were answered, after which the trial judge filed additional conclusions of fact, and entered judgment for the defendants, which was affirmed by the Court of Civil Appeals.

A number of interesting questions have been presented and ably discussed by counsel on both sides which it will not be necessary for us to pass upon, as we are of opinion that the rights of the parties depend upon the validity of the verbal contract made between the St. Louis Southwestern Railway Company of Texas and the plaintiffs in error in 1891. Does that contract come within the terms of Rev. St. 1895, art. 2543, subd. 5, in effect that a suit cannot be maintained "upon any agreement which is not to be performed within the space of one year from the making thereof," unless the same be in writing and signed by the party to be charged therewith?

It is the settled rule of construction in England that a contract which by its terms is capable of being performed within one year from the date of its making by one party, and which has been fully performed by such party within the year, is not within their statute of frauds, which is in the same language as ours. *Donellan v. Read*, 3 Barn. & Ad. 899, 23 Eng. Com. L. R. 391; *Smith v. Neal*, 89 Eng. C. L. R. 66; *Cherry v. Heming*, 4 Ex. 631. The English construction of that clause of the statute of frauds, which is by Mr. Reid denominated the "one side rule," is followed by the courts of the following states: Alabama, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, Rhode Island, South Carolina, Texas, Virginia, and Wisconsin. Out of the great number of decisions upon this question, which are to be found in the reports of those states, we cite the following as pertinent to the question presented in this case: *Rake's Adm'r v. Pope*, 7 Ala. 161; *Johnson v. Watson*, 1 Ga. 348; *W. U. Tel. Co. v. C. & P. R. R. Co.*, 86 Ill. 246, 29 Am. Rep. 28; *Saum v. Saum*, 49 Iowa, 704; *Bell v. Hewitt's Ex'rs*, 24 Ind. 280; *Berry v. Graddy*, 58 Ky. 553; *Langan v. Iverson* (Minn.) 80 N. W. 1051; *Winters v. Cherry*, 78 Mo. 344; *Kendall v. Garneau*, 55 Neb. 403, 75 N. W. 852; *Robbins v. McKnight*, 5 N. J. Eq. 642, 45 Am. Dec. 406; *Gee v. Hicks*, Rich. Eq. Cas. (S. C.) 5; *Brazee v. Wood*, 35 Tex. 342; *McDonnell v. Home Bitters Co.*, 1 White & W. Civ. Cas. Ct. App. § 1159; *Westfall v. Perry* (Tex. Civ. App.) 23 S. W. 740; *McClellan v. Sanford*, 26 Wis. 595; *Seddon v. Rosenbaum*, 85 Va. 933, 9 S. E. 326, 3 L. R. A. 337. The courts of Massachusetts, Michigan, New York, Vermont, and West Virginia hold the contrary rule; that is, that a verbal contract which is not capable of being performed by both parties within one year's time from the date at which it was made is void under the statute of frauds.

Donellan v. Read, which first construed the statute of frauds of

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that country, was decided in 1832, and in 1840 the Congress of the Republic of Texas embodied the same language that was construed in that case in the statute of frauds enacted by that Congress, on the 16th day of March, 1840. So closely did the Congress follow the English statute that the conclusion is irresistible that the Texas statute was in fact copied from that of England. Hart. Dig. 1451. It is fair to presume that the members of the Congress which enacted that law were advised of the construction which the courts of England had placed upon the language they then embodied in the statute of frauds of the republic, and we may also presume that the legislators used these words with the intent that they should receive the same construction that had been placed upon them by the English court. *Moffett v. Moffett*, 67 Tex. 642, 4 S. W. 70; *Johnson v. Hanscom*, 90 Tex. 321, 38 S. W. 761; *Morgan v. Davenport*, 60 Tex. 234; *Munson v. Hollowell*, 26 Tex. 475, 84 Am. Dec. 582; *Snoddy v. Cage*, 5 Tex. 106; *Trigg v. State*, 49 Tex. 645; *Brothers v. Mundell*, 60 Tex. 240. In 1871 the clause of our statute of frauds, which is involved in the examination of this question, was construed by the Supreme Court of this state in conformity to the English construction, and the decision of our court was based upon *Donellan v. Read*, and other English cases. *Brazee v. Wood*, *supra*. In 1879 the Revised Statutes of Texas were adopted by the Texas Legislature, which embodied the law of 1840; no change whatever being made in the terms of that law. Article 2543, Rev. St. 1895. The Revised Statutes were not simply a compilation of the laws, but were the work of five eminent attorneys of the state who were authorized by the statute to make such changes as might be necessary and to report the same to the Legislature. They made numerous changes, but reported that chapter as unchanged. The Legislature adopted it as reported. In view of the fact that the construction which the English courts placed upon the English statutes had been relied upon and quoted in the Texas case in 1871, and that, under this construction of our own state court as well as that of the English courts, the Legislature used the same language in re-enacting the law in 1879 and in 1895, we are constrained to give to the language of our statute the same meaning, and hold that the contract now under consideration, being by its terms capable of performance by the city of Tyler, its citizens, and others interested therein within one year from the date it was made, and as said contract has been performed by the said city, its citizens, and others interested with it within one year's time, it is not embraced within the terms and meaning of our statute of frauds, but is a valid contract, binding upon the said railroad company. In *Munson v. Hollowell*, before cited, speaking of the construction of another statute, Judge Moore said: "Whether the construction here indicated is the one we should place upon the statute if it were a question of first impression, unaffected by previous judicial opinion, is not now necessary to be determined.

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Its construction has been settled by a long series of decisions reaching back in England and America to the time of its enactment. If under these circumstances we are to give it a different interpretation from that which it has heretofore uniformly received, we think we should with much more propriety be subject to the charge of judicial legislation than when we give it the construction which has heretofore almost invariably been given to it, although its mere letter might lead to a different conclusion." In *W. M. W. & N. W. Ry. Co. v. Wood*, 88 Tex. 194, 30 S. W. 859, 28 L. R. A. 526, Judge Denman briefly refers to the question which we have had under consideration, and intimates an adverse opinion to that which we have expressed, but the question was not involved in that case, and an examination of the opinion of that learned jurist will show that he did not investigate the question with his usual care, for the reason that it was not necessary to be decided. We have found no decision of this court contrary to the conclusion that we have reached.

This brings us to the consideration of the effect that article 4367, Rev. St. 1895, has upon the rights of the parties under the contract, found by the jury to exist. That article reads as follows: "Every railroad company chartered by this state, or owning or operating any line of railway within this state, shall keep and maintain permanently its general offices within the state of Texas at the place named in its charter for the locating of its general office; and if no certain place is named in its charter where its general offices shall be located and maintained, then said railroad company shall keep and maintain its general offices at such place within this state where it shall have contracted or agreed or shall hereafter contract or agree to locate its general office for a valuable consideration; and if said railroad company has not contracted or agreed for a valuable consideration to maintain its general office at any certain place within this state, then such general offices shall be located and maintained at such place on its line in this state as said railroad companies may designate to be on its line of railway. And such railroads shall keep and maintain their machine shops and roundhouses, or either, at such place or places as they may have contracted to keep them for a valuable consideration received; and if said general offices and shops and roundhouses, or either, are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made, then said location shall not be changed; and this shall apply as well to a railroad that may have been consolidated with another as to those which have maintained their original organization." It will be observed that by the terms of that article the general offices of every railroad company owning or operating a railroad in this state shall be kept at some place in the state: First, at the place named in its charter; and, second, if no place is named in the charter, and such railroad company has for a valuable consideration contracted to locate its general offices at a particular place,

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then such offices must be kept and maintained at such place. Both by the charter and by the terms of the contract the general offices of the St. Louis Southwestern Railway Company of Texas were located at the city of Tyler, and the emphatic mandatory language of the statute is that the said company "shall keep and maintain" its general offices at that place. But it is claimed by the railroad company that under authority to amend its charter it may remove its offices from the city of Tyler. However that might be in the absence of any contract for their location at that place, we think it is quite evident that the provisions of the article above quoted are too definite and emphatic to allow of the construction that the railroad company by its own act could thwart the manifest purpose of the law. By a valid agreement and for a valuable consideration received by it, the St. Louis Southwestern Railway Company of Texas contracted with the plaintiffs in error and the citizens of Tyler to locate, keep, and maintain its machine shops and roundhouses at that city. The statute provides that the railroad company "shall keep and maintain its machine shops and roundhouses at such place or places as they may have contracted to keep them for a valuable consideration received." Such explicit language does not admit of construction, nor does it require argument to enforce its meaning. The contract and the law operates to fix beyond the control of the railroad company the place at which its machine shops and roundhouses must be kept and maintained. But it is said that the provisions of the succeeding clause of the statute by implication gives authority to remove its general offices and machine shops and roundhouses from that place. That clause reads as follows: "And if said general offices and shops and roundhouses, or either, are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made, then said location shall not be changed." If the conjunction "or" had been used instead of "and," the language would more clearly express the meaning of the statute, but it is sufficiently clear that the object of the clause last quoted was to apply the same rule to a different class of contracts, and to make clear the rights of the parties under such conditions. While it is true that a bond is a contract, it is likewise true that, in common parlance, bonds are not included in the term contracts, nor are they so treated by law writers, or in the decisions of the courts; but they constitute a separate and distinct class usually designated by the term "bonds." The author of that law evidently had in mind different classes of existing cases which called for relief by the Legislature, and in the preparation of the bill he showed great care to so separate the different classes to be provided for as to run no risk of confusing the subject. It is quite manifest that the Legislature intended by the last clause to apply the same rule to counties that had secured location by the voting of bonds as had been expressed in the preceding clause in favor of persons and towns

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which had by contract induced the location at a certain place; the phrase "shall not be changed" is in effect the same as "shall keep and maintain." It is doubtful if that class of cases embraced in the last clause quoted, would have been provided for by the preceding clause.

The St. Louis Southwestern Railway Company of Texas contends that the court should not undertake to enforce the specific performance of the contract made in this case, because it would involve the oversight and control of the road by the court, for which purpose the court is not properly equipped. There is no difficulty in enforcing the specific performance of this contract; the judgment of this court perpetuating the writ of injunction heretofore issued in this cause will have the effect to prevent the removal by the St. Louis Southwestern Railway Company of Texas of its general offices and its machine shops and roundhouses for its main line from the city of Tyler, and we apprehend that no compulsory process of the court will be required to secure the maintenance and operation of the general office, machine shops, and roundhouses as thus located; nor will there be necessity for the oversight and supervision of any judicial or executive officer of the state in the operation thereof. It is claimed that the enforcement of such contracts as that sought to be enforced in this case would be against the public policy of the state. On the contrary, to enforce the statute of the state, as will be done in this case, will be to enforce the public policy of the state as declared by the Legislature in the enactment of article 4367. There is no public policy nor public interest to which courts may give precedence over a valid statute enacted by the legislative department.

By the third cross-assignment of error the defendants in error challenge the capacity of the city of Tyler to maintain this suit as trustee for its citizens. There is nothing connected with the purposes of this suit, nor with the aims and objects of the contract upon which it is based, that are inconsistent with the duties and obligations of the municipal government of the city of Tyler. In fact the purpose of making the contract with the railroad company was to forward the financial interest of the citizens of Tyler, which is likewise one of the principal objects of municipal government. The interest of the city and the interest of its citizens in this matter are entirely harmonious, and, under this state of facts, we think that it is well settled by the authorities that a municipal corporation may be the depository of a contract of this character as the trustee for its citizens. *Bell v. Alexander*, 22 Tex. 359, 73 Am. Dec. 268; *Sargent v. Cornish*, 54 N. H. 21; *Higginson v. Turner*, 171 Mass. 591, 51 N. E. 172; *Phillips v. Harrow*, 93 Iowa, 103, 61 N. W. 434.

Defendants in error have presented a great number of cross-assignments of error which we have carefully examined and find no error pointed out which could by any probability have affected the finding of the jury or the court upon the issue on which we

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have determined this case; it is therefore unnecessary for us to discuss those assignments.

Having arrived at the conclusion that the verbal contract made by the St. Louis Southwestern Railway Company of Texas, through Edson, its general manager, was binding upon the corporation, and that the statute before quoted, as a matter of law, fixed the rights of the parties under the contract, we deem it unnecessary to express an opinion as to whether or not the St. Louis Southwestern Railway Company of Texas, by purchasing, taking, holding, and enjoying the property and privileges which were derived through the contract of 1880, thereby adopted the same and became bound to carry out its stipulations. This opinion and judgment is limited to the enforcement of the rights of the parties under the verbal contract made in 1891 and article 4367 of the Revised Statutes. The special verdict of the jury and the findings of the judge show no ground upon which to enter any judgment against the Tyler & Southeastern Railway Company, R. H. Bowron, James Beattie, R. C. Hancock, P. H. Fullenweider, J. F. Lehane, R. S. Fife, S. J. Douglas, A. B. Liggett, Wm. Moseby, J. W. Hogan, R. D. Cobb, S. W. Graves, J. S. Berry, M. L. Lynch, L. P. Bogelma, W. H. Weeks, Milton Brown, O. K. Wheeler, B. F. Yowell, and W. J. Miller. It is therefore ordered and decreed that the judgment of the district court as to the parties named be in all things affirmed, and that they recover of the plaintiffs in error all of their costs in the different courts.

We conclude that the district court erred in rendering judgment in favor of the St. Louis Southwestern Railway Company of Texas against the plaintiffs in error, and we therefore reverse the said judgment as to said railroad company; and, it being the duty of this court to enter such judgment upon the verdict of the jury and the findings of the judge as the district court should have entered, it is hereby adjudged and decreed that the said city of Tyler, for and on behalf of its citizens and the said Johannah Pabst and W. H. Cousins and Sue Cousins, his wife, recover judgment against the St. Louis Southwestern Railway Company of Texas; that said railroad company shall keep and maintain in the city of Tyler its general offices, and shall keep and maintain its machine shops and roundhouses in said city; and it is ordered that the injunction heretofore granted in this cause by the judge of the district court be perpetuated. It is also ordered that the plaintiffs in error recover of the said railroad company all costs by them expended in all of the courts.

TOWNSEND *et al.* v. NORFOLK RY. & LIGHT CO.

(Supreme Court of Appeals of Virginia, Jan. 18, 1906. On Rehearing Feb. 23, 1906.)

[52 S. E. Rep. 970.]

Nuisance—Public Service Corporations—Matters of Private Nature.*—A railway and light company, though a public service corporation, stands on the footing of an individual as respects its power house, so that, it being a nuisance, injurious to adjoining property by reason of the vibration of the machinery, the smoke therefrom, and the escaping electricity, the company is liable for the injury; the authority conferred on it by Acts 1897-98, pp. 495, 1020, cc. 463, 989, to construct and operate plants for the generation of electricity, for its own use and for sale, not being imperative, but permissive, and not conferring statutory sanction for the commission of a nuisance, so that it cannot be said that the Legislature contemplated the doing of the very act which occasioned the injury.

On Rehearing.

Appeal and Error—Granting Writ—Review.—While, on a petition for writ of error, the Supreme Court must grant the writ unless the decision questioned is plainly right, it will not disturb the decision and grant an injunction which the lower court has refused, unless the error in refusing it be manifest.

Error to Circuit Court of City of Norfolk.

Action by Thomas Townsend and others against the Norfolk Railway & Light Company. Judgment for defendant. Plaintiffs bring error. Reversed.

Tazewell Taylor and *Th. A. Williams*, for plaintiff in error.

White, Tunstall & Wilcox and *W. H. Venable*, for defendant in error.

KEITH, P. The plaintiffs in error brought an action of trespass against the Norfolk Railway & Light Company, and their declaration states: That they were seised and possessed, as joint owners, of a certain lot of land, with the buildings and improvements thereon, situated on the west side of Cumberland street, in the city of Norfolk, Va.; that the Norfolk Railway & Light Company, a corporation organized under the laws of the state of Virginia, owned a certain lot in the city of Norfolk, fronting on Cove street; that the defendant had erected on this lot a power house, equipped with large and heavy machinery, consisting of boilers, engines, dynamos, condensers, and generators, for the purpose of generating electric power, and as a part of its equipment of said power house had erected in connection with its buildings three or more metal stacks; that it was the duty of the defendant so to

*See foot-note appended to *Connors v. Yazoo & M. V. R. Co.* (Miss.), 17 R. R. R. 455, 40 Am. & Eng. R. Cas., N. S., 455; *Perrine v. Pennsylvania R. Co.* (N. J.), 17 R. R. R. 450, 40 Am. & Eng. R. Cas., N. S., 450; *Atchison, etc., Ry. Co. v. Armstrong* (Kan.), 17 R. R. R. 415, 40 Am. & Eng. R. Cas., N. S., 415; *Smith v. St. Paul, etc., Ry. Co.* (Wash.), 17 R. R. R. 114, 40 Am. & Eng. R. Cas., N. S., 114.

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maintain and operate its power house and plant as not to injure or interfere with the comfort, use, and enjoyment by the plaintiffs of their property, but, disregarding its duty in this behalf, on the 1st day of August, 1902, and on divers other days prior thereto and continuously up to the present time, the defendant did so wrongfully and unjustly operate and conduct its plant, or power house, that large columns of smoke, dust, cinders, sparks, and soot had been emitted from the stacks of the defendant, and thrown, propelled, and hurled against, upon, and through the houses of the plaintiffs on the property aforesaid, thereby preventing its proper and useful enjoyment by the plaintiffs; that their property had been made untenable, and that its rental and salable value had been depreciated; that the houses of the plaintiffs upon their property, as aforesaid, had been and were being greatly shaken and damaged, in such a manner as to cause the same to become and be uncomfortable, dangerous, and uninhabitable; that by reason of the premises the property of the plaintiffs had deteriorated in value, both as income-producing and as marketable property; and, further, that the defendant, by allowing the electric current from the wires and conduits, or on return circuit, to escape from its wires, or returning by ground circuit, to run over and through the pipes of metal placed to carry water and gas to the houses of plaintiffs, has caused the metal pipes, thus acting as conductors of electricity, to be eaten up and destroyed, and that although the defendant has been often requested by the plaintiffs to refrain and desist from the wrongful and unjust operation and management of its said plant, or power house, in the several ways hereinbefore described, yet it has refused to desist from the said wrongful and unjust operation and management of its plant as aforesaid, to the damage of the plaintiffs \$2,000.

To this declaration the defendant filed a special plea, in which it sets out that, before the time of the committing of the alleged grievances in the declaration mentioned, the General Assembly of Virginia had passed an act to incorporate the Virginia Electric Company, by which it was provided that it should have power to construct, lease, purchase, or acquire by consolidation with any other company or companies, and operate and maintain in the city of Norfolk, suitable works, machinery, or plants for the manufacture of electricity, and for the sale and distribution of the same; that it should have power to sell and distribute the same for public or private illumination, for heating and for power, and for any other purposes which the same might be used for; that it should have power to do such acts and things, and conduct such enterprises as might be convenient in connection with or incidental to the enjoyment of the powers thereinbefore conferred, and that it might, with the consent of the proper authorities of the city of Norfolk, use the streets and roads thereof for laying its mains, pipes, wires, and erecting its poles; that by an act of the Legislature, entitled "An act to incorporate the Old

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Dominion Electrical Development and Power Company" (Acts 1897-98, p. 1020, c. 989) it was provided that the said Old Dominion Electrical Development & Power Company should have power to erect, maintain, and operate plants in this state for the generation of electricity and the supply of electric current for its own use and for sale to persons, natural or artificial, desiring to use the same for heat, light, or power, or any and all use to which the electric current might then or at any time thereafter be applicable, and might manufacture, use and sell, distribute and furnish the same for said purposes, and all electrical supplies of all kinds, to all and any persons and corporations, upon such terms as might be agreed upon by and between the contracting parties; that by the 7th section (page 1022) of the act last above-mentioned, it was provided that the board of directors of the Old Dominion Electrical Development & Power Company should have the power to change the name of that company and to adopt such other name as they might deem proper upon the fulfillment of certain specified conditions; that in pursuance of said power the board of directors changed the name of the Old Dominion Electrical Development & Power Company, so that it became and was the Norfolk & Ocean View Railway Company; that said last-mentioned company, by virtue of the powers granted to it by its acts of incorporation, acquired the works, property, rights, privileges, and franchises of the Virginia Electric Company; and that said Norfolk & Ocean View Railway Company thereby became and was entitled, empowered, and authorized to do and perform any, all and singular, the acts referred to in the act of incorporation of the Virginia Electric Company, as well as any, all, and singular the acts requisite, necessary, or proper in connection with the powers, privileges, and rights of the said company in the matter of carrying on the business of the said company. The plea further avers that on the 2d day of November, 1899, by an agreement entitled "Agreement of Consolidation of the Norfolk Street Railroad Company and the Norfolk & Ocean View Railway Company under the Name of the Norfolk Railway & Light Company," the said Norfolk Railway & Light Company became and was possessed, and still is possessed, of any and all and singular the rights, franchises, privileges, powers, works, properties, and all other interests of any sort whatever of the said constituent companies, the Norfolk Street Railroad Company and the Norfolk & Ocean View Railway Company, and especially and particularly the particular powers, privileges, and rights herein before more fully specified as to the operation and maintenance of the plants of the said companies; that under the said consolidation agreement the defendant became and was possessed, and still is possessed, of the said plant, power house, and manufactory, which is the same plant, power house, and manufactory as are complained of in the declaration of the plaintiffs; that not only has it obtained legislative sanction and authority for the operation

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of the said plant, power house, and manufactory, machinery, and boilers, but that furthermore, at divers times, the defendant has obtained permission and authority from the councils of the city of Norfolk to install the said machinery and boilers in its power house and manufactory; and further avers that, pursuant to the legislative and municipal authority had and obtained as aforesaid, it has ever since operated, and still continues to operate, its said plant, in a proper, careful, reasonable, and suitable manner; that it is necessary to the proper carrying on of defendant's business to operate and maintain the said power house, manufactory and plant in the manner in which it has been and is being operated; and that it has done no damage and occasioned no discomfort that is not the natural, proximate, inevitable, and necessary result of such proper, careful, reasonable, and suitable operation, without this, that the said defendant is guilty of the said supposed grievances, or any of them, in manner and form as the said plaintiffs hath above thereof complained; and of this it puts itself upon the country.

The plaintiffs demurred to this special plea, and that demurrer was overruled by the court. And, the plaintiffs not withdrawing, nor desiring to withdraw, their demurrer, the court gave judgment in favor of the defendant.

Section 153, art. 12, of the Constitution [Va. Code 1904, p. ccxlix], declares that the term "public service corporation" shall include "all transportation and transmission companies, all gas, electric light, heat and power companies, and all persons authorized to exercise the right of eminent domain, or to use or occupy any street, alley or public highway, whether along, over, or under the same, in a manner not permitted to the general public."

Under the terms of this definition it is apparent the Norfolk Railway & Light Company is to be deemed a public service corporation.

It will be observed that the declaration nowhere states that the injury of which plaintiffs complain was caused by any negligent act upon the part of the defendant. The contention of plaintiffs is that in the operation of its plant the defendant wrongfully caused smoke, dust, cinders, sparks, and soot from its chimney stacks to be thrown and propelled upon and through the houses of the plaintiffs; that by the operation of its heavy machinery it caused the houses of the plaintiffs to be greatly shaken and damaged; and that by permitting the electric current from its wires and conduits, or on return circuit, to escape from its wires, or returning by the ground circuit, to run over and through the pipes placed to carry water and gas to the houses of plaintiffs, the pipes had been eaten up and destroyed; and the useful and proper enjoyment of the property had been impaired, it had been rendered untenable, and its value diminished.

The defendant replies that it has operated, and continues to operate its plant in a proper, careful, reasonable, and suitable

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manner, in pursuance of legislative and municipal authority conferred upon it.

The question, therefore, for us to consider, is whether or not the court erred in overruling the demurrer to this plea.

The declaration sets forth a nuisance. The defendant justifies what it has done by pleading legislative authority for its acts.

A public service corporation is to be considered in two aspects. It has duties which it owes to the public, and which it must perform. It has other duties not of a public nature which are incidental to those of a public character, in the performance of which it stands upon the footing of a private corporation. With respect to the duties of the first class, it may be said that, in doing that which under the law it may be required to do, it cannot be considered as doing an unlawful act; and if a lawful act be done without negligence, any injury which it occasions is *damnum absque injuria*.

This aspect of the case was before this court in *Fisher v. Seaboard Air Line Railway Co.*, 102 Va. 363, 46 S. E. 381, where it was said that a railroad company acting under authority of law, whose road is constructed and operated with judgment and caution, and without negligence, is not liable to an adjacent landowner for damages resulting from noises, jarring and shaking of buildings, or dust and smoke incident to the running of trains; for no action lies for the loss or inconvenience resulting from doing an authorized act in an authorized way. To the authorities relied on in support of this case many others may be added.

Beseman v. Pennsylvania Railroad Co., 13 Atl. 164, from the Supreme Court of New Jersey, is strikingly in point. That was a suit for damages done to the houses and lands of plaintiff by the running of defendant's trains, to which the defendant replied that it acted under franchises derived from the public grant, and that it had built its road and run its trains, carrying merchandise and freight, near to the lands of the plaintiff, doing the plaintiff no more damage than that which necessarily resulted from the transaction of such acts and business, and that for such incidental and unavoidable damage it was not responsible. The plaintiff contended that, with respect to private property, a railroad is *per se* a nuisance whenever it throws a detriment, such as would be actionable at common law, on such property. Upon this the court said: "That this proposition, on which the plaintiff's case rests, is a most momentous one, is at once apparent. If it should be sustained, an illimitable field of litigation would be opened. If a railroad, by the necessary concomitants of its use, is an actionable nuisance with respect to the plaintiff's property, so it must be as to all other property in its vicinity. It is not only those who are greatly damaged by the illegal act of another to whom the law gives redress, but its vindication extends to every person who is damaged at all, unless, indeed, the loss sustained be so small as to be unnoticeable by force of the

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maxim 'De minimis non curat lex.' The noises and other disturbances necessarily attendant on the operation of these vast instruments of commerce are wide-spreading, impairing in a sensible degree some of the usual conditions upon which depend the full enjoyment of property in their neighborhood; and consequently, if these companies are to be regarded purely as private corporations, it inevitably results that they must be responsible to each person whose possessions are thus molested. Such a doctrine would make these companies, touching such landowners, general tort-feasors. Their tracks run for miles through the cities of the state, and every landowner on each side of the track would be entitled to his action; and so, in the less populated districts, each proprietor of lands adjacent to the road would have a similar right, and thus the litigants would be numbered by thousands. It is questionable whether the running of railroads would be practicable if subjected to such a responsibility. Nor is this susceptibility to be sued on all sides the only, or even the worst, consequence of the theory in question; for, if these rights of action exist, it follows, necessarily, that each of the persons in whom they are vested can prevent the continuance of the wrong out of which such rights of action arise. If this plaintiff should recover two or three verdicts against the defendant because of the damage that is inseparable from the running of its trains, there is plainly no ground on which the chancellor could refuse to enjoin a continuance of the nuisance. Nor does there appear to be any relief from such a consequence. The aggrieved landowner would be the master of the situation; for there is no law by force of which the company could take his land in invitum, or compel him to have his damages assessed once for all. In short, the plaintiff's claim involves the assertion that he can put a stop to the business of the defendant at the point in question." In concluding his opinion, the learned judge says: "I find no embarrassment in disposing of the present subject, for I have put railroads in the category of public agents, and have regarded them as possessed of all the immunities, in the particular in question, belonging to such an office."

That railroad corporations—public service corporations—are in many aspects to be regarded as quasi public corporations, can no longer be doubted. Upon that theory their duties are measured and their rights determined; and the control which the state asserts, the exercise of which is becoming more and more necessary with the growth and development of our transportation system, of which railroads constitute so essential a part, rests upon the public character of such corporations. A railroad, in the operation of its trains in the transportation of freight and passengers, is in the exercise of a public duty, and should be permitted to apply the same principles of construction when it pleads, for its protection, the powers conferred upon it by the Legislature, as are urged when the obligations imposed by the same charter are insisted upon in the effort to compel such

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corporations faithfully to perform the duties which they have assumed with respect to the public.

It would be easy to multiply authorities along this line. Indeed, *B. & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, upon which plaintiffs in error justly rely in another aspect of this case, uses the following language:

"Undoubtedly a railway over the public highways of the District, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation."

We shall not press this view of the case further, for counsel for plaintiffs in error state in their brief that they do not "seriously contest" the doctrine enunciated by this court in *Fisher v. Railway Company*, *supra*.

But was the defendant in error acting in its public capacity when it committed the grievances complained of? Every allegation in the declaration is directed against the injuries inflicted by the operation of the power house of the defendant. It is true that an electric railway cannot be operated without a power house; it is true that an engine house is a necessary adjunct to a steam railway; but they are incidents to the operation of the road, with which the public has no concern.

Pollock on Torts, at page 158 of the second edition of his work, says: "A railway company is authorized to acquire land within specified limits, and on any part of that land to erect workshops. This does not justify the company, as against a particular householder, in building workshops so situated (though within the authorized limits) that the smoke from them is a nuisance to him in the occupation of his house."

In *Re Rhode Island R. Co. (R. I.)* 48 Atl. 592, 52 L. R. A. 879, it is said: "The common carrier serves both the public and itself. It has its public and private functions. The public part is the exercise of its franchise for the accommodation of the public; the private part is its incidental business, with which the public is not concerned, and which the company manages for its own interest. The company carries passengers over its road as a public duty, but the generation of the power to propel cars is the private business of the company. Whatever is necessary to the exercise of the franchise is for the benefit of the public, but that which pertains simply to means of supply is a private business of the company."

To the same effect is *Louisville & Nashville Terminal Co. v. Jacobs (Tenn.)* 72 S. W. 957, 61 L. R. A. 192, where it is said:

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"But over and beyond this, we think a corporation, in selecting a place for its roundhouse, acted in a private capacity, and is responsible for the injurious consequences which may result from its use."

In *Beseman v. Railroad Co.*, supra, the court said: "A railroad company, in selecting a place for repair shops and engine house, acted altogether in its private capacity. Such location was a matter of indifference to the public; and consequently with respect to such an act the corporation stood on the footing of an individual and was entitled to no superior immunities."

In *Baltimore & Potomac R. Co. v. Fifth Bap. Ch.*, supra, the Baptist Church claimed that its services were habitually interrupted and disturbed by the hammering noises made in the workshops of the company, the rumbling of its engines passing in and out of them, and the blowing off of steam; that these noises were at times so great as to prevent members of the congregation, sitting in parts of the church farthest from the shops, from hearing what was said; that the act of blowing off steam occupied from 5 to 15 minutes, and frequently compelled the pastor of the church to suspend his remarks. The main reliance of the railroad company to defeat the action was the authority conferred upon it by the act of Congress of February 5, 1867, to exercise the same powers, rights, and privileges in the construction of a road in the District of Columbia, the line of which was afterwards designated, which it could exercise under its charter in the construction of a road in Maryland, with some exceptions not material here. By its charter it was empowered to make and construct all works whatever which might be necessary and expedient in order to the proper completion and maintenance of the road. In its opinion the court says: "It is no answer to the action of the plaintiff that the railroad company was authorized by act of Congress to bring its track within the limits of the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, and that the engine house and repair shop in question were thus necessary and expedient; that they are skillfully constructed; that the chimneys of the engine house are higher than required by the building regulations of the city, and that as little smoke and noise are caused as the nature of the business in them will permit. In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. * * * Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in

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disregard of the private rights of others, and with immunity for their invasion."

In *Ridge v. Railroad Co.* (N. J. Ch.) 43 Atl. 276, the *Beseman* case, *supra*, and *Railroad Co. v. Fifth Bap. Ch.*, *supra*, are considered, and the court says: "In the latter case it was denied by the Supreme Court of the United States that the railroad had been invested with the privilege of building an engine house or repair shop next to a church in the city of Washington. The court held that the grant of power did not authorize the company to place such structure wherever it might think proper in the city without reference to the property or rights of others. The doctrine of that case was approved in the opinion of *Beseman v. Railroad Co.*, *supra*, upon the ground that in selecting the place for repair shops the railroad company acted altogether in a private capacity. Such location, it was said, was a matter of indifference to the public, and consequently, with respect to such act, the corporation stood upon the footing of an individual, and was entitled to no superior immunities. What was meant was that while the public was concerned that a railroad company should have all the appliances, including repair shops, to make its public service effective, it was immaterial to the public where such appliances were placed, so long as the service was efficient. All that concerns the public is to have an efficient service in the way of transportation of persons and freight. The company is shielded from responsibility for incidental damages resulting from acts which are necessary to bring about such service. In the federal decision it was admitted that the company, by virtue of its franchise, had the right to build repair shops and engine houses, but, having the liberty to choose different sites for its structures, it was bound to select one where they would not inflict an injury upon the property of others."

In *Rapier v. London Tramways Company* (1893) L. R. 2 Ch. Div. 588, the syllabus of the opinion delivered by Lindley, L. J., is as follows: "The defendants were a tramway company, who were empowered by their act to lay down and construct two lines of tramway according to deposited plans, together with the works and conveniences connected therewith. The act gave no compulsory powers for taking lands, and made no special mention of building stables. The defendants constructed the lines, and built some large blocks of stables near the plaintiff's house for the horses employed in drawing the cars. The plaintiff complained of the smell caused by the stables, and brought an action for an injunction to restrain the defendants from using the stables so as to cause a nuisance. Held (affirming the decision of Kekewich, J.) that, although horses were necessary for the working of the tramways, the company were not justified by their statutory powers in using the stables so as to be a nuisance to their neighbors, and that it was no sufficient defense to say that they had taken all reasonable care to prevent it."

Other aspects of this case were discussed before us, upon

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which we have not deemed it necessary to touch; and without intimating any opinion upon them, except in so far as has been herein expressed, we shall content ourselves for the present with saying that we are of opinion that the circuit court should have sustained the demurrer to the special plea.

On Petition for Rehearing.

In the opinion delivered by the court when the judgment sought to be reviewed by this petition for rehearing was pronounced, it is said:

"The declaration set forth a nuisance. The defendant justifies what it has done by pleading legislative authority for its acts.

"A public service corporation is to be considered in two aspects. It has duties which it owes to the public, and which it must perform. It has other duties not of a public nature, which are incidental to those of a public character, in the performance of which it stands upon the footing of a private corporation. With respect to the duties of the first class, it may be said that in doing that which under the law it may be required to do, it cannot be considered as doing an unlawful act; and if a lawful act be done without negligence, any injury which it occasions is *damnum absque injuria*."

This position is earnestly assailed in the petition for a rehearing, where it is broadly asserted that no such distinction between the public and private functions of a corporation exists, and that all is lawful which the Legislature authorizes to be done, although the authority conferred be not imperative but merely permissive. It may be that in the distribution of the duties of a public service corporation into those of a public and those of a private nature, the classification was inaccurate and unscientific, though it has the sanction of courts of the highest respectability. By other courts the same conclusion is reached by a consideration of the language used by the Legislature in the act of incorporation, and by its construction determining whether or not the lawmaking power intended to permit an act to be done, or to require its performance—to confer a privilege, or to impose a duty.

In the case of *Fisher v. Seaboard Air Line Railway Co.*, 102 Va. 363, 46 S. E. 381, the position of this court is well stated in the syllabus: "A railroad company, acting under authority of law, whose road is constructed and operated with judgment and caution, and without negligence, is not liable to an adjacent land-owner for damage resulting from the noises, jarring and shaking of buildings, dust and smoke, incident to the running of trains. No action lies for the loss or inconvenience resulting from doing an authorized act in an authorized way." This is to be understood, of course, in the light of the facts presented in that record, where damages were claimed for the noises, jarring and shaking of buildings, dust and smoke incident to the running of trains. We were of opinion that in the absence of negligence, no damages could be recovered, for the reason that the road was

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obliged to run its trains, which could not be done, whatever the degree of caution exercised, without the inconveniences and injuries enumerated.

In *Makely v. Southern Railway Company** complaint was made of the operation of trains of the defendant company, and of a power house maintained by it for the purpose of lighting the various buildings in its yards. There was a bill praying an injunction filed in the circuit court of Alexandria, which the learned judge of that court refused, but without prejudice to the right of plaintiff to seek her remedy at law. There was no question made as to the solvency of the railway company or its ability to respond in any damages which might be adjudged against it. We concurred with the judge of the circuit court in the opinion that, at least in the preliminary stages of the case, before the right had been established at law, it would be improper to enjoin the defendant company. And just here it may be proper to state that while, upon a petition for a writ of error or appeal, this court is required to grant the writ prayed for unless the decision called in question be plainly right, we should not overrule the decision of the lower court, and grant an injunction which it has refused, unless the error in refusing it be manifest.

We have mentioned the *Fisher Case* and the *Makely Case*, not with any view to vindicating our consistency, but because we felt that it would be well to clear up any doubt that might exist as to the attitude of this court with respect to those decisions.

Coming back to the petition for rehearing, we find the position of the petitioner thus stated: "The application of this doctrine of 'private capacity' is wholly inconsistent with the principles enunciated in the *Fisher Case*. We think that the fact that the doctrine is wholly erroneous can easily be demonstrated by stating it in the form of a syllogism, thus:

"The injuries done to property without negligence by a public service corporation, for which it will be held liable, are those done by it in its private capacity.

"All injuries done to property without negligence by a public service corporation are done by it in its private capacity; i. e., by the means and methods employed.

"Therefore a public service corporation is liable for all injuries to property done by it without negligence.

"The conclusion is manifestly incorrect, and at least one of the premises must therefore be erroneous. The second premise we think we have demonstrated to be correctly stated; that is, that injuries to property are the result of the means and methods employed, and not of the public service performed. The error lies, therefore, in the first premise.

"The vice in this premise, and the simple answer to the various illustrations which we have given above, is demonstrated by a statement of the true principle, which is that a public service

*No opinion.

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corporation, acting without negligence, is not liable for injuries which are the necessary consequence of the performance of its authorized functions. And we need go no further in search for authority for this position than the Fisher Case itself, where the court, quoting from Pollock on Torts, said: 'It is settled that no action can be maintained for loss or inconvenience which is the necessary consequence of an authorized thing being done in an authorized manner.'

We must again advert to the principle that all opinions are to be considered in the light of the facts to which they apply, for the transition from an authorized to an unauthorized act—from that which is lawful to that which is unlawful—is oftentimes by easy and almost imperceptible graduations, so that in the enunciation of a principle the eye must always be kept upon the precise facts upon which it is to operate.

Almost all the questions upon which the law is doubtful or obscure arise at the vanishing point between contradictory and irreconcilable principles, and mark the effort "to deduce harmony from the reciprocal struggle of discordant powers." Burke.

Law is not an exact science. It has no invariable standard by which rights may be measured. It does not submit to inflexible rules of logic, nor can it, in its application to the varied affairs of men, always clothe itself in the form of syllogism; and while we might hesitate to go to the full length of the view expressed by the great moralist we have just quoted, it is to a large extent true that "every human benefit and enjoyment, every virtue and every prudent act, is founded on compromise and barter."

We should not, therefore, have been disposed to abandon our position, even though it had failed when subjected to the syllogistic test; but we are not prepared to admit that the test has been correctly applied. We do not admit the truth of the minor premise. We do not admit that all injuries done to property without negligence by public service corporations are done by them in their private capacity.

All injuries done to property without negligence by a public service corporation for which it will be held liable, it may be perhaps be conceded, are done by it in its private capacity; but there are injuries done by it in its public capacity for which it will not be held liable, and in that distinction is to be found the very gist of this controversy.

Nor can we concur in the answer which the petitioner suggests to the illustrations which it had given. We cannot admit that a public service corporation, acting without negligence, is, under all circumstances, irresponsible for injuries which are the necessary consequence of the performance of its authorized functions. There must be something more than authority to do the act complained of. It must be an act which the corporation is required to perform—a duty which it owes and which has been imposed upon it by the legislative act granting the charter by which it exists—or at least it must appear that the particular act

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complained of and immunity from its consequences were within the contemplation of the Legislature. It is true that in *Pollock on Torts*, quoted in the *Fisher Case*, *supra*, it is said that "no action can be maintained for loss or inconvenience which is the necessary consequence of an authorized thing being done in an authorized manner." But *Pollock* also says, in his second edition, at page 158: "A railway company is authorized to acquire land within specified limits, and on any part of that land to erect workshops. This does not justify the company, as against a particular householder, in building workshops so situated (though within the authorized limits) that the smoke from them is a nuisance to him in the occupation of his house." The two statements by the same author are apparently opposed to each other, and yet may be in entire harmony as applied to varying conditions of facts.

In *Managers of the Metropolitan Asylum District v. Hill* (1880-81) 6 App. Cas. L. R. 193, the metropolitan poor act, authorizing the formation of districts and district asylums for the care and cure of sick and infirm poor, created corporations for that purpose, and gave authority to the poor law board to issue directions to these corporations, enabled them to purchase lands and erect buildings for the purposes of the act, and made the rates of parishes and unions liable for the outlay thus incurred. But it does not by direct and imperative provisions order these things to be done, so that if, in doing them, a nuisance is created to the injury of the health or property of persons resident in the neighborhood of the place where the land is purchased or the buildings erected, it does not afford to these acts a statutory protection. And therefore, where such nuisance was found as a fact, it was held that the district board could not set up the statute, nor the orders of the poor law board under it, as an answer to an action, or to prevent an injunction issuing to restrain the board from continuing the nuisance; and in continuing his opinion Lord Blackburn states this principle: "On those who seek to establish that the Legislature intended to take away the private rights of individuals, lies the burden of showing that such an intention appears by express words or necessary implication." And per Lord Watson it was said: "Where the terms of a statute are not imperative, but permissive, the fair inference is that the Legislature intended that the discretion, as to the use of the general powers thereby conferred, should be exercised in strict conformity with private rights."

That case finely illustrates the effect of a statute merely permissive in its terms.

In *London, Brighton & South Coast Ry. Co. v. Truman and Others*, 11 App. Cas. L. R. 1886, a railway company were authorized among other things to carry cattle, and to purchase by agreement, in addition to the lands which they were empowered to purchase compulsorily, any lands, not exceeding in the whole 50 acres, in such places as should be deemed eligible, for the

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purpose of providing additional stations, yards, and other conveniences for receiving, loading, or keeping any cattle, goods, or things conveyed or intended to be conveyed by the railway, or for making convenient roads or ways thereto, or for any other purposes connected with the undertaking which the company should judge requisite. The company were also empowered to sell such additional lands and to purchase in lieu thereof other lands which they should deem more eligible for the aforesaid purposes, and so on from time to time. The act contained no provision for compensation in respect of lands so purchased by agreement. Under this power the company, some years after the expiration of the compulsory powers, bought land adjoining one of their stations, and used it as a yard or dock for their cattle traffic. To the occupiers of houses near the station the noise of the cattle and drovers was a nuisance which, but for the act, would have been actionable. There was no negligence in the mode in which the company conducted the business. Held, that the purpose for which the land was acquired being expressly authorized by the act, and being incidental and necessary to the authorized use of the railway for the cattle traffic, the company were authorized to do what they did, and were not bound to choose a site more convenient to other persons; and that the adjoining occupiers were not entitled to an injunction to restrain the company, distinguishing between the case of *Metropolitan Asylum District v. Hill*, just cited. Among those who delivered opinions in this case was Lord Blackburn, from whom we have just quoted, who says, in part: "I do not think there can be any doubt that if, on the true construction of a statute, it appears to be the intention of the legislature that powers should be exercised, the proper exercise of which may occasion a nuisance to the owners of neighboring land, and that this should be free from liability to an action for damages, or an injunction to prevent the continued proper exercise of these powers, effect must be given to the intention of the legislature"—again resting the case upon a proper construction of the act of incorporation. In this case the House of Lords reversed the decisions of the Court of Appeal, and of North, J., which is to be found in 25 Ch. Div. 426. It undertakes to distinguish, while it does not overrule, *Metropolitan Asylum Dist. v. Hill*, *supra*, and seems to rest upon the express terms of the act of Parliament under consideration. It is at most merely persuasive authority, and if it decides that a merely permissive authority from the Legislature confers complete immunity from acts which constitute a nuisance, if not negligently performed, it would be irreconcilable with other English cases of high authority—indeed, of equal authority with itself—with the decisions of the Supreme Court of the United States, and with those of state courts, to which we shall presently advert.

In *Cogswell v. Railroad Co.*, 103 N. Y. 10, the syllabus is as follows:

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"Whether the Legislature can authorize a railroad corporation to maintain an engine house, under circumstances which, if maintained by an individual, would by the common law constitute a nuisance to private property without providing compensation, quære.

"But if this should be conceded, nevertheless the statutory sanction which will justify an injury by a railroad corporation to private property without making compensation therefor, and without the consent of the owner, must be express or given by clear and unquestionable implication from the powers expressly conferred so that it can fairly be said that the Legislature contemplated the doing of the very act which occasioned the injury; it may not be presumed from a general grant of authority.

"Where the terms of a statute giving authority to such a corporation are not imperative, but permissive, this does not confer license to commit a nuisance, although what is contemplated by the statute cannot be done without."

In *Bohan v. Port Jervis Gaslight Company*, 122 N. Y. at page 18, 25 N. E. at page 246, 9 L. R. A. 711, it is said that:

"Although the acts complained of are inseparably connected with the carrying on of the business itself, and the resulting damages a necessary consequence, if those acts constitute a nuisance per se, it is not necessary to show negligence in order to sustain a recovery.

"Every person is bound to make a reasonable use of his property, having respect for his neighbor's right. A use which produces destructive vapors and noxious smells, resulting in material injury to the property and the comfort of those dwelling in the neighborhood, is not reasonable, and is a nuisance per se.

"As a general rule, corporations authorized by statute to carry on a business, although it may be of a quasi public character, are under the same obligations to make a reasonable use of their property and to respect the rights of others as are citizens.

"While the Legislature may authorize acts, which would otherwise be a nuisance, when they affect or relate to matters in which the public have an interest or over which they have control, the statutory authority which affords immunity for such acts must be express, or a clear and unquestionable implication from powers expressly conferred, and it must appear that the Legislature contemplated the doing of the very act which occasioned the injury."

This whole subject is considered by the Supreme Court of the United States, in *Baltimore & Potomac R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, which was decided in 1883, and has met with general approval. The Baltimore & Potomac Railroad Company was authorized by act of Congress to lay its track within the limits of the city of Washington, and to construct other works necessary and expe-

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dient to the proper completion and maintenance of its road. It erected an engine house and machine shop on a parcel of land immediately adjoining the church, and used them in such a way as to disturb, on Sundays and other days, the congregation assembled in the church, to interfere with religious exercises therein, break up its Sunday Schools, and destroy the value of the building as a place of public worship. Suit was brought against the railroad company to recover damages, and among other defenses the company relied upon statutory authority; and its counsel undertook to maintain that "no action will lie and no recovery can be had for doing that which the law authorizes the party to do, and that cannot be adjudged a nuisance and be held unlawful which the law declares to be lawful." Answering that contention, Mr. Justice Field says:

"The authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road, did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the Capitol, or in the most densely populated locality. Indeed, the corporation does assert a right to place its works upon property it may acquire anywhere in the city. Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred.

"Undoubtedly, a railway over the public highways of the District, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation."

It is said in the petition that the latter part of this quotation is a dictum. We hardly think so; but even if it were, it is the dictum of a judge whose great ability entitles his every utterance to the highest respect, and is sanctioned by the concurrence of the entire court. We may safely consider that opinion as

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expressing the fixed views of the Supreme Court of the United States upon the questions discussed.

The legislative authority relied upon in this case—Acts 1897-98, pp. 495, 1020, cc. 463, 989, respectively—is as follows:

At section 2, p. 496, occurs the following language: "The said company shall have power to construct, lease, purchase or acquire by consolidation with any other company or companies, and operate and maintain in the city of Norfolk, or both, and in any other city, town or village in the said county, suitable works, machinery and plants for the manufacture of electricity, and for the sale and distribution of the same; and it shall have power to sell and distribute the same for public and private illumination, for heating, for power and for any other purposes which the same may be used for, and it shall have power to do such acts and things, and conduct such enterprises as are convenient in connection with or incidental to the enjoyment of the powers hereinabove conferred, and may, with the consent of the proper authorities of the city of Norfolk, and of such other city or county as are named above, use the streets and roads thereof for laying its mains, pipes and wires and erecting its poles."

And at section 3, p. 1020, it is declared that: "The said company is authorized to promote, establish and maintain the business of a general railway and electrical company. To erect, maintain and operate plants in this state for the generation of electricity and the supply of electric current for its own use and for sale to persons, natural or artificial," etc.

In these quotations is found the sole authority of the defendant to permit or to require, to excuse or to justify it in the performance of the acts complained of in this suit. The case is, therefore, plainly to be classed with *B. & P. R. Co. v. Fifth Baptist Church*, and other cases which we have cited, in which the effect of the legislative authority has been discussed. It will be seen that the language is not imperative, but permissive, and that it does not confer statutory sanction for the commission of a nuisance in any way whatever, and most assuredly cannot be said to confer it in express terms, "or by clear and unquestionable implication from the powers given," so that it cannot be fairly said that "the Legislature contemplated the doing of the very act which occasioned the injury," and immunity is not to be presumed from a general grant of authority.

But it is said that the decision in this case, if permitted to stand, will "practically debar the use of many of the most important and developing features of our modern growth."

It would be a source of regret if, in the administration of justice by the establishment and enforcement of sound principles, the prosperity of our people should be hindered or checked, but it would be not only a source of regret, but of reproach, if material prosperity were stimulated and encouraged by a refusal to give to every citizen a remedy for wrongs he may sustain, even though inflicted by forces which constitute factors

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in our material development and growth. Courts have no policies, and cannot permit consequences to influence their judgments further than to serve as warnings and incentives to thorough investigation and careful consideration of the causes submitted to them. Those duties being faithfully performed, courts may await the result with patience, if not always with confidence, and say, with the great Lord Mansfield, "Fiat justitia, ruat cælum."

The petition to rehear is denied.

NORTH CAROLINA CORP. COMMISSION v. SEABOARD AIR LINE Ry. Co.

(Supreme Court of North Carolina, Dec. 12, 1905.)

[52 S. E. Rep. 941.]

Railroads—Regulation—Establishment of Side Track.—Where the action of the corporation commission in requiring a railroad company to install a private switch has been affirmed by the circuit court on a jury finding that the requirement was reasonable, the fact that the switch would increase the danger of operating the road is no cause for reversing the judgment of the circuit court.

Same—Reasonableness of Order—Evidence.—On an issue as to the reasonableness of an order of the corporation commission requiring a railroad to establish a private switch, evidence that the railroad had previously maintained a switch at the same place without inconvenience or accident was admissible.

Brown, J., dissenting.

Appeal from Superior Court, Wake County; Justice, Judge.

Proceeding by the state, on relation of the North Carolina Corporation Commission, on petition of the Round Pine Lumber Company, against the Seaboard Air Line Railway Company. From a judgment affirming the action of the commission, the railway company appeals. Affirmed.

T. B. Womack and Pou & Fuller, for appellant.

H. E. Norris and Seawell & McIver, for appellee.

CLARK, C. J. The corporation commission act (Laws 1899, p. 292, c. 164, § 2,) enumerates in 26 subheads the powers conferred upon the corporation commission. Among these, subsection 15 authorizes the commission "to require the construction of side tracks by any railroad company to industries already established or to be established: Provided, it is shown that the proportion of such revenue accruing to such side track is sufficient within five years to pay the expenses of its construction"—and further restricting the power by forbidding the commission to require the construction of any side track more than 500 feet. The power of the General Assembly to establish a commission to supervise and regulate the rates and operations of quasi public corporations exercising public franchises has been

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too often decided in the state and federal Supreme Courts to be again discussed. The matter has been discussed, with the citation of authorities. *R. R. Connection Case*, 137 N. C. 14, 49 S. E. 191 et seq.; *Corporation Commission v. Railroad (Rate Case)* 127 N. C. 283, 37 S. E. 266; *Express Co. v. Railroad*, 111 N. C. 463, 16 S. E. 393; and in many others, among them, *Corporation Commission v. Railroad ("Track Scales Case")* 51 S. E. 793, at this term.

As to this special matter, which arises under subhead 15, authorizing the commission to require the establishment of side tracks for the use of industrial plants, there is, in view of the great industrial development of the state, scarcely any power granted to the commission that is of greater importance. Owing to the exigencies of their business, as well as the greater cost of land immediately at railroad stations and in towns, many factories, and especially most lumber plants, are situated at some distance from any passenger and freight station, though usually on the line of the same railroad. To require their products, which are usually shipped in car load lots, to be hauled to a distant station, often over bad roads, when the trains perhaps pass within a few yards of the plant, would entail a great and useless expense, to the great discouragement of such enterprises in our midst. To avoid this the railroads, whenever the receipts in their judgment would justify it, have for years been putting in such sidings, upon which empty cars would be placed when called for, and, when loaded, would be taken away by some passing train. Such sidings are not passenger or freight stations named in subsections 12, 13, 13a, and 14, and have not (except possibly in rare instances) any agent. Prior to the enactment of this provision of the statute the establishment of such sidings rested in the arbitrary will of the common carrier, who could also discontinue such sidings at will. Such powers, it will be seen at once, placed the industrial development of the state at the mercy of the railroad management, which could mar the prosperity of any plant along its line by refusing a siding, or arbitrarily discontinuing it if established. This power could be used for both political and pecuniary advantage. Whether it was ever so used or not the General Assembly, while not prohibiting the carrier from continuing to establish such sidings at its pleasure, deemed it wise to take the power of refusing to grant or continue such sidings out of the arbitrary will of the common carrier by authorizing the corporation commission to require the establishment of such sidings in proper cases. It did not, however, substitute the arbitrary power of the commission for the arbitrary power of the carrier, but it gave the former authority to require such sidings only when the "revenue accruing from such side track is sufficient within five years to pay the expense of its construction," and subject also to a review of the reasonableness of such order on appeal to the superior court, and by further review as to the rulings on the law to this court.

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By a subsequent act (Laws 1903, p. 788, c. 444, amended by chapter 693, p. 1073, of the same year) a penalty is imposed for refusing to receive loaded cars at such side tracks as well as at regular depots or stations, showing that the Legislature was advertent to the distinction and difference between such sidings and "regular stations."

In the present case, the corporation commission, upon petition of the Round Pine Lumber Company, ordered the establishment of such siding, sufficient to hold four cars, on the line of defendant road, at the twenty-fourth milepost from Raleigh, and about $1\frac{1}{4}$ miles north of Merry Oaks Station. The lumber company agreed to prepare the grade for said siding, and to furnish the cross-ties for the same, and to have the switch lamp for said siding lighted every night while it should be in existence. The corporation commission found that approximately 30,000,000 feet of lumber would be shipped by the lumber company from said siding in two years, yielding a revenue of not less than \$6,000 to the defendant, and that the cost to the defendant of constructing the siding, the grading being done and cross-ties furnished by the lumber company (as offered), would be about \$200, and ordered that, upon the petitioner doing the grading and furnishing the cross-ties, the defendant construct, on or before 23d August, 1905, a spur siding, as prayed, to hold four cars. An appeal to the superior court was taken upon the ground that the order was unjust and unreasonable; that it would entail considerable and unnecessary cost upon the defendant, which would be taking its property for private purposes without compensation; that the commission had no right to make the order; that the petitioner's mill was 800 yards from the defendant's track, and hence the petitioner could not use the siding without hauling that distance or constructing a tramroad; and, lastly, that putting in the siding would increase the hazard in operating the defendant's road. Upon appeal in the superior court three issues only were submitted, and without exception: (1) Was it reasonable that the defendant be required to construct the spur siding for the convenience of the petitioner as prayed for? (2) Is the spur siding a necessary convenience for the use of the petitioner in the shipment of freight from its sawmill? (3) Will the revenue accruing to the defendant from such spur or side track from the shipment of freight, within five years, be sufficient to pay the expenses of its construction? The jury responded, "Yes" to each of these issues, and judgment was entered reaffirming the order made by the corporation commission, but extending the time for its execution till 3d November, 1905.

Upon appeal to this court the defendant frankly admits in its brief that "the order appealed from does not lessen the revenues of the road, but distinctly tends to increase the same," and rests its case almost entirely upon the allegation that putting in the side track would increase the hazard of operating its road by

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reason of the additional switch required. But this point, if it could be made one of law, is not raised by the tender and refusal of an issue as to such alleged fact, nor was it presented, as might probably have been done, by an appropriate prayer upon the first issue. It was presented as an issue of fact by the argument and evidence, on the first issue, to the jury on the trial, and the finding upon the issue was adverse to the contention of the defendant. There was neither any prayer for instruction refused, nor any exception to the charge. If it is competent for us to take judicial notice of such matters, we should say that, while there is some danger that this switch may be misplaced, there is also risk as to any other switch on the line of the defendant's road, just as there is danger that any rail, if not renewed, may become worn, or any cross-tie, if not removed in time, may become rotten, and cause derailments; but these are risks necessarily incident to the defendant's business, and to be guarded against by its diligence, and certainly the supposed danger from adding one switch to the great number now on the defendant's line is not a sufficient cause, as a matter of law, to reverse the judge's order made upon the responses to the issues submitted to the jury, without exception from the defendant, and without a prayer for instruction upon this aspect of the case. There was, as already stated, no exception to the charge, and the only exception to the evidence is that the plaintiff was permitted to show that a few years ago the defendant's road maintained a spur or side track at this same spot for two years without inconvenience or accident. This was competent, certainly, to show the practicability of a side track being established at that point, and requires no serious consideration. Indeed, the argument in this court was chiefly upon the evidence whether it showed the order of the commission to be a reasonable one, which was properly a matter for consideration by the jury, and which has been passed upon by them under instruction from the court with which the defendant was satisfied, as it filed no exceptions thereto. There was evidence, too, that the facilities offered the petitioner at Merry Oaks were entirely inadequate for the accommodation of its shipments, aside from the evidence that it would add \$5 to \$8 to the cost per car load if the petitioner were required to ship from that point, and that it would be impossible to haul from the sawmill to Merry Oaks in the winter at all.

We affirm the judgment of the superior court, and, as the date of its execution (3d November, 1905) has now passed, final judgment will be entered here, directing the execution of the work in the same terms as prescribed by the judgment of the superior court, on or before 15th February, 1906. This course was pursued in the Railroad Connection Case, 137 N. C., and in other cases therein quoted on page 21, 49 S. E. 199.

Affirmed.

BROWN, J., dissents.

YAZOO & M. V. R. CO. v. SANDERS.

(Supreme Court of Mississippi, March 12, 1906.)

[40 So. Rep. 163.]

Nuisance—Action for Damages.*—Where a locomotive of defendant killed animals and knocked them into a ditch near plaintiff's house, and it refused to remove them, on request therefor by plaintiff, though the odor from the decaying carcasses was extremely offensive in the house, punitive damages may be awarded.

Appeal from Circuit Court, Quitman County; Sam C. Cook, Judge.

Action by Ophelia Sanders against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Action of nuisance brought by Mrs. Ophelia Sanders against the Yazoo & Mississippi Valley Railroad Company for damages caused by the action of the servants of the defendant railroad company in refusing to remove the carcasses of animals killed by the locomotive. The plaintiff alleged that the animals which had been knocked by the locomotive into a ditch near her house were not removed by the servants of the railroad, though she made a request of them so to do and offered to pay part of the expense of such removal. She further alleges that the odor from the decaying carcasses was so offensive as to be very annoying to her and to make life in her house almost unbearable. The defense of the railroad company was that, since it was without the corporation limits, they were not obliged to remove the carcasses; that they were unable to obtain hands to have them removed; and that they buried them in the ditch where they lay by covering them with dirt. On the trial the court submitted the question of compensatory damages and also of punitive damages, and the trial resulted in a verdict for the plaintiff, and defendant appeals.

Mayes & Longstreet, for appellant.

M. E. Denton and J. W. Mack, for appellee.

TRULY, J. The railroad company should take heart of grace at the smallness of the verdict in this case, instead of complaining that punitive damages were awarded. If the story of the appellee be true, and it was not only accepted by the jury, but its truth forces itself upon each individual member of the court, a more flagrant, unwarranted, and oppressive violation of the trampling upon the rights of the public was never presented to an appellate court. To willfully commit a trespass upon the

*For the authorities in this series on the question, when punitive or exemplary damages are, and are not, recoverable, see foot-note appended to *Chicago Union Traction Co. v. Lauth* (Ill.), 17 R. R. R. 606, 40 Am. & Eng. R. Cas., N. S., 606.

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rights of an individual is of itself sufficient to permit the awarding of punitive damages, though committed upon but one single occasion. What, then, must be said of a case where for each minute of the time, by day and by night, from day to day, there was a continued violation of the rights of the appellee by the commission of an act which rendered the enjoyment, and practically the habitation, of her home impossible. Under the facts of this record, not even the limit of the amount claimed in the declaration would have induced us to have interfered with the amount of the verdict. There was no error of law.

Affirmed.

CHICAGO, BURLINGTON, & QUINCY RAILWAY COMPANY, Plff. in Err., v. PEOPLE OF THE STATE OF ILLINOIS *ex rel.* I. O. GRIMWOOD, F. L. O'Brien, and Joseph Eccles, as Commissioners of Drainage District No. One of the Town of Bristol, Kendall County, Illinois.

(Argued December 14, 1905. Decided March 5, 1906.)

[26 Sup. Ct. Rep. 341.]

Error to State Court—Federal Question—Decision on Non-Federal Ground.—A state court cannot, by resting its judgment upon some ground of local or general law, defeat the appellate jurisdiction of the Supreme Court of the United States, if a Federal right or immunity was specially set up or claimed which, if recognized and enforced, would require a different judgment.

Constitutional Law—Police Power.*—The police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as those designed to promote the public health, the public morals, or the public safety.

Constitutional Law—Due Process of Law—Taking Private Property for Public Use.*—The imposition upon a railway company of the entire cost of removing and rebuilding a railway bridge and culvert made necessary by the proposed widening and deepening of the channel of a creek by drainage commissioners acting under the authority of the Illinois farm drainage act of July 1, 1885, does not amount to a taking of private property for public use, which requires compensation in order to afford the due process of law guaranteed by the Federal Constitution.

Constitutional Law—Equal Protection of the Laws.*—The equal protection of the laws guaranteed by the Federal Constitution is not denied to a railway company by requiring it to stand the entire expense of removing and rebuilding its bridge and culvert, made necessary by the proposed widening and deepening of the channel of a creek by drainage commissioners acting under the authority of the Illinois farm drainage act of July 1, 1885, to effect the drainage of low lands.

Constitutional Law—Due Process of Law—Taking Private Property for Public Use.*—The expense of removing the soil attendant

*For the authorities in this series on the subject of the police powers of a state over railroad companies, see foot-notes appended to *Railroad Com'rs v. Atlantic C. L. R. Co. (S. Car.)*, 17 R. R. R. 505, 40 Am. & Eng. R. Cas., N. S., 505; foot-notes appended to *Sluder v. St. Louis Transit Co. (Mo.)*, 16 R. R. R. 293, 39 Am. & Eng. R. Cas., N. S., 293.

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upon the widening and deepening of the channel of a creek across a railroad right of way by drainage commissioners acting under the authority of the Illinois farm drainage act of July 1, 1885, cannot be imposed upon the railway company without denying it the due process of law guaranteed by the Federal Constitution, which requires that compensation be made when private property is taken for public use.

In error to the Supreme Court of the State of Illinois to review a judgment affirming a judgment of the Circuit Court of Kendall County, in that state, awarding mandamus in proceedings presenting the question as to the right to impose upon a railway company the expense attendant upon the removal and rebuilding of a bridge and culvert, made necessary by the widening and deepening of the channel of a creek to subserve the drainage of low lands. Affirmed, subject to the qualification that the expense attendant merely upon the removal of the soil cannot be cast upon the company.

See same case below, 212 Ill. 103, 72 N. E. 219.

The facts are stated in the opinion.

Messrs. Albert J. Hopkins, Robert Bruce Scott, and Chester M. Dawes, for plaintiff in error.

Messrs. John K. Newhall and John M. Raymond, for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court:

This is a contest between certain drainage commissioners in Illinois and the Chicago, Burlington, & Quincy Railway Company, as to the validity of a demand made by the former that the latter should remove the bridge and culvert now maintained by it over Rob Roy creek, in Kendall county, Illinois, and, if it continues to maintain a bridge and culvert at the same point, that one be substituted that will meet the requirements of a certain plan of drainage adopted by those commissioners. Let us see in what way the dispute arises.

This suit or proceeding is based in part on what is known as the farm drainage act of Illinois, in force July 1st, 1885, entitled, "An Act Provided for Drainage for Agricultural and Sanitary Purposes, etc." Hurd's Rev. Stat. (Ill.) 1901, p. 712. By that act the commissioners of highways in each town, in the several counties under township organization, are constituted drainage commissioners for all drainage districts in their respective towns, with power as a body politic to sue and be sued, contract and be contracted with. § 1. Owners of lands are authorized to "drain the same in the general course of natural drainage, by constructing open or covered drains, discharging the same into any natural water course, or into any natural depression, whereby the water will be carried into some natural water course, or into some drain on the public highway, with the consent of the commissioners thereto; and when such drainage is wholly upon the owner's land, he shall not be liable in damages therefor to any person or persons or corporation." § 4.

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The act also provided: "When the case involves a system of combined drainage in one town, and it is proposed that the cost shall be borne proportionately by the several parties benefited, a petition addressed to the drainage commissioners shall be presented to the town clerk, signed by a majority in number of the adult owners of land lying in a proposed district, and they shall be the owners in the aggregate of more than one third of the lands lying in the proposed district, or by the owners of the major part of the land and who constitute one third or more of the owners of the land in the proposed district, setting forth the boundaries, or a description of the several tracts of land thereof or fractions as usually designated: . . . Said petition shall state that the lands lying within the boundaries of said proposed district require a combined system of drainage or protection from wash or overflow; that the petitioners desire that a drainage district may be organized, embracing the lands therein mentioned, for the purpose of constructing, repairing, or maintaining a drain or drains, ditch or ditches, embankment or embankments, grade or grades, or all or either, within said district, for agricultural and sanitary purposes, by special assessments upon the property benefited thereby." § 11. Again: "Upon the organization of a drainage district, the commissioners shall go upon the land and determine upon a system of drainage, which shall provide main outlets of ample capacity for the waters of the district, having in view the future contingencies, as well as the present. . . . The maps and papers showing the final determination as to the system of drainage shall be filed in the clerk's office and be recorded in the drainage record." § 17. Hurd's Rev. Stat. (Ill.) 1901, pp. 713, 714, 717.

Section 40½ has, however, a more special application to the present case. It is in these words: "The commissioners shall have the power and are required to make all necessary bridges and culverts along or across any public highway or railroad which may be deemed necessary for the use or protection of the work, and the cost of the same shall be paid out of the road and bridge tax, or by the railroad company, as the case may be: Provided, however, notice shall first be given to the road or railroad authorities to build or construct such bridge or culvert, and they shall have thirty days in which to build or construct the same, such bridges or culverts shall, in all cases, be constructed so as not to interfere with the free flow of water through the drains of the district. Should any railroad company refuse or neglect to build or construct any bridge or culvert as herein required, the commissioners constructing the same may recover the cost and expenses therefor in a suit against said company before any justice of the peace or any court having jurisdiction, and reasonable attorney's fees may be recovered as part of the cost. The proper authorities of any public road or railroad shall have the right of appeal the same as provided for individual landowners." § 40½. Ibid., 723.

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It is contended by the defendants in error that § 56 of what is known as the levee act has a bearing on the case. That section need not, however, be set out, as the supreme court of the state adjudged in this case that a district organized under the farm drainage act was subject only to the provisions of that act, and that the drainage commissioners could not claim any authority under the other act. 212 Ill. 103, 72 N. E. 219. See also, *Gauen v. Moredock & I. L. Drainage Dist. No. 1*, 131 Ill. 446, 23 N. E. 633; *Drainage Comrs. v. Volke*, 163 Ill. 243, 45 N. E. 415; *McCaleb v. Coon Run Drainage & Levee District*, 190 Ill. 549, 60 N. E. 898.

The present proceeding was instituted in the circuit court of Kendall county, Illinois, by the defendants in error as drainage commissioners for the Bristol drainage district in that county, against the Chicago, Burlington, & Quincy Railway Company. It is a petition for mandamus.

Besides a general demurrer, the railway company demurred specially upon the ground that a judgment in favor of the commissioners would take its property for public use without compensation, and therefore without due process of law, as well as deny to it the equal protection of the laws, in violation of the Constitution of the United States. The demurrer was overruled. The defendant having elected to stand by its demurrer, judgment was rendered ordering a writ of mandamus as prayed for in the petition. That judgment was affirmed by the supreme court of Illinois, 212 Ill. 103, 72 N. E. 219, and hence the present writ of error.

As the case was determined upon the demurrer, the facts are to be taken as alleged in the petition. The case, thus presented, is as follows:

The drainage district in question was organized under the farm drainage act above referred to and contains about 2,000 acres of land on both sides of Rob Roy creek, across which are the road and right of way of the railway company. For more than fifty years before the district was established, that creek had been, as it now is, a natural water course. Prior to June 24th, 1903, the commissioners located a ditch or drain on the line of the creek for the purpose of enlarging its channel or water course, and thereby enabling the lands in the drainage district to be better drained and made more tillable.

The railway company operated and maintained its road across Rob Roy creek, not under any specific grant of authority, but under its general corporate power to construct, operate, and maintain a railroad. It placed a bridge or culvert 12 by 30 feet at the point where the road crosses the creek. In constructing a foundation for the bridge or culvert the company sank or placed in the creek at the point of crossing huge wooden timbers and stones, thereby preventing the deepening and enlarging of the creek by the commissioners, unless they removed such timber and stones; and if that be done the result will be the destruction

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of the bridge or culvert. The present channel or water way of the creek, under the bridge or culvert is 3 feet in depth and 12 feet in width. It is insufficient to allow the natural flow of water in the ditch or drain proposed to be constructed by the commissioners. The estimated cost of this ditch or open drain is \$20,000. The present bridge across the creek does not exceed \$8,000 in value, and a new bridge, conforming to the plan of the Commissioners, will cost not exceeding \$13,000.

On the 24th of June, 1903, the drainage commissioners notified the railway company in writing that a bridge was necessary at the point where the company's right of way would be crossed or intersected by the proposed ditch; that it was necessary to enlarge the opening under the present bridge; that the proposed improvement was to be the water way of a combined system of drainage established in the vicinity under the charge and direction of the drainage commissioners of the district; that the main ditch of the drainage, where it will intersect the company's right of way, must be of the width of 23 feet and of the depth of $9\frac{1}{2}$ feet, the bridge constructed to be of the width of 23 feet in the clear at the surface or level of land, and to permit at least sixteen feet in the clear at the bottom of the ditch. The notice stated that the company was required, in pursuance of the statute in such case made and provided, to build and construct such bridge within thirty days from the date of the notice, in default whereof the commissioners would construct the same at the cost and expense of the company.

The company disregarded the notice and failed to build and construct the required bridge or culvert at the point of intersection with the creek, in accordance with the dimensions specified in the notice, and so as to permit such enlargement of the channel under the bridge as would be sufficient for the natural flow of water in the proposed ditch or drain.

The petition averred that a majority of the lands of the drainage district were swamp or slough lands, and in their present condition were not subject to cultivation, but by means of the proposed deepening and enlarging of Rob Roy creek, and as a result of the removal of the timbers and stones in the creek and the enlargement and deepening of the creek, all the lands in the drainage district would be "greatly improved, and made good, tillable land, subject to cultivation;" that the proposed location of the ditch or drain along the creek was the best route or means for drainage of the district, constituting the only natural water course of the drainage district, and affording the only natural outlet or way of drainage of the lands to make them tillable; that if said improvement and enlargement of the ditch was made and the timbers and stones removed from the creek at the point of crossing, all of the lands of the district would be made good, tillable lands for general farming purposes; and that the proposed construction of a ditch or drain along Rob Roy creek, when completed in accordance with said plans, would "not divert

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or carry waters which by nature of force of gravity would flow or drain into any other natural water course in said drainage district or the vicinity thereof."

The commissioners allege in their petition that the neglect, failure, and refusal of the railway company to remove the timbers and stones it had placed in the creek, and to construct and enlarge the opening under its bridge or culvert, had prevented them from completing the construction of the ditch or drain in accordance with the plans adopted by them; that it was necessary for the use and protection of the proposed drainage work that the opening underneath the bridge or culvert be constructed and enlarged in the manner indicated in order that the lands in the district might be drained in accordance with said plans; which plans "are reasonable for the suitable and proper drainage of said district."

The relief asked was a writ of mandamus commanding the railway company to forthwith enlarge, deepen, and widen the water way over and across the company's right of way across Rob Roy creek.

1. The first question is one of the authority of this court to review the judgment below. As we have seen, the railway company insisted in the court of original jurisdiction that the statute under which the drainage commissioners proceeded could not be applied in this case without taking its property for public use without compensation, and therefore depriving it of property without due process of law, or without denying to it the equal protection of the laws, guaranteed by the Constitution of the United States. The judgment of the trial court was adverse to that view. In the supreme court of the state the railway company, by its assignments of error, preserved its objection based on constitutional grounds. That court did not, in words, refer to the Constitution of the United States, and its opinion concluded: "Entertaining the views above expressed, and founding our conclusion upon the rights and duties of the parties as found in the common law, we deem it unnecessary to pass upon the constitutionality of § 40½ of the farm drainage act." [212 Ill. 120, 72 N. E. 225.]

The contention is that as the state court based its judgment on the common-law duty of the railway company, and not expressly on any Federal ground, it cannot be said that there was any denial of the Federal right claimed by the company; consequently, it is argued, this court is without jurisdiction to re-examine the final judgment. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575.

Undoubtedly, the general rule is that where the judgment of the state court rests upon an independent, separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however the Federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other

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may be appropriate, without considering that question. But it is equally well settled that the failure of the state court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law. And such plainly was the effect of the judgment in this case. If, as the railway company contended, the proposed action of the drainage commissioners would deprive it of property without due process of law and also deny to it the equal protection of the laws, then a judgment should have been rendered for the company. And that result could not be avoided merely by silence on the Federal question, and by placing the judgment on some principle of the common law. The constitutional grounds relied on must, if sustained, displace or supersede any principle of general or local law which, but for such grounds, might be sufficient for the complete determination of the rights of the parties. The claim of a Federal right or immunity specially set up from the outset went to the very root of the case and denominated every part of it. If that claim be valid, then the law is for the railway company; for the supreme law of the land must always control. Therefore a failure to recognize such Federal right or immunity, and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied. That claim having, then, been distinctly set up by the company, and being broad enough to cover the entire case, it may not be ignored, and this court cannot refuse to determine whether the alleged Federal right exists and is protected by the Constitution of the United States. If the case had been decided in favor of the railway company on some ground of local or general law, then the claim of a Federal right would have become immaterial, and we could not have re-examined the judgment. But the decision was otherwise, and was, in law, a denial of the claim of a Federal right.

For these reasons we are of opinion that this court has jurisdiction to re-examine the final judgment of the state court so far as it involved the Federal right or immunity specially set up by the railway company.

2. The concrete case arising upon the petition and the demurrer is this: A public corporation, charged by law with the duty of causing a large body of lands, principally swamp and slough lands, to be drained and made capable of cultivation, has, under direct legislative authority, adopted a reasonable and suitable plan to accomplish that object. That plan requires the enlarging and deepening of the channel of a natural water course running through the district, which is the only natural outlet or way of drainage of the lands of the district,—the best and only practicable mode by which the lands can be made tillable. But

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that plan cannot be carried out unless the timbers and stones in the creek—placed there by the railway company when it constructed the foundation for its present bridge—are removed. The timber and stones referred to cannot, however, be removed without destroying the foundations of the present bridge and rendering it necessary (if the railway company continues to operate its road, which we assume it intends to do) to construct another bridge with an opening underneath wide enough to permit a channel sufficient to carry off the waters of the creek as increased in volume under the drainage system adopted by the commissioners.

The contention of the railway company is that, as its present bridge was lawfully constructed, under its general corporate power to build, construct, operate, and maintain a railroad in the county and township aforesaid, and as the depth and width of the channel under it were sufficient, at the time, to carry off the water of the creek as it then flowed, and now flows,—the foundation of the bridge cannot be removed and its use of the bridge disturbed unless compensation be first made or secured to it in such amount as will be sufficient to meet the expense of removing the timbers and stones from the creek and of constructing a new bridge of such length and with such opening under it as the plan of the commissioners requires. The company insists that to require it to meet these expenses out of its own funds will be, within the meaning of the Constitution, a taking of its property for public use without compensation, and, therefore, without due process of law, as well as a denial to it of the equal protection of the laws.

The importance of these questions will justify a reference to some of the adjudged cases; referring first to those recognizing the distinction between an incidental injury to rights of private property resulting from the exercise of governmental powers, lawfully and reasonably exerted for the public good, and the taking, within the meaning of the Constitution, of private property for public use.

In *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 642, 25 L. Ed. 336, 338, which involved a claim for damages directly resulting from the construction by the city of Chicago of a tunnel under Chicago river, whereby for a very long time the plaintiff was prevented from using its dock and other property for purposes of its business; in *Mugler v. Kansas*, 123 U. S. 623, 669, 31 L. Ed. 205, 213, 8 Sup. Ct. Rep. 273, which related in part, to the lawful prohibition by the state of the use of private property in a particular way, whereby its value was materially diminished, if not practically destroyed; in *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 557, 571, 38 L. Ed. 269, 272, 274, 14 Sup. Ct. Rep. 437, which involved the question whether a railroad company could be required, at its sole expense, to remove a grade crossing which it had lawfully established and used, and to establish another crossing at a different place; in *Chicago*,

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B. & O. R. Co. v. Chicago, 166 U. S. 226, 252, 41 L. Ed. 976, 990, 17 Sup. Ct. Rep. 581, in which one of the questions was whether it was a condition of the exercise by the state of its authority to regulate the use of property owned by individuals or corporations, that the owner should be indemnified for the damage or injury resulting from the exercise of such authority for legitimate public purposes; *Gibson v. United States*, 166 U. S. 269, 271, 276, 41 L. Ed. 996, 998, 1002, 17 Sup. Ct. Rep. 578, in which the owner of a farm on an island in the Ohio river, at which there was a landing, sought to recover compensation for the injury done to the farm by reason of the construction by the United States of a dike for the purpose of concentrating the waterflow in the main channel of the river; and in *Scranton v. Wheeler*, 179 U. S. 141, 164, 45 L. Ed. 126, 137, 21 Sup. Ct. Rep. 48, which involved the question whether the United States was required to compensate an owner of land fronting on a public navigable river, when his access from the shore to the navigable part of such river was permanently obstructed by a pier erected in the river under the authority of Congress for the purpose of improving navigation;—in each of those cases this court recognized the principle that injury may often come to private property as the result of legitimate governmental action, reasonably taken for the public good and for no other purpose, and yet there will be no taking of such property within the meaning of the constitutional guaranty against the deprivation of property without due process of law, or against the taking of private property for public use without compensation. To this class belongs the recent, and, as we think, decisive case of *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453, 49 L. Ed. 831, 25 Sup. Ct. Rep. 471, to be hereafter adverted to in another connection. In this class may also be placed *Mills v. United States*, 12 L. R. A. 673, 46 Fed. 738. That was the case of an improvement by the United States of the navigation of Savannah river, which resulted in so raising the water in that river as to make it impossible to prevent the flooding of adjacent rice fields that were ordinarily and naturally drained into the river, and rendering it necessary that expense be incurred in order to provide new drainage from those fields into a back river, where the water levels were suitable. In commenting upon that case, this court said, in *United States v. Lynah*, 188 U. S. 445, 47 L. Ed. 539, 23 Sup. Ct. Rep. 349; "Obviously there was no taking of the plaintiff's lands, but simply an injury which could be remedied at an expense, as alleged, of \$10,000, and the action was one to recover the amount of this consequential injury. The court rightfully held that it could not be sustained." See also, *Bedford v. United States*, 192 U. S. 217, 48 L. Ed. 414, 24 Sup. Ct. Rep. 238, and *Manigault v. Springs*, 199 U. S. 473, ante, 127, 26 Sup. Ct. Rep. 127.

We refer also, as having direct application here, to some of the cases, familiar to the profession, that recognize the possession

by each state of the power, never surrendered to the government of the Union, of guarding and promoting the public interests by reasonable police regulations that do not violate the Constitution of the state or the Constitution of the United States. *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 472, 24 L. Ed. 527, 530; *Patterson v. Kentucky*, 97 U. S. 501, 503, 24 L. Ed. 1115, 1116; *Morgan's L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, 464, 30 L. Ed. 237, 241, 6 Sup. Ct. Rep. 1114; *Hennington v. Georgia*, 163 U. S. 299, 308, 309, 41 L. Ed. 166, 170, 171, 16 Sup. Ct. Rep. 1086; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628-631, 41 L. Ed. 853, 854, 17 Sup. Ct. Rep. 418.

We assume that the drainage statute in question is entirely consistent with the Constitution of Illinois. It is so regarded by the supreme court of the state, and that is all-sufficient in this case. We assume, also, without discussion—as from the decisions of the state court, we may properly assume—that the draining of this large body of lands so as to make them fit for human habitation and cultivation is a public purpose, to accomplish which the state may, by appropriate agencies, exert the general powers it possesses for the common good. By the removal of water from large bodies of land, the state court has said, and by “the subjection of such lands to cultivation, they are made to bear their proper proportionate burden to the support of the inhabitants and the commerce of the state. Their value is increased, and thereby their contribution in taxes to the state and local governments is increased.” 212 Ill. 103, 119, 72 N. E. 219. It is conceded that this public purpose cannot be certainly and effectively attained except through the plan adopted by the drainage commissioners. Further, the regulations against which the railway company invokes the Constitution have a real, direct, and obvious relation to the public objects sought to be accomplished by them; in no sense are they arbitrary or unreasonable. Indeed it is admitted that the plan of the commissioners, is appropriate and the best that can be devised for draining the lands in question. But the railway company, in effect, if not in words, insists that the rights which it asserts in this case are superior and paramount to any that the public has to use the water course in question for the purpose of draining the lands in its vicinity, although such water course was in existence, for the benefit of the public, long before the railway company constructed its bridge. This contention cannot, however, be sustained, except upon the theory that the acquisition by the railway company of a right of way through the lands in question, and the construction on that right of way of a bridge across Rob Roy creek at the point in question, carried with it a surrender by the state of its power, by appropriate agencies, to provide for such use of that natural water course as might subsequently become necessary or proper for the public interests. If the state could part with such power, held in trust for the public,—which is

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by no means admitted,—it has not done so in any statute, either by express words or by necessary implication. When the railway company laid the foundations of its bridge in Rob Roy creek, it did so subject to the rights of the public in the use of that water course, and also subject to the possibility that new circumstances and future public necessities might, in the judgment of the state, reasonably require a material change in the methods used in crossing the creek with cars. It may be—and we take it to be true—that the opening under the bridge as originally constructed was sufficient to pass all the water then or now flowing through the creek. But the duty of the company, implied in law, was to maintain an opening under the bridge that would be adequate and effectual for such an increase in the volume of water as might result from lawful, reasonable regulations established by appropriate public authority from time to time for the drainage of lands on either side of the creek. Angell, *Water Courses*, 6th Ed. § 465b, p. 640.

The supreme court of Illinois said in this case: "The right of drainage through a natural water course or a natural water way is a natural easement, appurtenant to the land of every individual through whose land such natural water course runs, and every owner of land along such water course is obliged to take notice of the natural easement possessed by other owners along the same water course." Again, in the same case: "Where lands are valuable for cultivation, and the country, as this, depends so much upon agriculture, the public welfare demands that the lands shall be drained; and, in the absence of any constitutional provision in relation to such laws they have been sustained, upon high authority, as the exercise of the police power." Further: "A natural water course, being a natural easement, is placed upon the same ground, in many respects as to the public right, as is a public highway. At the common law, if a railroad or another highway crosses a natural water course or a public highway, such highway or railroad must be so constructed across the existing highway or water way, as the case may be, shall not only subserve the demands of the public as they exist at the time of crossing the same, but for all future time. . . . The great weight of authority is, that where there is a natural water way, or where a highway already exists and is crossed by a railroad company under its general license to build a railroad, and without any specific grant by the legislative authority to obstruct the highway or water way, the railroad company is bound to make and keep its crossing, at its own expense, in such condition as shall meet all the reasonable requirements of the public as the changed conditions and increased use may demand." The court said that the implied authority of the company to build its present bridge was coupled with its common law duty "to build its bridge over the natural water course with a view of the future as well as the present contingencies and requirements of

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such water course, and with the further implied provision that there remained in the state, whenever the public welfare required it, the right to regulate its use." Still further: "The subject [the draining of lands] was deemed of such importance that the people, by § 31 of article 4 of the Constitution of 1870, conferred upon the general assembly plenary powers in making provision for drainage for agricultural and sanitary purposes, and pursuant to that power the general assembly passed the act under which the appellees are proceeding, declaring that the organization should be for agricultural and sanitary purposes. The drainage districts organized as are the appellees, under that law are invested with the right of eminent domain and the power of taxation, upon the theory that they are public utilities and are held to be quasi public corporations. In their organic character they do not represent merely the individual property owners or themselves, but they represent the state in carrying out its policy, as found in the common law and declared by its Constitution and statutes. It has been so often said that it need only be adverted to here, that corporations such as appellant do not hold their property and exercise their franchises strictly in a private right, but that from the nature of their business and their relation to society they are public corporations in a sense, and are subject to public control and regulation, though with their grant of power to traverse the state with their lines of railroad it cannot be said that their right of private property attaches to every highway and water course over which their roads may be constructed. To so hold would render such enterprises, which are designed for the benefit of the state, obstacles to its progress and a menace to its general welfare. . . . Of course, in the exercise of the right of the public interest, as against such corporations, the demand must be reasonable, and must clearly appear to be for the public welfare. In this case it is not questioned that the improvement of Rob Roy creek, as proposed, is necessary for the proper drainage of the lands comprising the drainage district. The petition alleges that such enlargement is necessary and that the same cannot be carried on with the obstructions placed in the bed of said creek by appellant. This the appellant does not deny." 212 Ill. 109-111, 114, 118, 72 N. E. 219.

In *Ohio & M. R. Co. v. McClelland*, 25 Ill. 140, 144, it was said—indeed, all the cases hold—that "the power to enact police regulations operates upon all alike;" that that power "is incident to and a part of government itself, and need not be expressly reserved, when it grants rights or property to individuals or corporate bodies, as they take subservient to this right."

A case quite in point is that of *Kankakee & S. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621. That was an action against a railroad company to recover for damage from the backing of water upon plaintiff's land by reason of an insufficient culvert constructed by it for the passage of water from a certain natural water

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course. The contention of the company was that the culvert when constructed was sufficient for the flow of water at the time, and that it was not bound to make such provision as was necessary for an increase of water in the slough subsequently arising from the drainage into it of the lands along its course. Upon this point the supreme court of Illinois said: "We do not subscribe to this doctrine. The Parker slough was a water course, and it was the legal right of anyone along its line for miles above the railroad, where the water naturally shed toward the slough, to drain into it, and no one below, owning land along the slough, would have any legal remedy against such person so draining water into the slough above him, for any damage done to his inheritance by means of an increased flow of water caused thereby. In other words, the slough was a legal water course for the drainage of all the land the natural tendency of which was to cast its surplus water, caused by the falling of rain and snow into it; and this whether the flow was increased by artificial means or not. It would seem legitimately to follow that the railroad company, in providing a passageway for the slough, was bound to anticipate and provide for any such legal increase of the water flow. If it did not, it was doing a wrong and legal injury to any one situated like the appellee, who received injury in consequence of a failure on its part to do its duty." See also, the following Illinois cases: *People ex rel. Bloomington v. Chicago, & A. R. Co.*, 67 Ill. 118; *Chicago, R. I. & P. R. Co. v. Moffitt*, 75 Ill. 524; *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109; *Ohio & M. R. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529; *Frazer v. Chicago*, 186 Ill. 480, 486, 51 L. R. A. 306, 78 Am. St. Rep. 296, 57 N. E. 1055.

Many cases in other courts are to the same general effect. They negative the suggestion of the railway company that the adequacy of its bridge and the opening under it for passing the water of the creek at the time the bridge was constructed determines its obligations to the public at all subsequent periods. In *Cooke v. Boston & L. R. Corp.* 133 Mass. 185, 188, it appeared that a railroad company had statutory authority to cross a certain highway with its road. The statute provided that if the railroad crossed any highway it should be so constructed as not to impede or obstruct the safe and convenient use of the highway. And one of the contentions of the company was that the statute limited its duty and obligation to provide for the wants of travelers at the time exercised the privilege granted to it. The court said: "The legislature intended to provide against any obstruction of the safe and convenient use of the highway, for all time; and if, by the increase of population in the neighborhood, or by an increasing use of the highway, the crossing which at the outset was adequate is no longer so, it is the duty of the railroad corporation to make such alteration as will meet the present needs of the public who have occasion to use the highway." In *Lake Erie & W. R. Co. v. Cluggish*, 143 Ind. 347,

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42 N. E. 743, the court said (quoting from *Lake Erie & W. R. Co. v. Smith*, 61 Fed. 885): "The duty of a railroad to restore a stream or highway which is crossed by the line of its road is a continuing duty; and if, by the increase of population or other causes, the crossing becomes inadequate to meet the new and altered conditions of the country, it is the duty of the railroad to make such alterations as will meet the present needs of the public." So, in *Indiana ex rel. Muncie v. Lake Erie & W. R. Co.*, 83 Fed. 287, which was the case of an overhead crossing lawfully constructed on one of the streets of a city, the court said: "If, by the growth of population or otherwise, the crossing has become inadequate to meet the present needs of the public, it is the duty of the railroad company to remedy the defect by restoring the crossing so that it will not unnecessarily impair the usefulness of the highway."

The cases to which we have referred are in accord with the declarations of this court in the recent case of *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453, 49 L. Ed. 831, 25 Sup. Ct. Rep. 471. That case would seem to be decisive of the question before us. It there appeared that a gas company had acquired an exclusive right to supply gas to the city of New Orleans and its inhabitants through pipes and mains laid in the streets. In the exercise of that right it had laid its pipes in the streets. Subsequently a drainage commission, proceeding under statutory authority, devised a system of drainage for the city, and in the execution of its plans it became necessary to change the location in some places of the mains and pipes laid by the gas company. The contention of that company was that it could not be required, at its own cost, to shift its pipes and mains so as to accommodate the drainage system; that to require it to do so would be a taking of its property for public use without compensation, in violation of the Constitution of the United States. This court said: "The gas company did not acquire any specific location in the streets; it was content with the general right to use them; and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the state might require, for a necessary public use, that changes in location be made. * * * There is nothing in the grant to the gas company, even if it could legally be done, undertaking to limit the right of the state to establish a system of drainage in the streets. We think whatever right the gas company acquired was subject, in so far as the location of its pipes was concerned, to such further regulations as might be required in the interest of the public health and welfare. These views are amply sustained by the authorities. *National Waterworks Co. v. Kansas City*, 28 Fed. 921, in which the opinion was delivered by Mr. Justice Brewer, then circuit judge; *Columbus Gaslight & Coke Co. v. Columbus*, 50 Ohio St. 65, 19 L. R. A. 510, 40 Am. St. Rep. 648, 33 N. E. 292; *Jamaica Pond Aqueduct Corp. v. Brookline*, 121 Mass. 5; *Re Deering*, 93 N. Y. 361; *Chicago, B. & Q. R. Co. v.*

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Chicago, 166 U. S. 226, 254, 41 L. Ed. 979, 990, 17 Sup. Ct. Rep. 581. In the latter case it was held that uncompensated obedience to a regulation enacted for the public safety under the police power of the state was not taking property without due compensation. In our view, that is all there is to this case. The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the state, for the purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*."

The learned counsel for the railway company seem to think that the adjudications relating to the police power of the state to protect the public health, the public morals, and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals, or the public safety. Hence, he presses the thought that the petition in this case does not, in words, suggest that the drainage in question has anything to do with the health of the drainage district, but only avers that the system of drainage adopted by the commissioners will reclaim the lands of the district, and make them tillable or fit for cultivation. We cannot assent to the view expressed by counsel. We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 292, 43 L. Ed. 702, 704, 19 Sup. Ct. Rep. 465; *Gilman v. Philadelphia*, 3 Wall. 713, 729, 18 L. Ed. 96, 100; *Pound v. Turck*, 95 U. S. 459, 464, 24 L. Ed. 525, 527; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 470, 24 L. Ed. 529. And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose. Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals, or the public safety, any more than under a police regulation having no relation to such matters, but only to the general welfare. The foundations upon which the power rests are in every case the same. This power, as said in *Carthage v. Frederick*, 122 N. Y. 268, 10 L. R. A. 178, 19 Am. St. Rep. 490, 25 N. E. 480, has always been exercised by municipal corporations, "by making regulations to

Donora Southern R. Co. v. Pennsylvania R. Co

Appeal from Court of Common Pleas, Washington County.

Bill by the Donora Southern Railroad Company against the Pennsylvania Railroad Company and others. Decree for plaintiff, and defendants appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

A. M. Todd and Jas. A. Wiley, for appellants.

Samuel McClay, J. H. Murdoch, T. F. Birch, and Reed, Smith, Shaw & Beal, for appellee.

PER CURIAM. This was a bill for injunction against a threatened repetition of the action of defendant in tearing up the tracks of the plaintiff, and incidentally for assessment of the damages for the acts already committed. The title to the land was in dispute. In 1902 plaintiff, a Pennsylvania corporation, located its route and constructed a portion of it on this land by agreement with one Bamford, who was then, and had been for many years, in possession under claim of title. On May 21, 1904, Bamford conveyed the land to plaintiff, which had previously constructed additional tracks to those built in 1902. In 1903 the defendants' lessor acquired an adverse title to the land, but, as found by the court below, with knowledge of Bamford's possession. And the defendants made no claim to title prior to 1903, and no effort to take possession until May 16, 1904, when it entered and tore up complainant's rails.

On these facts the court found as conclusions of law: "(1) That in 1902 the plaintiff company had power to take and condemn a right of way across the land, without regard to who owned it, and, having found Bamford in long possession, it had entered and built part of its tracks with his consent. (2) That defendants' lessor, when it acquired title in 1903, took subject to a visible easement thereon, 'and cannot now call in question the legality of the plaintiff's previous entry and appropriation.' (3) That this is not an ejectment suit, and that it is not necessary for the court to adjudicate the title to the land. (4) That the plaintiff company was in possession of its right of way under permission from one who was in possession under color of title, and who made a claim of title that had such a reasonable basis as would put the defendant companies who never were in possession, at least so far as the ground covered by the right of way was concerned, to an action at law to test their rights. The defendant companies took the law in their own hands and undertook by force to redress what they claimed was an invasion of their rights, and, in addition, they threaten a repetition of this force if the plaintiff company should attempt to restore the tracks destroyed. In doing so they committed a wrong, the repetition of which should be restrained. (5) That an injunction should issue, and damages should be assessed at \$1,000, but that the injunction granted and the findings of fact and conclusions of

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law, which are held to justify it being granted, are not to prejudice the right of either of the parties hereto to establish, maintain, or defend in a court of law its title and right of possession to the said 6.73 acres of land described in the fourth paragraph of the plaintiff's bill, or any part thereof, or its legal or equitable right of possession to the strip of land over and across said tract of land covered by the location of the plaintiff company's main line and branch B."

On these findings and conclusions the decree is affirmed.

ILLINOIS, I. & M. RY. CO. v. RING.

(Supreme Court of Illinois, Dec. 20, 1905.)

[76 N. E. Rep. 83.]

Appeal—Review—Conflicting Evidence.—A verdict in condemnation proceedings will not be disturbed on appeal, where the evidence is conflicting, and the jury viewed the premises, and there is no showing of prejudice or that the amount is grossly excessive.

Eminent Domain—Opinion Evidence.*—In condemnation proceedings, a witness may base his opinion as to the damage to land on the possibility of danger of fire from sparks from locomotives.

Appeal—Review—Assignment of Errors.—Where the action of the court in overruling a demurrer is not assigned as error, it cannot be reviewed.

Appeal from Will County Court; Arthur W. Deselm, Judge.

Condemnation proceedings by the Illinois, Iowa & Minnesota Railway Company against Martin Ring. From a judgment, the railroad company appeals. Affirmed.

This was a condemnation proceeding begun in the county court of Will county by the filing of a petition by the appellant company against the appellee to condemn under the statute a strip of land 100 feet in width across the 80-acre farm owned by appellee. The strip of land as located by appellant runs lengthwise and diagonally across the 80 acres of land, by beginning on the north line of the tract, where the west line of the said right of way is 196 feet from the northwest corner of the said tract, then running partly on a curve to the southeast corner of the tract, so that the east line of the right of way is 39½ feet from the said southeast corner, dividing the 80 acres, lengthwise, into two irregular, triangular shaped pieces of land, one of which contains about 45½ acres and the other 28 acres. The cause was tried before the court and a jury. The jury made a personal inspection of the premises, and returned a verdict finding the sum of

*For the authorities in this series on the question whether danger to property not taken from fires set by locomotives is an element of damages in condemnation proceedings, see notes appended to *Hamilton v. Pittsburg, etc., R. Co.* (Pa.), 13 Am. & Eng. R. Cas., N. S., 376; *Kay v. Glade Creek & R. R. Co.* (W. Va.), 17 Am. & Eng. R. Cas., N. S., 695.

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\$1,189.50 as just compensation for the 6½ acres of land taken, and finding the sum of \$3,197.25 as damages to the remainder of the land adjacent to the strip taken. Judgment was rendered in accordance with the verdict, and this appeal is prosecuted to reverse that judgment.

Eddy, Haley & Wetten and *J. L. O'Donnell (Charles H. Pegler, of counsel)*, for appellant.

C. W. Brown, Coll McNaughton, and P. Shutts, for appellee.

RICKS, J. (after stating the facts). The principal contention of appellant is that the damages are excessive. It will be seen from the statement of the case that the amount of damages allowed for the land taken amounted to \$183 per acre for the 6½ acres. The evidence discloses that the land was worth from \$120 to \$200 per acre, some of the witnesses testifying that the land was worth from \$200 to \$300 per acre. The amount of the damages was within the range of the evidence, which was all that was necessary; and as to the damages to the land not taken, the jury fixed the price at \$43.50 per acre. Eleven witnesses testified for appellee as to the damages to the remainder of the land: the lowest being \$55 and the highest \$80 per acre, the balance of the witnesses ranging in amounts between the two. The amount found by the jury to be the actual damages was less than the lowest estimate placed upon the land by any witness for appellee. We have repeatedly held that allowances for damages by a jury in a condemnation proceeding, if within the range of the evidence, will not be disturbed on appeal, where the evidence is conflicting and the jury viewed the premises. *Illinois, Iowa & Minnesota Railway Co. v. Humiston*, 208 Ill. 100, 69 N. E. 880, and cases cited. This court will not disturb the finding of the jury under such circumstances, unless we can say from the record that the jury were prejudiced and unfair in reaching their conclusion, or that the amount found is grossly excessive for the land taken and damaged. No such condition exists in this record. The verdict of the jury is in accord with the evidence in every respect, and it would be unwise for this court to undertake, as an abstract proposition of law, to determine what the amount of damages would be upon a condemnation proceeding, without having an opportunity to see and inspect the premises. All we have to go by is the evidence as it appears in the record, and if we find that the judgment is reasonable and sustained by the evidence it is our duty to sustain the verdict of the jury.

It is next insisted that it was error in permitting the witness Baker to testify as to the element of damages that might arise from fire that might be emitted from the engines in use on said road. Other witnesses testified to substantially the same as did the witness Baker, but no objection was made or exception taken to their testimony. The witness testified that one of the things he took into consideration as to the determination of the market value of the land was the danger from fire. We think that the

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evidence was proper, as it is competent for witnesses to give their opinion as to the state of facts upon which they base their opinion, and we see no good reason why the probabilities of fire from passing trains should not be shown by the evidence to be an element of damages that may be taken into consideration. *Chicago, Paducah & Memphis Railroad Co. v. Atterbury*, 156 Ill. 281, 40 N. E. 826.

It is next urged that counsel for appellee, in addressing the jury, made improper remarks; but upon objection by counsel for appellant the remarks objected to were either at once withdrawn or modified, and we are unable to see how the jury could have been prejudiced by the remarks.

It is next urged that a demurrer which was filed to the appellee's cross-petition should have been sustained. The demurrer was overruled, but the ruling of the court is not assigned as error, and appellant abode the ruling of the court on the demurrer. Under this condition of the record we are not at liberty to decide this question, as only errors that are assigned can be reviewed by this court.

After a careful examination of the record we find no error which would justify us in reversing the judgment. The judgment of the county court of Will county is accordingly affirmed.
Judgment affirmed.

FEWELL v. SOUTHERN RY. CO.

(Supreme Court of Appeals of Virginia, Feb. 2, 1906.)

[52 S. E. Rep. 689.]

Master and Servant—Injuries to Servant—Defective Appliances—Selection by Servant.*—A gang of men engaged in loading and unloading freight cars were furnished with a sufficient supply of boards to be used as a gangway for their trucks. The men were authorized, and it was their duty, to select for themselves and to place in proper position the boards to be used by them. Plaintiff, who was a member of the gang, or one of his companions, selected a board having a large piece chipped out of one corner to use as a gang plank from a car to the platform. The truck which plaintiff was pushing struck the board at the defective corner, knocking it from its position, and causing the truck and plaintiff to fall, thereby injuring plaintiff. Held, that the injury was attributable to the negligence of plaintiff or of one of his fellow servants in selecting an obviously defective plank, and the railroad was not liable therefor.

Error from Corporation Court of Alexandria.

Action by D. Fewell against the Southern Railway Company.

*For the authorities in this series on the question whether the master is liable for injuries to employees from their selection and use of improper appliance, or failure to use appliances, where proper appliances have been furnished, see foot-note appended to *Hayes v. New York, etc., R. Co.* (Mass.), 15 R. R. R. 369, 38 Am. & Eng. R. Cas., N. S., 369.

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There was a judgment for defendant, and plaintiff brings error. Affirmed.

John M. Johnson, for plaintiff in error.

C. C. Carlin, for defendant in error.

HARRISON, J. This action was brought to recover damages for an injury alleged to have been received by the plaintiff in consequence of the negligence of the defendant company. Judgment was given in favor of the defendant upon its demurrer to the evidence, and this action of the corporation court is alone called in question by this writ of error.

The evidence tends to show that the plaintiff was one of a crew or gang of truckmen in the employment of the defendant, whose duty it was to load and unload freight cars; that at the Alexandria station of the defendant company there are several tracks lying parallel with each other, upon which the cars stand about three feet apart; that the nearest car is within three feet of the platform, and that the method of unloading the cars is by means of boards, about four feet long and three feet wide, covering the space from one car to the other, for the trucks to pass over, the space between the last car and the platform being covered by a similar board; that, when a car contains freight which can be passed over, the custom is to bridge such freight with the boards already mentioned and pull the trucks over the bridge thus constructed; that on the morning of the accident in question the plaintiff was engaged in unloading cars; that in the car next to the platform there was a pile of long, heavy iron pipes, about two feet high; that this pile of pipes was bridged, as already indicated, which made an ascent on one side and a descent on the other. The evidence further tends to show that the board extending from the car to the platform was defective in: having a piece about six inches square "chipped" out of one corner of the end resting upon the car; that the construction of the bridge over the pile of pipes in the car gave the truck such momentum in coming down the incline of the bridge that the plaintiff could not properly control or direct it; and that the truck struck the board at the defective corner, knocking it from its position, and causing the truck to fall to the ground and the plaintiff to fall on the platform, receiving in some way the injury complained of. The evidence further tends to show that there was a large number of these boards scattered about in different places over the platform for the use of the truckmen in loading and unloading cars; that it was the duty of the truckmen to select the boards they were about to use, and to place the same in proper position; and that it was the right and duty of the truckmen, if they found a defective board in use, to discard it and substitute one that was sound. The evidence further tends to show that sound boards were easily accessible to the truckmen, and that immediately after this accident, before the work was proceeded with further, a sound board was put in the place of the one that was defective.

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This is the plaintiff's case, as made by his own evidence, and there are no reasonable inferences that could be drawn from any evidence in the case which would add anything to its strength.

The contention of the plaintiff is that the accident which caused his injury was due to the defective board over which his truck had to run from the car to the platform, which defect caused the board to give way when struck by the truck, which was accelerated in speed by the momentum received in coming down the incline of the bridge over the iron pipes.

Admitting the theory of the plaintiff to be true, and that the defective board caused the accident, the question then arises, who is responsible for the use of this defective board?

The accident occurred since the adoption of the present Constitution, but it is conceded, both in the petition for a writ of error and in oral argument at bar, that the plaintiff does not come within any of the provisions, with respect to fellow servants, to be found in section 162 of that instrument.

The evidence does not show which one of the crew to which the plaintiff belonged selected and placed the defective board in position, but it does abundantly show that it was the duty of the plaintiff and his fellow servants to select the board and put it in position for use. The evidence shows that the defendant company always kept a supply of good boards on hand, readily accessible to the truckmen for whose use they were intended, and that there was a supply at hand on the morning of the accident. The injury complained of was, therefore, due to the negligence of the plaintiff or of his fellow servants in selecting for their use a defective board.

In the case of smaller appliances, which are ordinarily kept in considerable quantities, and are in their nature intended to be transported from place to place, when the master keeps an adequate and accessible stock of such appliances in good condition, contributory negligence is predicable of the act of the servant who selects an appliance which he knows, or ought to have known, to be defective and dangerous. *Labatt on Master & Servant*, vol. 1, p. 880; *White v. Newport News Shipbuilding Co.*, 95 Va. 355, 28 S. E. 577.

If the plaintiff, or his co-employees, had exercised ordinary care and prudence in selecting the board, he would have escaped injury. His own negligence, or that of his fellow servants, contributed to his misfortune, and therefore, upon well-settled principles, the defendant company cannot be held responsible.

For these reasons, the judgment complained of must be affirmed.

JOHNSON v. BOSTON & M. R. R.

(Supreme Court of Vermont, Windsor, Feb. 2, 1906.)

[62 Atl. Rep. 1021.]

Master and Servant—Injuries to Brakeman—Low Bridges—Assumed Risk.*—Plaintiff, a brakeman on defendant's railroad, as his train approached a low bridge of which he had knowledge, lay face downward, prone on the car on which he was riding, that he might pass under the bridge in safety. He was surrounded, however, by a cloud of smoke and steam so dense that it cut off his view of objects about him, and, being choked by the smoke, he raised his head to catch his breath, and came in violent contact either with the bridge or ice hanging therefrom, and was injured. Plaintiff had knowledge that the engine drawing the train had been leaking steam in unusual quantities ever since the train was started, and that defendant's engines generally were in bad condition in that respect at the time of the accident. Held, that plaintiff assumed the risk and was not entitled to recover.

Same—Proximate Cause.—In an action for injuries to a brakeman while passing under a low bridge, plaintiff's testimony that he thought that he was struck by ice on the bridge, in the absence of anything else in the record to show whether plaintiff's opinion was well-founded, was insufficient to establish that the presence of ice was the cause of the accident, or that the presence of such ice as might have been on the bridge at the time was unusual.

Same—Negligence—Fellow Servants.†—A railroad fireman is a fellow servant of a brakeman on the same train, precluding the brakeman from recovering for injuries sustained by the fireman's negligence in throwing fresh coal into the boiler, contrary to custom, when the train was on a downgrade and while the brakemen were required to be on top of the cars, thereby causing a dense volume of smoke and gas to be emitted, etc.

Exceptions from Windsor County Court; Loveland Munson, Judge.

Action by Samuel Johnson against the Boston & Maine Rail-

*For the authorities in this series on the question whether railroad employees assume the risks from structures over or too near tracks, see foot-notes appended to *South Side Elev. R. Co. v. Nesvig* (Ill.), 17 R. R. R. 805, 40 Am. & Eng. R. Cas., N. S., 805; foot-notes appended to *Miller v. Boston & Maine R. R.* (N. H.), 17 R. R. R. 564, 40 Am. & Eng. R. Cas., N. S., 564; foot-note appended to *Fearns v. New York Cent. & H. R. R. Co.* (Mass.), 15 R. R. R. 814, 38 Am. & Eng. R. Cas., N. S., 814.

†For the authorities in this series on the question whether the members of the same train crew are fellow servants, see foot-notes appended to *Shugart v. Atlanta, etc., Ry.* (C. C. A.), 17 R. R. R. 558, 40 Am. & Eng. R. Cas., N. S., 558 (engineer and other members of his train crew); foot-notes appended to *McLeod v. Chicago & N. W. Ry. Co.* (Iowa), 14 R. R. R. 715, 37 Am. & Eng. R. Cas., N. S., 715 (conductor and other members of his train crew); *Virginia & S. W. Ry. Co. v. Bailey* (Va.), 15 R. R. R. 795, 38 Am. & Eng. R. Cas., N. S., 795 (fireman fellow servant of brakeman of his train); *Louisville & N. R. Co. v. Sullivan* (Ky.), 11 R. R. R. 131, 34 Am. & Eng. R. Cas., N. S., 131 (brakeman on freight train not fellow servant of its fireman while latter was temporarily performing duties of engineer); *Hale v. Kansas City Southern Ry. Co.* (C. C. A.), 8 R. R. R. 4, 31 Am. & Eng. R. Cas., N. S., 4; *Southern Ry. Co. v. Clifford* (Ky.), 21 Am. & Eng. R. Cas., N. S., 229 (brakeman and fireman are).

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road. A verdict was directed in favor of defendant. Judgment was rendered thereon, and plaintiff brings exceptions. Affirmed.

Argued before ROWELL, C. J., and TYLER, START, WATSON, HASELTON, and POWERS, JJ.

R. E. Stevens and Frank Plumley, for plaintiff.

Hemton & Stickney, for defendant.

POWERS, J. The plaintiff seeks damages for injuries sustained in the defendant's service at Lebanon, N. H., on January 2, 1902. At that time he was, and for more than 11 years prior thereto had been, employed by the defendant as a freight brakeman, running usually between Concord, N. H., and White River Junction, Vt. During all that time there had been maintained at Lebanon an overhead bridge spanning the defendant's track, so low as to endanger one passing under it on the top of a freight car and compel him either to descend between the cars or lie flat upon the car to escape its perils. On the day named the plaintiff's train reached Lebanon between 8 and 9 o'clock in the evening. It was a moonlight night, and freezing. From Lebanon toward White River Junction the defendant's road is descending, and agreeably to the defendant's rule the plaintiff was at his post on top of the fourth car from the engine as the train left the station at Lebanon and approached this dangerous bridge. The plaintiff knew all about the bridge and its dangers, and being then mindful of its perils, in conformity with a custom which he had observed during the entire period of his employment on the road, as the train approached the bridge, he lay face downward prone upon the car, that he might pass under in safety. He was surrounded with a cloud of smoke and steam so dense as to completely envelop him and cut off his view of objects about him, and, being choked by the smoke, steam, and gas from the engine, he raised his head to catch breath, and came into violent contact with the bridge itself, or the ice depending therefrom, and was severely injured. A verdict was directed for the defendant in the court below, and to that direction the plaintiff excepted.

This accident happened in New Hampshire, but we need not pause to consider whether we are to apply the law of that state or our own; for upon the questions raised by this record their decisions are in entire accord with ours. The law of the case is found in the rule, variously stated in the different cases, but, so far as applicable here, amounting to this: The servant assumes, not only the risks ordinarily incident to his employment, but such unusual and extraordinary risks as he knows and comprehends. *Carpenter's Adm'r v. Railroad Co.*, 73 Vt. 336, 50 Atl. 1099; *Morrisette v. Railroad Co.*, 74 Vt. 232, 52 Atl. 520; *Kilpatrick v. Railroad Co.*, 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887; *Leazott v. Railroad (N. H.)* 45 Atl. 1084; *Burnham v. Railroad (N. H.)* 44 Atl. 750. So it is that a servant, when in the course of his employment a special and obvious risk is pre-

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sented to him—one not ordinarily incident to the business—may, as a rule, decline to accept it; but, if he choose to encounter it, he assumes it. And this is so, though the risk arises from the negligent performance of the master's duties. *Talbot v. Sims* (Pa.) 62 Atl. 107; *Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425. This case, then, so far as the dangers arising from the low bridge are concerned, comes within the decisions in *Carbine's Adm'r v. Railroad*, 61 Vt. 348, 17 Atl. 491, *Allen v. Railroad*, 69 N. H. 271, 39 Atl. 978, and many such cases. For the plaintiff knew all about the bridge and the dangers arising from it, and by continuing in the service had assumed these as among those incident to his employment. Indeed, this proposition is not seriously questioned; but the plaintiff insists that he was at the time of the accident subjected to an unusual and extraordinary hazard, in that the engine hauling this train was defective, and leaked steam in extraordinary volume; that this was a condition which ought not to have existed, and would not have existed but for the negligence of the defendant, and consequently was not a danger assumed by him; and that this condition was a proximate cause of the injury, and affords a legal basis for a recovery. And so it does, unless, as we have seen, the condition and its dangers were known to and voluntarily incurred by him. That the condition of this locomotive was as plaintiff claims, and that such condition resulted from the negligence of the defendant, is not denied. But the record shows that its condition had been the same in respect to leaking steam in unusual quantities all the way from Concord. Not only that, but it appears that the engines generally on the defendant's road were in bad condition in the respect indicated at the time of this accident. All this was known by the plaintiff. The risk of being blinded and choked by the usual volume of smoke and steam necessarily emitted from the locomotive while passing under the low bridge was one of the ordinary hazards of the service. *Hardy v. Railroad*, 68 N. H. 536, 41 Atl. 179. The increased danger arising from an engine leaking unusual quantities of steam was as obvious to the plaintiff as to the defendant; and it must be held that the plaintiff, by continuing in the service with full knowledge, assumed the increased hazard—that of passing under a dangerously low bridge while enveloped in an unusual cloud of steam emitted from a leaky engine.

It is further insisted by the plaintiff that there was evidence in the case tending to show that the plaintiff was struck by the ice depending from the bridge, and that this affords evidence of the defendant's negligence sufficient to sustain a recovery. The only evidence on this subject was the statement of the plaintiff to the effect that he thought that he was struck by the ice on the bridge, and there is nothing in the record to show whether this opinion was well-founded or otherwise. Nor is there anything in the record tending to show that the condition in this respect at the time of the accident was unusual. For aught that

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appears, it was usual for ice to form on the bridge as it had that night. It was incumbent on the plaintiff to show this—to show an unusual condition—for the ordinary condition in this respect was, like the others, covered by his assumption of risk. Nor would the negligence of the fireman, if any, in throwing into the boiler fresh coal on a downgrade while the brakemen had to be on top of the cars, contrary to the custom of the fireman, thereby causing a dense volume of smoke and gas to be emitted, avail the plaintiff. For this would be the negligence of a fellow servant, not shown to have been incompetent, which could not form the basis of a recovery.

Judgment affirmed.

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(Court of Appeals of New York, Feb. 13, 1906.)

[76 N. E. Rep. 923.]

Negligence—Question for Court.—In actions for personal injuries arising from negligence, that the facts are undisputed does not make the question of negligence one of law.

Master and Servant—Torts of Servant—Liability of Master.*—In an action against a railroad company to recover for the death of a boy killed by a detective while stealing a ride on a freight train, if the evidence shows that he acted maliciously or in the pursuit of some purpose of his own, the defendant railroad company, in whose employ he was, is not bound by his act; but if, while acting within the general scope of his employment, he disregards his master's orders or exceeds his powers, the master will be responsible for his conduct.

Same—Question for Jury.—A boy who had been stealing a ride on a freight train jumped from the train and was pursued by a detective employed to keep tramps and trespassers from its trains and yards, and at a point about 100 feet from the yard he was shot by the detective. Held a question for the jury, in an action to recover against the railroad for the death of the boy, whether the detective acted within the scope of his employment, or whether he acted as a public officer only.

*For the authorities in this series on the question whether the master's liability for the negligence or torts of his servant depends upon whether they occurred while the servant was acting within the scope of his employment, see foot-note appended to *Barmore v. Vicksburg, etc., Ry. Co.* (Miss.), 17 R. R. R. 841, 40 Am. & Eng. R. Cas., N. S., 841; *St. Louis, etc., Ry. Co. v. Grant* (Ark.), 17 R. R. R. 343, 40 Am. & Eng. R. Cas., N. S., 343; *Berry v. Boston Elev. Ry. Co.* (Mass.), 17 R. R. R. 338, 40 Am. & Eng. R. Cas., N. S., 338; *Overtoni v. Boston & M. R. R.* (Mass.), 17 R. R. R. 332, 40 Am. & Eng. R. Cas., N. S., 332; foot-note appended to *Texas Midland R. R. v. Dean* (Tex.), 16 R. R. R. 596, 39 Am. & Eng. R. Cas., N. S., 596 (arrests and prosecutions).

For the authorities in this series on the question whether a railroad company is liable for the wilful or malicious torts of its employees, see foot-note appended to *Davenport v. Charleston & W. C. Ry.* (S. Car.), 17 R. R. R. 222, 40 Am. & Eng. R. Cas., N. S., 222; *Willis v. Maysville & B. S. R. Co.* (Ky.), 16 R. R. R. 832, 39 Am. & Eng. R. Cas., N. S., 832.

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Master and Servant—Injuries to Third Person—Actions—Question for Jury—Credibility of Witnesses.—In an action against a railroad company to recover for the death of a boy shot by a detective of the company, the detective, after testifying for plaintiff as to the circumstances resulting in the shooting, testified on cross-examination to matters excusing his conduct, which matters were undisputed. Held, not to authorize the taking of the case from the jury; the credibility of the witness being for the jury.

Gray, J., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Charles F. Sharp, administrator of George Sharp, against the Erie Railroad Company. From a judgment of the Appellate Division (85 N. Y. Supp. 553, 90 App. Div. 502), affirming a judgment for defendant, plaintiff appeals. Reversed.

David C. Robinson and *Frank C. Ogden*, for appellant.
Frederick Collin, for respondent.

O'BRIEN, J. The plaintiff's intestate, a boy of about 17 years of age, was shot and killed on the 16th of May, 1901, by a man named Wheeler, at Salamanca. The boy, with one or two companions, got upon one of defendant's freight cars at Elmira for the purpose of stealing a ride. They were running away from their homes, and their destination was Youngstown, Ohio. When the train arrived at Salamanca, some 60 miles west, it appears that three men shouted to them that there were detectives in the yard, and they proceeded to get off as quickly as possible. They jumped from the moving train and were pursued by Wheeler along the railroad track for some distance to the west when the boy turned at right angles and passed to the adjacent land through an open gate. The pursuit was continued by Wheeler for about 50 feet on the adjoining land, and when the boy, being ahead of him, was about 1000 feet from the railroad premises, Wheeler drew a pistol and fired at him; the ball entering the back of his head, producing death.

The question in this case is whether the defendant can be held responsible for the act of Wheeler in killing the boy. It is claimed that Wheeler acted in a dual capacity; that, while he was the servant of the defendant for certain purposes, he was also a public officer, and that he killed the boy while acting in the capacity of such officer, and not as the servant of the defendant. It is important to know at this stage of the discussion just what Wheeler's relations to the defendant were. There does not seem to be any dispute in regard to the scope of his employment. He was paid \$50 a month by the defendant, and his duties were to protect the company's interests on the right of way; to keep tramps from trains and look after robberies that might occur at stations and on freight cars in the yards and on the tracks and in the station, and look after persons in an intoxicated condition on the company's property, and generally to look after crimes committed against the railroad company on

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the right of way. It was part of his duty to drive off and keep off trespassers from the company's property. His duty was not limited to keeping trespassers off the trains where it was to the company's interest to keep them out of the yard. That was largely committed to his discretion. It will be observed that there is no conflict in the testimony nor any dispute about the facts, and it is argued by the learned counsel for the defendant that in such cases the question becomes one of law for the court, and there is nothing for the jury to pass upon. That was the view taken by the learned courts below. The plaintiff was nonsuited, and the Appellate Division affirmed the judgment. It is argued that the moment Wheeler passed beyond the boundaries of the defendant's premises onto the adjoining lot where the deceased was killed he was no longer acting as the defendant's servant, but was pursuing and seeking to arrest the boy who had committed or was engaged in the commission of a crime. It will be noted that the pursuit commenced when the deceased jumped from the car and was continuous until the shooting occurred. So the question is whether, at the time that Wheeler fired the fatal shot, he was acting as the defendant's servant or as a public officer; and, further, whether that question was one of law for the court, or of fact for the jury.

In actions for personal injuries arising from negligence, and in other actions sounding in tort, it is far from correct to assert that when the facts are undisputed the question becomes one of law. Whether the undisputed facts impute negligence is for the jury, when the circumstances are such that men of ordinary prudence and discretion might differ as to the character of the acts under the circumstances of the case, or whether the inferences to be drawn from or the significance to be attached to the testimony are doubtful. 1 Thomas on Negligence, p. 673. A recent author who has written much on the law of negligence states the rule in these words: "It is obviously a question of fact for the determination of a jury whether, at the time of the particular act or omission by the servant which caused the injury, the plaintiff's servant was acting within the scope of his employment or acting outside of it to effect some purpose of his own. Upon such a question the verdict of a jury will be conclusive. * * * Whether the person whose immediate negligence or misconduct caused the particular injury was acting at the time as the servant of the person sought to be charged frequently depends on such a variety of facts that it falls outside of any definite rule, and for that reason becomes, under proper instructions, a question of fact for the jury." 1 Thompson on Negligence, §§ 615, 616. The circumstances of this case, it seems to me, presented a question of the same general character. Did Wheeler, at the moment that he fired the fatal shot, put off his character as a servant of the defendant and put on another and different character, namely, the powers and duties of a public officer? Does the fact that he crossed the boundary line of the

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defendant's premises in pursuit of the boy make the question one of law? If it be a question of law, the principle would be the same whether he had passed the boundary line by the distance of 2 feet instead of 50. It is obvious that there is no rule or principle of law to determine such a question, and hence it belonged to the jury. It has been frequently decided by this court that cases almost identical in their facts must be determined by the jury when the testimony is of the same character as that in the case at bar. *Rounds v. D., L. & W. R. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Lynch v. Met. El. R. R. Co.*, 90 N. Y. 77, 43 Am. Rep. 141; *Cohen v. Dry Dock, etc., R. R. Co.*, 69 N. Y. 170; *Peck v. N. Y. C. & H. R. R. Co.*, 70 N. Y. 587; *Hoffman v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 25, 41 Am. Rep. 337. These cases, and other cases on the same subject, were reviewed and approved in a very recent case in this court, which is almost identical in its facts with the case at bar. *Magar v. Hammond*, 183 N. Y. 387, 76 N. E. 474. It was there held that the defendant would be liable for the act of Wheeler if he was engaged within the general scope of his employment, and whether he was so engaged or was seeking to effect some purpose of his own was a question of fact for the jury.

A railroad company employing a servant who happens to be a public officer acquires no immunity from such employment. Constables and policemen are often employed by corporations in the same capacity as Wheeler was. It is not beyond the province of a jury in such a case to find that the official acts of the employee are to be used for the benefit of the defendant and in protection of its interests or property. And, hence, in such a case the character of the servant's act is to be determined in the same way and upon the same principles as if he was not a public officer at all. If he acts maliciously or in pursuit of some purpose of his own, the defendant is not bound by his conduct, but if, while acting within the general scope of his employment, he simply disregards his master's orders or exceeds his powers, the master will be responsible for his conduct. There was no proof in this case that Wheeler was a public officer, except his own statement given upon the examination of the defendant's counsel. It seems that the plaintiff's counsel called him as a witness to prove the facts resulting in the shooting of the boy, and upon the defendant's cross-examination he testified to his official character without producing any written or record evidence of the fact. The rule in such cases seems to be that where one of the parties to an action calls his opponent as a witness and proves by him facts tending to sustain his case, and such witness in his own behalf afterwards gives an explanation of the circumstances which, if true, repels the idea of liability on the part of the defendant, and, though such explanation is not disputed by other evidence, this does not authorize the court to take the case from the jury; it is for them to determine what degree of faith is to be given to the explanatory testimony. Wheeler was undoubtedly

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an interested witness. He testified to facts necessary to the plaintiff's case, and then testified to facts in the nature of an excuse for his own conduct; and, although the excuse was not affected by any other evidence, still his credibility was for the jury. *Becker v. Koch*, 104 N. Y. 394, 10 N. E. 701, 58 Am. Rep. 515; *Manhattan Co. v. Phillips*, 109 N. Y. 383, 17 N. E. 129; *Cross v. Cross*, 108 N. Y. 628, 15 N. E. 333.

It follows that it was for the jury to determine whether Wheeler acted within the scope of his employment, or whether, being a public officer, he acted in that capacity alone. For these reasons I think the judgment should be reversed, and a new trial granted, costs to abide the event.

CULLEN, C. J., and BARTLETT, WERNER, and HISCOCK, JJ., concur.

GRAY, J., dissents on the ground that as the plaintiff had shown Wheeler to be a local police officer, constable, and deputy sheriff, and that the assault upon the boy was not committed upon the defendant's premises, his act was necessarily that of an officer of the law. Hence the nonsuit was right.

CHASE, J., not sitting.

Judgment reversed, etc.

SPANGLER v. BALTIMORE & O. R. Co.

(Supreme Court of Pennsylvania, Jan. 2, 1906.)

[62 Atl. Rep. 919.]

Master and Servant—Injury to Servant—Negligence of Fellow Servant.*—Where plaintiff's husband, an employee of defendant railroad company, was killed in a collision while on an engine of the company, and the accident was caused by the violation by fellow servants of the rules of the company, it was not liable.

Appeal from Court of Common Pleas, Allegheny County.

Action by M. E. Spangler against the Baltimore & Ohio Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The following is the opinion of Brown, J., in the court below:

"This matter arises upon a motion to take off a compulsory nonsuit in an action by Mary E. Spangler against the Baltimore & Ohio Railroad Company to recover damages resulting from the death of her husband, caused by a head-on collision between an east-bound freight engine and a west-bound passenger train. Mr. Spangler was upon the east-bound freight engine operated

*For the authorities in this series on the question whether an employee assumes the risks from the negligence of his fellow servants, see foot-notes appended to *Louisville & N. R. Co. v. Dillard* (Tenn.), 17 R. R. R. 762, 40 Am. & Eng. R. Cas., N. S., 762.

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by the freight crew proceeding to the scene of a wreck upon the Wheeling Branch of said company.

"The undisputed evidence shows: (1) That the telegraphic message (under which the freight engine was proceeding) was subject (a) to the rule and railway schedule of the company giving priority of right of way to passenger trains, and (b) to the rule requiring a flagman approximately a mile ahead of the freight engine to protect its crew against passenger trains. (2) That, in violation of these rules and schedules well known to the employees of the railroad company (of whom Mr. Spangler was one), the freight engine, without any flagman ahead, proceeded easterly several miles to the point of its collision with the west-bound passenger train.

"The violation of these rules by fellow servants, being the proximate cause of the collisions, bars a recovery. The case is ruled by *Kennelty v. Baltimore & Ohio Railroad Company*, 166 Pa. 60, 30 Atl. 1014, in which it is said by Mr. Justice Fell, delivering the opinion: 'It was clearly shown by the testimony produced by the plaintiff that the collision was caused not by an unsafe schedule or defective rules, but that it was due to the reckless disregard of clearly defined and well-understood duties by those in charge of the train. As they were co-employees of the plaintiff's husband, there was nothing to leave to the jury, and the nonsuit was properly entered.'

"Motion overruled."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Joseph Howley and W. A. Hudson, for appellant.

John S. Wendt and Johns McCleave, for appellee.

PER CURIAM. Judgment affirmed, on the opinion of the court below.

TENNESSEE COAL, IRON & R. CO. v. BRIDGES.

(Supreme Court of Alabama, June 30, 1905.)

[39 So. Rep. 902.]

Master and Servant—Injuries to Servant—Fellow Servants—Sufficiency of Complaint.*—Code 1896, § 1749, subsec. 5, makes an employer liable for injuries to a servant, caused by the act of a fellow servant, when the injury is the result of the negligence of a servant in charge or control of any locomotive engine, switch, car, or train on the railroad, etc. Held, that a complaint for injuries to a servant caused by his being struck by defendant's railroad engine, failing to charge that the person whose negligence was complained of was in charge of the engine, did not state a cause of action under such section.

Same.*—A complaint for injuries to a servant by the alleged wanton, reckless, or intentional act of a fellow servant was de-

*See foot-notes appended to *Louisville & N. R. Co. v. Dillard* (Tenn.), 17 R. R. R. 762, 40 Am. & Eng. R. Cas., N. S., 762.

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murderable, where it failed to further charge that the master was negligent in the selection of the alleged negligent servant or in giving him orders, etc.

Same—Liability of Master.—While a master is liable for the wanton, reckless, willful, or intentional act of his employee within the scope of his employment, the master is not liable when the injury is to a fellow servant, unless negligence is shown in the master himself or the case is brought within the employers' liability act.

Same—Complaint.—A complaint for injuries to a servant by the intentional or willful act of a fellow servant operating a locomotive and cars, which failed to allege that the engine or car was "on any railroad track," did not state a cause of action within Code 1896, § 1794, subsec. 5, rendering a master liable for injuries to a servant by the negligence of any servant in charge of a locomotive, car, or train upon any part of the track of a railroad.

Pleading—Allegations as to Venue—Negating Defenses.—Though an action for injuries to a servant must be brought in the county where the injury occurred, or in the county where plaintiff resides, as provided by Acts 1903, p. 182, the complaint need not allege that the action is so brought.

Master and Servant—Injuries to Servant—Questions for Jury.—In an action for injuries to a servant, evidence held to require the denial of a general charge for defendant.

Trial—Special Findings—Several Counts.—Where the complaint contained several counts, it was proper to refuse a charge that, if the jury believed the evidence, they should find for defendant on one of the counts.

Master and Servant—Injuries to Servant—Contributory Negligence—Instructions.—In an action for injuries to a servant, an instruction that if plaintiff's conduct approximately contributed to his own injury he could not recover, without requiring that plaintiff's conduct must have been negligent, was properly refused.

Same—Willful Injury.—Where, in an action for injuries to a servant, there was proof sustaining allegations of willful, wanton, and reckless conduct on the part of defendant's engineer, which was proximately the cause of plaintiff's injury, a request to charge that if there was a safe way and an obviously dangerous way for plaintiff to discharge his duties, and he selected the dangerous way, he could not recover, was properly refused.

Same—Instructions.—In an action for injuries to a servant, a charge that if plaintiff could have performed his duties in unloading the car in question without being on the running board of the trestle where the car was being placed, and he could have remained in a place of safety until the car was placed, he proximately contributed by his own negligence to his injury and could not recover, was properly refused, because it did not hypothesize that the running board was an obviously dangerous place.

Same—Assumed Risk.—Where, in an action for injuries to a servant, there was evidence that the injuries were the result of the willful, wanton, and reckless conduct of defendant's engineer, pleas alleging that plaintiff assumed the risk were unavailable.

Appeal from Circuit Court, Colbert County; E. B. Almon, Judge.

"To be officially reported."

Action by G. M. Bridges, as administrator of Arthur A. Hughes, deceased, against the Tennessee Coal, Iron & Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

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Rehearing denied January 9, 1906.

This was an action by the administrator of Arthur A. Hughes. The said Hughes having died between the trial of this cause in the lower court and the time of the submission of this cause in this court, revivor was had in the name of J. M. Bridges as administrator. The complaint contained eight counts; the first four counting on the negligence of the defendant, through its servant, Jim Street, the engineer in charge of defendant's engine, by negligently running his engine against defendant and knocking him off the trestle. Jim Street is alleged to be a fellow servant. The first count declares that the injury was wantonly or recklessly done. The other three are in simple negligence. Demurrers were interposed to these counts: To the first count because (1) therein and thereby plaintiff seeks to hold the defendant liable for the wanton, reckless, or intentional act of a fellow servant, and fails to allege or show that such act was done under the direction or instruction of the defendant; (2) said count of complaint shows that the injury complained of was caused by the negligence of the fellow servant of plaintiff, and fails to show or allege any negligence on the part of defendant in the selection of such fellow servant. To the second count because (1) said count fails to allege or show that the defendant owed plaintiff any duty at the time and in the place where the injury complained of occurred. To the fourth count because (1) said count fails to allege or show that the defendant owed plaintiff any duty at the time and in the place where the injury complained of occurred. To each count of the complaint because said complaint and each count thereof fails to show where the injury complained of occurred.

Plaintiff added the fifth, sixth, seventh, and eighth counts. The fifth count alleges that the defendant was engaged in operating a glass furnace in Colbert county, and was in the corporate limits of Sheffield; and in connection therewith and accessory thereto the defendant was at the same time operating locomotives or switch engines and cars upon railroad tracks and the handling of material for and the products of said furnace; that plaintiff was employed by said company in the capacity of trestle foreman, and was in the active discharge of his duties upon said trestle when it was being used by the defendant in its said business, when he was recklessly, wantonly, or intentionally injured by the defendant, through its servant, one Jim Street, who is alleged to have been employed by defendant, and was at the time working for defendant, in the capacity of engineer, and who so wantonly or recklessly handled the engine of which he was in charge as to knock plaintiff off the trestle. The sixth count is in simple negligence, and contains practically the same allegations that are contained in the fifth count, leaving out the wanton, reckless, or intentional feature of it. The seventh count is similar in all respects to the fifth count, except it alleges that one John Gay, who was in the employment of the defendant,

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working on said trestle, caught hold of the car which was being operated by defendant, through its agent, Jim Street, recklessly and wantonly, to prevent being knocked off, and that the engineer in charge of the engine propelling the car recklessly, wantonly, or intentionally ran said engine and car, with the said John Gay holding thereto, along the trestle, so that the body of said John Gay struck the plaintiff and knocked him from the trestle. The eighth count is a repetition of the seventh count, but alleges simple, instead of wanton, negligence. Demurrers were interposed for all the counts except count 6.

The following charges were refused to the defendant: "(3) Gentlemen of the jury, there is no evidence of wanton, willful, or intentional injury on the part of the defendant's servant, Street, towards plaintiff; and if you believe the evidence in this case you must find for the defendant on the first and fifth counts of the complaint. * * * (5) The court charges the jury that there is no evidence of willful, wanton, or intentional injury on the part of Street; and if they believe the evidence they must find for the defendant on the first and fifth counts. * * * (7) If the jury believe from the evidence that plaintiff's conduct proximately contributed to his own injury, then he cannot recover in this case, and your verdict must be for the defendant. * * * (9) If the jury believe from the evidence that the plaintiff could have performed his duties in unloading the car without being upon the running board of the trestle, where the car to be unloaded was being placed, and that he could have remained in a place of safety until the car was placed, then he contributed by his own negligence proximately to his injury, and he cannot recover. * * * (12) If the jury believe from the evidence that there was a safe way and an obviously dangerous way for the plaintiff to discharge the duties of his employment, and the plaintiff selected the obviously dangerous way of performing said duties, and he was thereby injured, I charge you that the plaintiff was guilty in selecting the dangerous way to perform his duties, and cannot recover in this case, and your verdict should be for the defendant."

Defendant filed a number of pleas. Plea No. 2 alleged that the plaintiff assumed the risk of injury in his said employment; No. 3, that the employment in which plaintiff was then engaged was obviously dangerous and known to the plaintiff for a sufficient length of time, that he remained therein, and thereby assumed the risk of said employment.

Tillman, Grub, Bradley & Morrow and *Wilhyte & Nathan*, for appellant.

Kirk, Carmichael & Rather, for appellee.

SIMPSON, J. The first count of the complaint is not a count under the statute, because it does not allege that the party whose negligence is complained of was in charge of an engine on a railroad. Code 1896, § 1749, subsec. 5; Sloss-Sheffield Steel &

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Iron Co. v. Mobley, 139 Ala. 425, 36 South. 181. As a complaint at common law said count alleges that the injury resulted from the wanton, reckless, or intentional act of a fellow servant of plaintiff, but does not allege or show that the master was guilty of negligence in the selection of said servant, or in the orders given him, or otherwise. Consequently the demurrer to this count should have been sustained. 2 *Labatt on Master and Servant*, p. 2355, § 855a; *Lawler v. Androscoggin R. R. Co.*, 62 Me. 463, 16 Am. Rep. 492. While it is true that under our decisions a master is liable for the wanton, reckless, willful, or intentional acts of his employee, when acting within the scope of his employment, yet that does not abrogate the principle that when the injury is to a fellow servant the master is not liable, unless the case is brought within the statute, or, if the common-law liability is relied on, negligence be alleged and shown in the master himself. 1 *Labatt on Master and Servant*, pp. 391, 392, § 177, and note. *The Wildman Case*, 119 Ala. 566, 24 South. 765, the *Gilliam Case*, 70 Ala. 268, the *Highland Ave. Case*, 125 Ala. 483, 28 South. 28, and the *Henry Case*, 139 Ala. 162, 34 South. 389, were all cases of injury to a passenger or a stranger; and the case of *So. Ry. v. Moore*, 128 Ala. 434, 29 South. 659, merely decides that, in a case within the statute, the fact that the injury was from the willful, wanton, reckless, or intentional wrong of the fellow servant does not prevent a recovery, the same as if it was negligence, strictly speaking. The general principle is that the "master is not liable to those in his employ for injuries resulting from the negligence, carelessness, or misconduct of a fellow servant." *Laning v. N. Y. Central R. Co.*, 49 N. Y. 521, 10 Am. Rep. 417.

The demurrer to the fourth count of the complaint was improperly overruled. Said count alleges that defendant was operating a furnace in Colbert county, and was operating a locomotive along a certain railroad track, but it does not allege that the engine or car was on any railroad track. See *Mobley's Case*, *supra*. Notwithstanding Acts 1903, p. 182, requiring these actions to be brought in the county where the injury occurred, or in the county where plaintiff resides, it is not necessary to allege these matters in the complaint, as it is a matter of defense to be pleaded. The demurrer to the fifth count should also have been sustained. See *Mobley's Case*, *supra*, and others referred to. The court finds in the record no demurrers to the sixth count of the complaint.

As there was a conflict in the evidence on the subject of giving or obeying signals to stop and of the safety or unsafety of the position on the running board, and on the question whether or not the engineer ran the car further than the signals authorized, also as to whether plaintiff was knocked off by the car or by the body of Gay, the court properly refused to give the general charge for defendant. Charges 3 and 5, requested by the defendant, were properly refused. Where the complaint contains

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several counts, it is proper to refuse a charge instructing the jury, if they believe the evidence, to find for the defendant on one of the counts. *U. S. Fidelity & Guaranty Co. v. Habel*, 138 Ala. 348, 35 South. 344; *Bessemer Liquor Co. v. Tillman*, 139 Ala. 462, 36 South. 40.

The court did not err in refusing to give charge 7, requested by defendant. In order to sustain the defense of contributory negligence, the conduct of the plaintiff must be negligent, and must also contribute proximately. This charge does not refer it to the jury to determine whether plaintiff was negligent. A man's conduct may proximately contribute to his injury, yet he may have been free from any negligence. Charge 7 was properly refused. The court properly refused to give charge 12, requested by the defendant, as there were counts in the complaint alleging willful, wanton, and reckless conduct on the part of the engineer, and the court is not prepared to say that there was no evidence from which the jury might find that said allegations were sustained. Charge 9 was properly refused because it did not hypothesize that the running board was a place obviously dangerous.

The demurrers to pleas 2 and 3 were properly sustained, as said pleas do not sufficiently set forth any defense.

For the errors pointed out, the judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

MCCLELLAN, C. J., and TYSON and ANDERSON, J., concur.

PITTSBURGH, C., C. & ST. L. RY. CO. v. PECK.

(Supreme Court of Indiana, Nov. 28, 1905.)

[76 N. E. Rep. 163.]

Pleading—Matters of Fact or Conclusions—Negligence—Personal Injury—Allegation of Facts Showing Legal Duty.*—The complaint, in an action for a personal injury negligently inflicted by another, must allege facts showing that the latter owed a legal duty to the person injured and that he negligently failed to perform the duty; and the mere allegation of the pleader that such a duty existed is insufficient.

Same—Master and Servant—Injury to Employee.*—A complaint, in an action under the employers' liability act (Laws 1893, p. 294, c. 130, § 1; Burns' Ann. St. 1901, § 7083, subd. 4), making a railroad company liable for an injury to an employee caused by the negligence of the person in charge of any engine, which alleges that cars were drawn past a switch, that it then became the duty of the engineer not to move the cars until signaled to do so by the switchman or the

*See extensive note, 17 R. R. R. 236, 40 Am. & Eng. R. Cas., N. S., 236; foot-note appended to *Kansas City, etc., R. Co. v. Matthews* (Ala.), 17 R. R. R. 79, 40 Am. & Eng. R. Cas., N. S., 79; *Georgia Ry. & Elec. Co. v. Reeves* (Ga.), 17 R. R. R. 26, 40 Am. & Eng. R. Cas., N. S., 26.

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conductor in charge, and that the engineer, without receiving any signal and in disregard of his duty, backed the cars, causing the injury complained of, is fatally bad for failing to allege the facts making it the duty of the engineer not to move the cars unless signaled.

Same.—The complaint is also objectionable as containing allegations in the alternative.

Appeal from Circuit Court, Cass County; J. M. Rabb, Special Judge.

Action by Charles M. Peck against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court, under Burns' Ann. St. 1901, § 1337u. Reversed.

G. E. Ross, for appellant.

Kistler & Kistler, for appellee.

JORDAN, J. Appellee, on January 10, 1903, by a complaint in four paragraphs, instituted this action to recover for personal injuries sustained by him on account of the alleged negligence of appellant railway company. The first and third paragraphs of the complaint were dismissed, and the cause tried on the second and fourth. A demurrer for insufficiency of facts was overruled to each of the latter paragraphs. On the issues joined the case was tried by a jury, and a verdict returned awarding appellee damages in the sum of \$2,400. The court, over appellant's motion for a new trial, rendered judgment upon the verdict. The errors assigned are to the effect that the court erred in overruling appellant's demurrer to each of the aforesaid paragraphs of the complaint upon which the cause was tried, and in denying its motion for a new trial.

It appears to be conceded by the parties that both the second and fourth paragraphs are based on the fourth subdivision of section 7083, Burns' Ann. St. 1901; the same being section 1 of the employers' liability act of 1893 (Laws 1893, p. 294, c. 130), which provides that "Every railroad or other corporation * * * operating in this state shall be liable for damages for personal injuries suffered by an employee while in its service, the employee so injured being in the exercise of due care and diligence in the following cases: * * * Fourth: Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any * * * locomotive engine or train upon a railway." The fourth paragraph of the complaint alleges that the defendant, appellant herein, is a corporation organized under the laws of the state of Indiana and owns and operates a steam railroad within and through said state, and within and through the city of Logansport, therein. It is alleged that in the latter city, on March 8, 1902, and long prior thereto, the defendant as a part of its railway system owned and operated a railway yard consisting of various switches, tracks, and spurs, extending in an easterly direction from a point near Berkly and Canal streets to a point near Seventeenth street in

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said city. On said day the plaintiff, appellee herein, was in the employ of the defendant as a switchman engaged with others of its employees in switching cars, making up and separating trains of cars, and in discharging duties usually required of a switchman in railway yards. There was used by the defendant for the purpose of switching and making up trains, etc., a locomotive engine which was in charge of a locomotive engineer who was an employee of the defendant. This engine was operated in the yards and on the tracks of the company. About 8 o'clock on the night of said day this engine in charge of said engineer was connected or attached to a cut of cars which were standing in said yard, and said cut was pulled in a westerly direction out on to one of the main tracks of the defendant's road for the purpose of clearing a switch which was connected with another track parallel thereto. The cut of cars was drawn past said switch connection and there stopped, "when and where," as stated or alleged by the pleader, "it became the duty of said locomotive engineer not to move or propel said locomotive and cars nor to back the same until signaled to do so by this plaintiff, or the conductor, an employee of said company in charge and conducting the switching of said cars." The pleading then alleges that the plaintiff rode on the cut of cars in question down to the switch and alighted therefrom, and that after the cars had passed the switch he then "carefully and prudently started to cross said track, and while doing so his foot caught within the equipment of said switch connection and road structure and became fastened and held him secure; that he immediately tried to release himself from such retention, using due care and diligence in that respect, but was unable to do so before the injury hereinafter complained of. That while in such condition, not being able to extricate himself and get off of said track, and without any signal to do so from this plaintiff or other person whose duty it was to signal such engineer, and in total disregard of his duty in that respect, said engineer in charge of said locomotive engine, as aforesaid, carelessly and negligently backed said cut of cars against and upon this plaintiff, thereby injuring him by crushing, maiming, and mangling his right leg," etc.

Appellant's counsel insist that both of the paragraphs in question are insufficient upon demurrer, at least, for the reason that each fails to show by the averment of proper facts the existence of any legal duty owing to the plaintiff herein, either by the defendant or the engineer to whom the alleged negligence is imputed. The rule is well and universally settled that, in pleading a cause of action in accident cases to recover for a personal injury or death of a person on account of negligence, it is essential that the complaint inter alia contain an allegation or statement of facts by which it is shown that the defendant owed a legal duty to the plaintiff, and that the defendant negligently performed or negligently failed to perform such duty. The mere allegation or conclusion of the pleader standing alone that such a

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duty existed, or in other words, in the absence of facts or circumstances to sustain the allegation or conclusion that the duty existed, is not sufficient as a matter of pleading. *Jeffersonville, etc., R. Co. v. Dunlap*, 29 Ind. 426; *Pittsburgh, etc., R. Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 218, and the many authorities and cases there cited; *Chicago, etc., R. Co. v. Barnes* (Ind. Sup.) 73 N. E. 91; *Black's Law & Prac. Accident Cases*, § 150; 14 *Ency. Pl. & Prac.* p. 332. The fourth paragraph, in regard to the question of showing a legal duty owing by the engineer to whom the negligence is imputed upon which appellee seeks to base his cause of action, certainly falls far short under the facts of coming within the requirements of the rule asserted. It must be remembered that there is a material difference in respect to a matter or question of pleading and one relating to evidence. In pleading or stating a cause of action facts must be directly and positively alleged, while in regard to evidence conclusions may be inferred or warranted from facts or circumstances shown upon the trial. *Laporte Carriage Co. v. Sullender* (at the May term, 1905) 75 N. E. 277. In *Chicago, etc., Ry. Co. v. Barnes* (Ind. Sup.) 73 N. E. 91, this court, in speaking in respect to what is necessary to disclose a legal duty in a pleading, said: "It was not essential to allege that a certain line of conduct was a duty imposed upon appellant by law, for as a general rule a legal duty may be implied from the facts averred in the pleading." It will be noted that the paragraph under review, after averring that the engineer stopped the cut of cars at the point in question, then charges that it became the duty of the engineer not to move or propel the locomotive and cars, nor to back the same until signaled to do so by the plaintiff or the conductor, etc. The pleading then proceeds to allege that the plaintiff in crossing the track caught his foot in the manner as shown and while in this position it is averred that the engineer, "without any signal from the plaintiff or other person whose duty it was to signal said engineer, carelessly and negligently backed said cut of cars," etc. Aside from the mere charge or conclusion of the pleader, there is nothing in the nature of facts alleged to in any manner disclose that it was the duty of the engineer not to move the locomotive and cars from the point at which they had been stopped unless signaled to do so by the plaintiff. If this duty arose out of any rule or rules of appellant company, or out of any orders or directions given by it, or from anything which required the engineer in charge of the engine in question to be subject to the signal of plaintiff at that particular time, such facts ought to have been alleged. Had the pleading upon the point in controversy properly revealed a legal duty owing by the defendant to the plaintiff, then, under a well settled rule, a violation or breach thereof might have been shown by a general averment of negligence. See *Pittsburgh, etc., R. Co. v. Lightheiser*, *supra*, page 265, 163 Ind., 71 N. E. 218; *Chicago, etc., R. Co. v. Barnes*, *supra*.

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Counsel for appellee, however, in view of their argument, apparently labor under the mistake that a general allegation of negligence will suffice to show both a legal duty and a violation thereof. This is untenable. The pleading may also be said to be open to the objections that it alleges certain matters and things in the alternative. As a general rule, to plead in the alternative vitiates the pleading. 1 Chitty on Pleading, *pp. 236, 237; *Wheeler v. Thayer*, 121 Ind. 64, 67, 22 N. E. 972, and authorities there cited. While the second paragraph is not quite as objectionable as the fourth, nevertheless it is open to the same objections which we have pointed out in regard to the latter, and these serve to condemn it.

Other questions are argued by counsel for appellant, but these, in part at least, are settled by the decision in the *Lighthouse Case*, *supra*, and the decisions of this court in later cases. In respect to others it is not clear that they will arise again upon another trial of the cause, therefore we pass them without consideration.

For the error of the trial court in overruling the demurrer to the second and fourth paragraphs of the complaint, the judgment is reversed, with instructions to sustain the demurrer to the paragraphs in question, with leave to appellee to file an amended complaint.

JEMMING v. GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota, Nov. 24, 1905.)

[104 N. W. Rep. 1079.]

Master and Servant—Personal Injuries—Operation of Railroad—Fellow Servants.*—A crew of nine men, consisting of an engineer, a craneman, a fireman, two jackmen, and four pitmen, were engaged in operating a steam shovel in a gravel pit. The outfit consisted of a shovel, an engine house, which contained the engine which operated the shovel, an old engine tender, which contained the coal and water, and a caboose. It was all located upon a short track, which was made up of sections six feet long. As the work progressed, and it became necessary to move the shovel forward, a section of track was taken up from the rear and placed in front of the shovel. The track was in no way connected with any other track. About 16 feet from the

*For the authorities in this series on the question what is, and is not, railroad work, see foot-note appended to *Mace v. Boedker & Co.* (Iowa), 17 R. R. R. 301, 40 Am. & Eng. R. Cas., N. S., 301.

For the authorities in this series on the question whether a foreman is a fellow servant of a hand working under him, see foot-note appended to *Hilton v. Fitchburg R. R.* (N. H.), 16 R. R. R. 757, 39 Am. & Eng. R. Cas., N. S., 757; *Hooe v. Boston & N. St. Ry. Co.* (Mass.), 14 R. R. R. 288, 37 Am. & Eng. R. Cas., N. S., 288.

For the authorities in this series showing who are vice principals or superior servants, whose negligence other employees do not assume, under the fellow servant rule, see foot-note appended to *Struble v. Burlington, etc., Ry. Co.* (Iowa), 16 R. R. R. 259, 39 Am. & Eng. R. Cas., N. S., 259.

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shovel outfit, there was a temporary track, upon which stood ballast cars, and this track was about 80 rods from the main railroad track, with which it connected at a point about one mile distant. The engineer employed and discharged the men and generally controlled the crew. He personally had charge of the work of moving the crane, and controlled the speed and course of the bucket attached thereto. Plaintiff, one of the pitmen, was injured by the negligent manner in which the engineer caused the bucket to swing from the ballast car into the pit. Held:

(1) That the plaintiff and his fellow servants were not at the time of the accident engaged in operating a railway.

(2) That the danger to which the plaintiff was subjected was not one of the hazards peculiar to the operation of a railroad, and therefore was not within section 2701, Gen. St. 1894.

(3) That the engineer was a fellow servant of the plaintiff, who was a pitman, and whose work it was, with the assistance of others, to take the six-foot section of track from the rear of the outfit, carry it forward, and fasten in position in front of the steam shovel.

Negligence—Pleading—Proof.—The rule that where the complaint in an action to recover damages for personal injuries alleges specific acts of negligence the proof will be confined to the matters thus alleged, applied.

(Syllabus by the Court.)

Appeal from District Court, Wright County; Arthur E. Giddings, Judge.

Action by Michael H. Jemming against the Great Northern Railway Company. At the close of the evidence, a verdict for defendant was directed, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

F. E. Latham and J. C. Tarbox, for appellant.

Rome G. Brown and Chas. S. Albert, for respondent.

ELLIOTT, J. The plaintiff was injured while in the employ of the defendant railway company, and brought this action to recover damages on the ground of the alleged negligence of the defendant. At the close of the plaintiff's case, the court directed a verdict in favor of the defendant, and from an order denying a motion for a new trial, the plaintiff appeals to this court.

The facts are comparatively simple and easily understood. The plaintiff was employed by the defendant railroad company as a pitman with one of the steam shovel crews engaged in shoveling gravel from a gravel pit in New London. He commenced work on the 12th of September, 1904, and was employed continuously from that date until the 10th of October, when he was injured. The steam shovel outfit with which the plaintiff was working consisted of the shovel, an engine house, which contained the engine operating the shovel, an old engine tender, containing the coal and water for the use of the engine, and a sort of caboose. It was a steam shovel such as is ordinarily used for similar work in places in no way connected with the railway business. The shovel was located upon sections of track about 6 feet long, which were not connected in any way with any other track. About 16 feet from the shovel outfit, there was a

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temporary track, upon which stood ballast cars, and this track was about 80 rods away from the main railway track, with which it connected about one mile from the place where the steam shovel was located. The shovel worked into the bank immediately in front and on the left-hand side. In its operation the dirt was removed from the place immediately in front before commencing on the left-hand side. When enough had been removed from the front to make the necessary room, a section of the movable track was taken up from the rear of the outfit, carried forward by the pitmen, and placed in front of the shovel. The crew consisted of a fireman, engineer, craneman, two jackmen, and four pitmen, of which the plaintiff was one. It was the duty of the pitmen to level off the place for a section of the track, and then pick up the ties and rails constituting the section, carry them around in front of the shovel, and put them in place. These rails were six feet long, and were fastened together by two bridal bars or pieces of iron, which could be moved forward and backward on the rail. The same section was used over and over again, as fast as the steam shovel moved ahead. The shovel was moved by the engine, which was used to do the digging. The movements of the shovel were controlled by the engineer and the craneman. The engineer would swing the crane around, raise and lower it, and when the dipper was filled would raise it up, and swing it over the ballast car. He governed the speed and the height and course of the dipper. He hired and discharged the men constituting the crew, and was in general charge of the operation of the shovel. The craneman attended to the raising and lowering of the dipper while they were dipping. As usually operated, when the men were in the pit, the shovel was swung around from the ballast car over and across the track, then lowered at something like a right angle with its first course, then brought back towards the machinery, and pushed forward into the bank until the dipper was filled; after which it was raised up over the track, and back again to the car, where it was emptied. On the day when the plaintiff was injured the shovel was being operated somewhat faster than usual. The plaintiff was in the pit, engaged in fixing the bridal bars, when the engineer brought the dipper down in an unusual course, "kind of cornerwise" from where it started, over the place where he was working, so that it would have struck him had he remained in that place. In trying to escape he fell on the track, and the dipper in its forward course towards the dirt struck him, and caused the injuries complained of. At the time of the accident both the ballast car and the steam shovel outfit were stationary, the machinery and crane mechanism only being in motion.

1. The appellant contends that the defendant was guilty of negligence in not framing such general rules and regulations as a prudent man would under the circumstances consider necessary and reasonable for the elimination of possible dangers and the protection of the employees. There is nothing in the record

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to show whether or not such rules were made in this instance. But the appellant is not in a position to predicate negligence upon the failure to make such rules, even if it appeared that none were made and promulgated. The allegation of the complaint is that, "while plaintiff was so working, and while he was exercising ordinary care and caution, and without fault or negligence on the part of the plaintiff in any manner whatever, defendant wrongfully, negligently, and carelessly caused the heavy iron scoop or bucket for digging up and elevating the gravel, with the heavy arm or lever by which it was operated, to descend in a sudden and unexpected manner upon the plaintiff." The court will not consider acts of negligence not charged in the complaint. *Connelly v. Minneapolis Eastern Ry.*, 38 Minn. 80, 35 N. W. 582; *Morrow v. St. Paul City Ry. Co.*, 65 Minn. 382, 67 N. W. 1002. In the *Connelly* case the court used language which is equally applicable to the case at bar. "The appellant in his brief relies to some extent upon the duty of the defendant to make and promulgate general rules for the conduct of employees as far as might be necessary for the protection of co-employees. This case does not involve any such consideration. The complaint does not allege any neglect of duty on the part of the defendant in that respect, nor otherwise than in the movement of these cars on the particular occasion, nor was such a question litigated." For applications of this principle, see *Chicago City Ry. Co. v. Bruley*, 215 Ill. 464, 74 N. E. 441; *Hudgins v. Coca Cola Bottling Co. (Ga.)* 50 S. E. 974.

This leaves but two questions for consideration: (a) Did the work that the plaintiff was engaged in involve hazards or dangers peculiar to the operation of railroads? And (b) if it did not, was the engineer of the steam shovel outfit a vice principal or a fellow servant.

2. Chapter 13, p. 69, Laws 1887 (Gen. St. 1894, § 2701), was enacted for the purpose of abolishing, under certain conditions, the common-law rule which exempts employers from responsibility for damages resulting from personal injuries occasioned by the negligence of a fellow servant.

(a) If the language of the statute had been given a literal construction, it would have applied to all the employees of railroad companies under all circumstances, whether the injury complained of was received in the course of the employment or otherwise. When the statute first came before the court in *Lavallee v. St. P., M. & M. Ry. Co.*, 40 Minn. 249, 41 N. W. 974, it was recognized that such a reading would render the act unconstitutional as class legislation. It was, however, to be presumed that the Legislature did not intend the statute to be construed in such a manner as to destroy its validity. It was therefore held to be intended for the benefit only of such employees as were engaged in the extremely hazardous business of operating railroads. Thus limited, the act was constitutional. As said by Chief Justice Gilfillan: "The frequency and magni-

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tude of the dangers to which those employed in operating railroads are exposed; the difficulty—sometimes impossibility—of escaping from them with any amount of care when they come; the fact that a great number of men are employed, co-operating in the same work, so that no one of them can know all the others, their competency, skill, and care, so that he may be said to voluntarily assume the risk arising from the want of skill or care by any one of the number—are a sufficient reason for applying a rule of liability on the part of the employer to the employee so employed different from that ordinarily applied between master and servant. But no just reason can be suggested why such difference should be founded, not on the character of the employment, nor of the dangers to which those employed are exposed, but on the character only of the employer." See *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Labatt, Master and Servant*, § 643 et seq. This case was followed in *Johnson v. St. Paul & Duluth R. R. Co.*, 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419, where after full and careful reconsideration the statute was held to apply only to the employees of railway corporations exposed to the peculiar hazards connected with the use and operation of railroads. After noting the unsatisfactory efforts which had been made to apply other theories, Mr. Justice Mitchell said: "Therefore, after mature consideration, our conclusion is that, if any limitation is to be placed by the courts upon the application of this statute (and on constitutional grounds there must be), the only one which will furnish any definite or logical rule is to hold that it only applies to those employees who are exposed to the peculiar hazards incident to the use and operation of railroads, and whose injuries are the result of such dangers." The rule, as thus established, that the statute includes only the class of servants exposed to injury by the dangers peculiar to the use and operation of railroads, has never since been departed from by this court. *Pearson v. C., M. & St. P. Ry. Co.*, 47 Minn. 9, 49 N. W. 302; *Weisel v. Eastern Ry. Co.*, 79 Minn. 245, 82 N. W. 576; *Holtz v. G. N. Ry. Co.*, 69 Minn. 524, 72 N. W. 805; *O'Neal v. G. N. Ry. Co.*, 80 Minn. 27, 82 N. W. 1086, 51 L. R. A. 532; *Kline v. Minnesota Iron Co.*, 93 Minn. 63, 100 N. W. 681. And see *Akeson v. C., B. & Q. Ry. Co.*, 106 Iowa, 54, 75 N. W. 676.

The statute is held not to apply to street railways, although included within its general language, for the reason that their employees are not exposed to the hazards and dangers incident to the operation of ordinary railroads. *Funk v. City of St. Paul*, 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608. In the *Lavallee* Case the plaintiff at the time of his injury was employed as a boiler maker in the defendant's shops, and clearly did not come within the statute. In the *Johnson* case plaintiff was one of a crew of men who were engaged in repairing a bridge on defendant's road, and in performing the work

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it was necessary to leave the draw partly open. Through the negligence of one of the crew, the draw was left unfastened. The plaintiff was at work between the stationary part of the bridge and the draw, when the wind blew the draw shut, and injured him. It was held that the injury was not caused by a hazard incident to the operation of a railroad, and there could be no recovery. In the Pearson case a crew of sectionmen were engaged in loading railroad iron from the ground upon a flat car, when some of the crew negligently let one of the rails fall upon plaintiff's arm. The risk was not in any way different from that to which any one is subjected who with others engage in loading or unloading ponderous articles. It was held that there could be no recovery. In *Njus v. Chicago, etc., Ry. Co.*, 47 Minn. 92, 49 N. W. 527, the plaintiff was engaged in removing iron bars from a car to the ground, and it was held that he was within the statute as construed by the Supreme Court of Iowa, in which state the accident occurred. In the Weisel case the plaintiff was one of the crew of a steam shovel working in a gravel pit, which was being operated in a manner very similar to the one in the case at bar. For the purpose of supplying water to the shovel, a locomotive was brought into the pit near the shovel, and a hose attached to the locomotive was carried to the boiler of the steam shovel. The water under steam pressure was thus forced from the locomotive to the shovel. The locomotive with the tender loaded with coal came into the pit, and remained stationary. The plaintiff picked up the hose, and handed it to another member of the crew, who was standing on the loose coal upon the tender. In handling the hose the man on the coal dislodged a piece of coal, which fell upon the plaintiff, and injured him. The risk to which the plaintiff was subjected was held not to be a railroad hazard, as the danger of the coal falling was no other, different, or greater in any respect than would exist in the case of a stationary coal bin in no way connected with a railroad. In the Holtz case the plaintiff, with three other employees of the railroad company, were engaged in repairing a car in the repair shed. While under the car, engaged in putting plates and nuts on the bolts as they were driven through by another employee, one of the bolts, being longer than the others, came in contact with plaintiff's head, and severely injured him. It was held not a railroad hazard. In the O'Neill case the plaintiff, a section hand, was injured by coming in contact with a projecting bolt while engaged in removing a part of a railway bridge. The risk was not peculiar to railroading, but was incidental to the repair of a bridge.

The same construction has been placed upon the Iowa statute, which is like that of Minnesota. In *Reddington v. C., M. & St. P. R. R. Co.* (Iowa) 78 N. W. 800, the plaintiff was employed to aid in coaling the defendant's engine. The engine and train were standing still alongside the coal shed. "While so employed in hoisting coal for the purpose of filling a car, a co-employee so

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negligently moved a crane they were using in the work that it struck the plaintiff's arm and broke it. The danger arising from the use of the crane does not appear to have been greater or less by reason of the fact that it was used in loading a railroad car, nor does it appear that the plaintiff while engaged in his duties was exposed to any dangers from the operation of the road. The case comes within *Malone v. B., C. R. & M. Ry. Co.*, 61 Iowa, 326, 16 N. W. 203, 47 Am. Rep. 813, and *Id.* (Iowa) 21 N. W. 756, 54 Am. St. Rep. 11, and *Foley v. C. R., I. & P. Ry. Co.*, 64 Iowa, 644, 21 N. W. 124. In our opinion the evidence shows no liability." See, also, *Nelson v. C., M. & St. P. Ry. Co.*, 73 Iowa, 576, 35 N. W. 611, reversing *Reddington v. C., M. & St. P. Ry. Co.*, 75 N. W. 679 on rehearing. In *Smith v. St. Paul & Duluth Ry. Co.*, 44 Minn. 17, 46 N. W. 149, it was held not a necessary condition to the applicability of the statute that the employment of the servant injured and of the servant whose negligence caused the injury should be of the same kind. Both the servants whose conduct was in question were engaged in actual railroad operations.

There is another line of cases which illustrates the application of the statute. In *Nichols v. C., M. & St. P. R. R. Co.*, 60 Minn. 319, 62 N. W. 386, the plaintiff was employed as a wiper in a roundhouse, and was called by the foreman to aid in straightening a wire cable used to pull a plow in unloading gravel from flat cars in repairing the road. One end of the cable was attached to a switch stand, and the other to a locomotive, which pulled until the wire became taut. One of the employees pushed the cable off the end of the switch stand, and it swung around, and broke the plaintiff's leg. The hazard was held peculiar to the railroad business; the court saying: "The test is not whether the conditions are in any respect parallel to those to be found in some kind of business, or whether the appliances are in any respect similar to those used in some other kind of business. If there is an element of hazard or condition of danger which contributed to the injury, and which is peculiar to the railroad business, the statute applies. There certainly are such elements and conditions to this case." In *Mikkelsen v. Truesdale*, 63 Minn. 137, 65 N. W. 260, it appeared that the plaintiff was a "wiper," whose duty it was to assist in taking engines in and out of the roundhouse, and to the coal shed for coal. He was injured while assisting in coaling an engine by it being negligently moved by his co-servant, and it was held that the hazard was one peculiar to the operation of railroads. In *Leier v. Minnesota Belt Line, R. & T. Co.*, 63 Minn. 203, 65 N. W. 269, the plaintiff was injured while attempting to step from a platform to the top of a passing car, under the orders of a conductor. Very naturally it was held that he was injured by reason of exposure to a railroad hazard. In *Blomquist v. G. N. Ry. Co.*, 65 Minn. 69, 67 N. W. 804, the plaintiff, a sectionman, was employed in repairing the defendant's main track. The work had to be done with great and extraordi-

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nary haste, in order to avoid danger to trains that were or might be approaching. While engaged with other sectionmen in carrying a heavy iron rail, the plaintiff was injured by a fellow workman negligently releasing his hold on the rail and letting it fall. It was admitted that this was a close or "border" case, but it could be fairly said that the plaintiff's employment involved an element of danger peculiar to the railroad business, and intimately connected with, and growing out of, the operation of the road, to wit, "that he was engaged in repairing the track upon which trains were operated, and that, in view of that fact, the work had to be done with great and unusual haste, in order to avoid danger to trains that were or might be approaching." The Blomquist Case was followed in *Anderson v. G. N. Ry. Co.*, 74 Minn. 432, 77 N. W. 240. The plaintiff was engaged with others in repairing a portion of defendant's roadbed, and was injured by the negligence of a fellow servant in releasing a jack which held up a portion of the track, which then fell upon the plaintiff's foot. For the purpose of bringing the case within the principle of the Blomquist Case, it was alleged in the complaint that the work was being executed in great haste, so as to complete the work and replace the track before the arrival of any trains. This allegation was put in issue by the answer, and as the issues were presented, it was, under the evidence, a question for the jury whether or not the work in which the plaintiff was engaged at the time of his injury was being executed under such conditions and circumstances as to expose the plaintiff to the peculiar hazards incident to the use and operation of railroads, and whether he was injured as the result of such dangers. The same principle was applied in *Kreuzer v. Great Northern Ry. Co.*, 83 Minn. 385, 86 N. W. 413, where the plaintiff was injured, while at work clearing a wrecked train from the defendant's tracks, by the falling of the roof of a disabled car, caused by the negligence of a fellow servant. The wreck was an extensive one, and the tracks were covered with the disabled cars. The crew was called out in the middle of the night, and from all the circumstances it was apparent that the work was urgent, and that great haste was necessary in order to clear the track for the passage of expected trains. As in the Anderson Case, it was clearly a question for the jury to say whether the work was being done under such circumstances as to expose the plaintiff to the hazards peculiar to operating a railroad. In *Lindgren v. M. & St. L. Ry. Co.*, 86 Minn. 152, 90 N. W. 381, the plaintiff, a sectionman, was injured through the negligence of a fellow servant while engaged in removing a hand car from the railroad tracks to make way for an approaching freight train; and it was held, following *Steffenson v. C., M. & St. P. Ry. Co.*, 45 Minn. 355, 47 N. W. 1068, 11 L. R. A. 271, that the case was within the statute, as removing the car from the track was a part of the operation of the car. See, also *Benson v. Chicago, etc., Ry. Co.*, 75 Minn. 163, 77 N. W. 789, 74 Am. St. Rep. 444.

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(b) The appellant also contends that the crew which was operating the steam shovel was operating a railroad, within the meaning of the statute as construed by the decisions of this court. We do not think that the steam shovel with its tender and sections of movable track can be thus dignified. In *Schneider v. Chicago, B. & N. E. Co.*, 42 Minn. 68, 43 N. W. 783, the plaintiff was injured by being thrown from the pilot of an engine which was being operated upon a temporary construction track. It was not questioned but that the defendant was operating a railroad, but it was claimed that the proviso of section 2701 applied, as the road was not open to public use. See also *Moran v. Eastern R. Co.*, 48 Minn. 46, 50 N. W. 930, and *Roe v. Winston*, 86 Minn. 77, 90 N. W. 122. The road under construction in *Schus v. Powers-Simpson Co.*, 85 Minn. 447, 89 N. W. 68, was an extensive logging railroad, and it was contended unsuccessfully that the statute did not apply to it, because it was not organized as a railroad corporation, and was not engaged as a common carrier of passengers and freight, but confined its railroad business exclusively to its own affairs. The *Schus Case* was followed in *Kline v. Minn. Iron Co.*, 93 Minn. 63, 100 N. W. 681, where it appeared that the defendant was operating a narrow gauge railroad, about two or three miles long, with a full equipment of cars and engines. The only question involved was whether the statute applied to a private railway.

Under the construction thus given the statute and as applied in the cases to which attention has been called, it is very clear that the danger to which the plaintiff in this case was subjected was not one of the hazards peculiar to the operation of a railway. It was such as is incidental to the management of all machinery, and the accident would have been as liable to occur had the steam shovel been operated by parties not in the employ of a railway company, in excavating for a canal, or for the foundation of a building. It was a hazard connected with the operation of a steam shovel, and the mere fact that the shovel belonged to a railway company, and was being operated by its employees, did not change its nature.

3. As the case does not come within the purview of section 2701, Gen. St. 1894, it is necessary to ascertain whether the plaintiff and the engineer, through whose negligence plaintiff was injured, were fellow servants. The claim that the engineer was a vice principal cannot be sustained. It is true that he was in charge of the crane, had power to hire and discharge men, and was in a position of authority over the men. But it can no longer be contended in this jurisdiction that mere superiority of rank creates the relation of vice principal. It is the established law of this state that it is not the rank of the employee nor his authority over other employees, but the nature of the duty or service that he performs, which determines whether he is a vice principal or a fellow servant. *Labatt, Master & Servant*, § 514 et seq; *Cooley, Torts* (2d Ed.) 640; *Jaggard, Torts*, vol. 2, p. 1037; *Dillon*,

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article in 24 Am. L. Rev. 190. The law imposes upon the master certain absolute duties, and imperatively requires that he either perform them personally, or through some representative. If he chooses to delegate such duties to one of his employees, the delegate thus becomes his personal representative, and the master is responsible for the manner in which the duties are performed. As to this absolute duty, the obligation of the representative, whatever his rank as compared with other employees, stands in the place of the master; as to all other matters, he is a fellow servant of the other employees. He thus occupies a dual relation. To the extent to which the master's absolute duties are delegated to him he is a vice principal; where engaged with others in the common employment of the master he is a fellow servant. *Lindvall v. Wood*, 41 Minn. 212, 42 N. W. 1020, 4 L. R. A. 793; *Perras v. A. Booth Co.*, 82 Minn. 191, 84 N. W. 739, 85 N. W. 179; *Brown v. Minneapolis & St. Louis Ry. Co.*, 31 Minn. 553, 18 N. W. 834; *Ell v. N. P. Ry. Co. (N. D.)* 48 N. W. 222, 12 L. R. A. 97, 26 Am. St. Rep. 621; *Wood v. New Bedford Coal Co.*, 121 Mass. 252.

In this case it was the absolute duty of the railway company to use proper care to furnish its employees with a reasonably safe place to do the work of the master, and proper machinery and appliances with which to do the work; and if the company had delegated the performance of this duty to the engineer, he would have been a vice principal in relation to such duties. But it is not charged that there was any failure in the discharge of such duties, as the negligence alleged is merely the improper handling of a part of the machinery in a particular instance. The swinging of a crane through the same course every time it is operated is the mere act of a workman, and not one of the absolute duties which the law imposes upon the master. It was the individual duty of the man who was placed in the position of engineer to do his work so as to avoid injury to his fellow workmen. If he failed to do this, and injury resulted thereby to another co-employee, it was the unfortunate result of the casual negligence of the fellow servant, and there can be no recovery of damages from the master.

For the purpose of this case, it must be presumed that the machinery was proper, and was being operated in a proper place. The negligence, therefore, was in the improper use by one servant of a proper instrumentality, for which the master is not liable to the servant. It was the duty of the engineer to control the operation and movements of the crane. It was the duty of the plaintiff to aid in moving and placing the track. One was as much an individual duty as the other. No orders were given, as far as the record shows, by the engineer to the plaintiff. Each was employed to do his differential share of the labor of the common employment for the accomplishment of the ultimate object of such employment.

The facts bring this case squarely within the rule as stated in

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Borgerson v. Cook Stone Co., 91 Minn. 91, 97 N. W. 734: "As to those who are engaged with others in the common employment or in the details of the work, the performance of such duties, though different in kind, requires them to be regarded as fellow servants."

The court, therefore, properly directed a verdict, and the order denying the motion for new trial is affirmed.

LANGHORN, JOHNSON & CO. v. WILEY.

(Court of Appeals of Kentucky, March 8, 1906.)

[91 S. W. Rep. 255.]

Master and Servant—Servant's Injuries—Defective Appliances.*—

Where a servant, breaking rock with a steel instrument intended to cut steel rails made of the best steel and practically new, was injured by a piece of steel flying from the instrument, the master was not liable, though a tool called a wedge was generally used for splitting rock.

Appeal from Circuit Court, Johnson County.
"Not to be officially reported."

Action by J. M. Wiley against Langhorn, Johnson & Co. From a judgment in favor of plaintiff, defendants appeal. Reversed.

See 87 S. W. 266.

D. J. Wheeler, C. M. Cooper, and W. I. Harkins, for appellants.

C. B. Wheeler, for appellee.

CARROLL, C. This action to recover damages for personal injuries was instituted by appellee against the appellants, and is based on the fact that they failed to furnish him proper tools to work with. The appellee was a common laborer engaged in track laying, and similar work, on a branch road being constructed by the Chesapeake & Ohio Railway Company. The appellants were general contractors for the work, and sublet parts of it to other firms; and it is claimed by the appellants that appellee, when he received the injury complained of, was not in their employment, but was working for one of the independent subcontractors; and they seek to escape liability on this ground. The evidence, however, although somewhat confusing on this point, tends to show that the appellee, when he was injured, was working for the appellants. He was employed by Mr. Stringfeller, who was a foreman for them, under Mr. E. T. Morris,

*For the authorities in this series on the question of the care required of the master in furnishing and maintaining tools and appliances, see foot-notes appended to *Smith v. Fordyce* (Mo.), 16 R. R. R. 378, 39 Am. & Eng. R. Cas., N. S., 378; foot-note appended to *Randolph v. New York, etc., R. Co.* (N. J.), 8 R. R. R. 637, 31 Am. & Eng. R. Cas., N. S., 637.

their general manager. He was paid by them for his services. The jury under a proper instruction found this issue of fact adversely to appellants, and their finding is supported by the evidence. At the time appellee was injured, he was holding the handle of a tool called a "T-rail cutter," which at the time was being used for splitting rock, and a fellow laborer was engaged in striking it with a heavy sledge, and, while thus occupied, a small piece of the T-rail cutter, or sledge, flew off and struck appellee in the arm near the wrist, penetrating the flesh and inflicting a wound that seriously injured him; and at the time of the trial—more than a year afterwards—he was suffering from the yet unhealed wound. The T-rail cutter is a steel wedge-shaped instrument, sharp at one end, with a head on the other, is about 2 inches broad and 8 or 10 inches long, and in the center has a handle some 20 inches in length. One person holds it in place by the handle, while another strikes it with a sledge. This T-rail cutter, as it appears from the evidence, is primarily intended for, and generally used in, cutting off the end of steel rails, but is occasionally used in splitting rock, although a tool called a "wedge" and held in place by the hand while being struck is generally used for splitting rock. Appellee had never used this T-rail cutter before, but had probably seen others use it in cutting rails, as he had been working for about two months before the injury in laying rails and ballasting the track. On August 24th, in company with other laborers, he was ordered to go and get out a lot of rock; and on August 25th they commenced splitting the rock gotten out the day before, and used the tools they were directed to use by the foreman, who suggested that appellee, as he was an old man, might hold the cutter, as it was easier work, and let one of the younger men handle the sledge. It is charged in the petition that appellee was not skilled in that kind of work; that he did not know what kind of tools were necessary; that the tools as furnished by the appellants were not safe, proper, or sufficient for the purpose; that they were unfit and defective; that appellee did not know the tools were not safe, proper, or sufficient, but appellants did know they were not. The answer traversed the petition and averred that the tools were safe, proper, and sufficient, but that, if they were in any way defective, appellant did not and could not have known of the defects; that appellee did know or could have known of it. The appellee on the trial recovered a verdict for \$1,500, and appellants complain that the court misinstructed the jury; that the verdict is excessive and is not sustained by the evidence; and that error was committed in refusing a peremptory instruction asked for.

Without detailing the injury received by the appellee, it is sufficient to say that the verdict in the light of all the evidence is not excessive, if the appellee is entitled to recover anything. The record is unusually free from incompetent evidence, and the instructions presented the law of the case with admirable brevity and clearness, if the case should have been submitted to the jury

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at all. There is no evidence whatever in the record that either the sledge or T-rail cutter was defective; nor that any latent defects in them, if any, could by the exercise of ordinary care have been discovered. In fact, the testimony showed that the T-rail cutter was made of the best quality of steel, tempered for the purpose of using it in cutting steel rails; that the sledge was the kind in general use; and that the tools were practically new. Nor is there any evidence that these tools were not reasonably safe for the purpose for which they were being used. It is true that generally a small tool called a "wedge" was used in splitting rock, and the T-rail cutter for cutting rails, although the T-rail cutter was sometimes used in place of the wedge in splitting rock. The mere fact that the small wedge was in more general use in splitting rock than the T-rail cutter is not in and of itself sufficient to hold the master liable upon the ground that the tools furnished were not reasonably safe. The master is only obliged to furnish the servant with tools and appliances that are reasonably safe. In *Vissman v. Southern Railway Company*, 89 S. W. 502, 28 Ky. Law Rep. 429, the rule is thus stated: "While this court has repeatedly announced, and yet holds to the rule, that it is the duty of the master to use ordinary care to provide the servant with reasonably safe tools, material, and place for the work required of him, it has never been carried to the extent of holding him liable for defects in tools, material, or place of work that no sort of inspection on his part could have discovered, for he is not bound to make the tools, material, or place of work absolutely safe, or to insure those engaged in his service against the ordinary risks incident to the nature of the employment."

Applying to the evidence in this case this principle of law, it cannot be said that these tools were not reasonably safe for use in the work of splitting rock. We are therefore of opinion that the peremptory instruction offered by the appellants should have been given, and the jury instructed under the evidence, as found in this record, to return a verdict for the appellants.

The judgment is reversed, and cause remanded for a new trial.

MOLLHOFF v. CHICAGO, R. I. & P. R. Co.

(Supreme Court of Oklahoma, Sept. 6, 1905.)

[82 Pac. Rep. 733.]

Master and Servant—Personal Injuries—Negligence of Fellow Servant.*—An employee is entitled to recover damages for injuries suffered through the personal fault or misconduct of his employer; but when the employer has been personally free from blame, and the injury results from the fault or misconduct of a fellow servant, it would seem reasonable that the wrongdoer should be alone responsible, and one who is innocent should not be called upon to pay damages.

*See foot-notes appended to *Louisville & N. R. Co. v. Dillard* (Tenn.), 17 R. R. R. 762, 40 Am. & Eng. R. Cas., N. S., 762.

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Same—Vice Principal.†—A vice principal is one who is charged with or engaged in the performance of one of the positive duties of the master, which the master cannot delegate to another so as to relieve himself from liability, or who is placed in the absolute control or management of an entire business, or of a distinct department of a business; and for the negligent acts of a vice principal, whereby an injury results to an employee, the master is liable.

Same—Fellow Servants—Burden of Proof.‡—The law presumes that all persons engaged in the common employment of the same master, though different in rank, are fellow servants, and the burden is on him who claims damages for an injury caused by the negligence of one employed by the same master to show that his co-employee is a vice principal and stands in the place of the master.

Same.§—The master or employer is not liable for an injury to one employee occasioned by the negligence of another employee engaged in the same general undertaking, and it is not necessary that the servants should be engaged in the same operation or particular work. It is sufficient to bring the case within the general rule of exemption if they are in the employment of the same master, engaged in the same common enterprise, and both employed to perform duties tending to accomplish the same general purpose or directed to the accomplishment of the same general end.

Courts—Following Decisions of United States Supreme Court.—In cases involving the application of general propositions of law, and not modified or controlled by statutory provisions, it is the policy of this court to adopt and follow the law as laid down by the Supreme Court of the United States.

(Syllabus by the Court.)

Error from District Court, Caddo County; before Justice Frank E. Gillette.

Action by George Mollhoff against the Chicago, Rock Island & Pacific Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

A. J. Morris, for plaintiff in error.

M. A. Low, Blake & Blake, and *H. D. Crosby*, for defendant in error.

BURFORD, C. J. The plaintiff in error, George Mollhoff, brought his action in the district court of Caddo county to recover damages from the Chicago, Rock Island & Pacific Railroad Company for injuries received while in the employ of said company as a laborer. The cause was tried to a jury, and after both sides had introduced their evidence and rested the court directed a verdict for the defendant.

†For the authorities in this series showing who are, and are not, vice-principals, or superior servants, whose negligence other employees do not assume, under the fellow servant rule, see foot-notes appended to *Struble v. Burlington, etc., Ry. Co.* (Iowa), 16 R. R. R. 259, 39 Am. & Eng. R. Cas., N. S., 259.

‡See note appended to *Hunter v. Kansas City & M. R. & B. Co.* (C. C. A.), 10 Am. & Eng. R. Cas., N. S., 620.

§For the respective jurisdictions in which the different department limitation of the fellow servant is, and is not, recognized, see foot-notes appended to *Conine v. Olympia Logging Co.* (Wash.), 15 R. R. R. 387, 38 Am. & Eng. R. Cas., N. S., 387; *Indiana, etc., R. Co. v. Otslot* (Ill.), 14 R. R. R. 149, 37 Am. & Eng. R. Cas., N. S., 149; *Chicago & E. I. Ry. Co. v. White* (Ill.), 13 R. R. R. 558, 36 Am. & Eng. R. Cas., N. S., 558.

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The principal and controlling question in the cause is whether the plaintiff's injuries were the result of the negligence of the railway company or of one of his fellow servants. The plaintiff and five or six other persons were engaged in operating a steam shovel. It was the duty of one person to stand upon the car upon which the shovel was mounted and operate the machinery which controlled its movements, while the plaintiff and three or four other persons worked on the ground about the place where the dirt was taken from, both at the sides of the car and in front of the shovel. It was the duty of the plaintiff to regulate a jack-screw set under a portion of the frame work which supported the shovel when in operation, and also to level off the dirt and remove clods and stones from in front of the place where the shovel was operated. The apparatus constituting the steam shovel consisted of a heavy iron turntable resting upon one end of a movable car. In the center of the turntable was an upright post several feet in height. At the base of this post, attached to the turntable, was a heavy iron beam of considerable length, extending at an angle out from the car. Near the center of this beam was attached a swinging crane, which had at its outer end a large steel scoop or bucket which carried the dirt. To these parts were attached chains, pulleys, rods, wheels, and levers, all so adjusted and connected as to be controlled and operated from the car at the rear of the turntable, and mostly by one person. The process of handling earth with this machine was to lay a railway track alongside an embankment, or in a cut, and run the car which carries the machinery and supports the shovel out to the end of this track. Then, with a train of dirt cars on a track alongside, the beam carrying the crane and bucket is swung off to one side, or directly in front, until the shovel comes in contact with the embankment and is filled by being propelled through the earth. When full, the beam is elevated and swung around to the dirt train until the bucket is over one of the cars, when it is emptied by being dumped by the operator. The plaintiff had been working with this shovel for several days, and knew the manner of its operation and the danger of getting in the way of the bucket or shovel in its movements. On the day of the injury the shovel had been for a short time operating at one particular place, and not where it could reach the plaintiff. While he was engaged in leveling the dirt and smoothing down the rough places for the shovel to work over, the operator moved the bucket and swung it around to the place where the plaintiff was working. He failed to see the change in time to seek safety, and was struck by the bucket and pushed back against the car and had his jaw broken, and sustained other slight injuries.

The contention of the plaintiff is that one Butler, who was in charge of the shovel and gang of men, was a vice principal, and that it was through his negligence that the injury resulted to plaintiff. On the question of the relationship of Butler to the company, the evidence was that he was the engineer; that he

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operated the steam shovel, employed and directed the men who worked with him in the gang, made out their time checks, superintended the work, and discharged men at times. The outfit belonged to the railroad company, and was engaged in handling dirt for the railroad company. All were in the employ of the company and looked to it for their pay. There was no evidence showing what Butler's position with the company was, whether officer, manager, superintendent, overseer, or boss. He and his fellow workers were all laborers engaged in one common undertaking, that of handling earth to be used in repairing the roadbed of the railroad. While it is in evidence that Butler occupied a different grade of employment from that of the plaintiff and his fellow laborers, there is no evidence that the operation of this steam shovel was a separate and exclusive department of the company's business, or that Butler was in the absolute control and management of that or any other department of the company's business. The evidence failed to show that he was more than a foreman of a gang of men, the engineer of a piece of machinery, or the conductor of a work train. He was one of the daily laborers with all the others, operating and working with the steam shovel, in accomplishing the end for which they were employed. Counsel for plaintiff in error very aptly and correctly states his position as follows: "If at the time of the injury Butler was a vice principal or representative of the defendant in error, then plaintiff in error would have the right, under the law, to hold the defendant in error responsible for the negligent acts of Butler which caused the injury. On the other hand, if Butler was not a vice principal of the company, but was a mere fellow servant of the plaintiff in error, then there can be no recovery." Counsel for plaintiff in error is entitled to much commendation for the elaborate and logical manner in which he has collected and presented the numerous decisions of the various courts of last resort upon the question of what is necessary to constitute fellow workmen fellow servants, so as to relieve the master from liability for their acts of negligence toward each other. But counsel is in error in assuming that this is the "first case presented to this court which raises squarely the fellow servant proposition." Yet it may be that at the time counsel's brief was prepared the case of *Ruemmeli-Braun Co. v. Cahill*, 14 Okl. 422, 79 Pac. 260, had not been decided by this court. That case did squarely involve the fellow servant proposition, and the court, following the settled policy of this court that upon general propositions of law, unaffected by legislative enactments, it will adopt the law as enunciated by the Supreme Court of the United States, settled the law of this territory, as we trust, upon sound principles which will insure justice to all affected by it.

The propositions determined in that case are, we think, decisive of the case under consideration. It was held in that case that the authorities establish the doctrine that one may become a vice principal only either when he is performing or charged with

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one of the positive duties of the master belonging to that class which the master cannot delegate to a subordinate, so as to relieve himself from liability for the negligent acts of such subordinate, or where he is placed in the absolute control and management of an entire business, or of a distinct and separate department of a business; and the burden is upon the person alleging that one is a vice principal to establish the fact that he was clothed with absolute authority of management, and in the absence of such proof it is presumed that all engaged in the common employment of the same master, though different in rank, are fellow servants. In the case at bar the plaintiff failed to establish such facts as would support the reasonable inference that Butler had the entire and exclusive control of a distinct department of the business of the defendant railway company, and in the absence of such proof the presumption is that he and his collaborators were engaged in the accomplishment of a common end, were all engaged in the common employment of the same master, and hence fellow servants. In the case of *New England Railroad Company v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181, it was said: "We have no hesitation in holding, both upon principle and authority, that the employer is not liable for an injury to one employee occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough to bring the case within the general rule of exemption if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end. * * *" In the case of *Northern Pacific R. R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994, the Supreme Court of the United States said: "The rule is that, in order to form an exception to the general law of nonliability, the person whose neglect caused the injury must be one who was clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of service in a department. This distinction is a plain one and not subject to any great embarrassment in determining the fact in any particular case." This doctrine was quoted with approval by Mr. Justice Brewer in *Northern Pacific Railway Co. v. Dixon*, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. Ed. 1006.

Under the foregoing rule the burden was upon the plaintiff to show that the work being done by the steam shovel and the gang of men operating it at the time of the accident was a distinct department of the business of the defendant railway company, and not a separate branch or piece of work of a distinct department, and that the person whose negligence caused the injury was clothed with the control and management of such distinct

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department. The evidence falls far short of this requirement. All that was attempted to be shown was that the steam shovel was working at a point on the defendant's railroad, that it was being operated for the defendant company, that Butler was the engineer of the steam machinery and apparatus for operating the shovel, and that he directed its operations, and employed, discharged, and directed the men working with him, all of whom were employed and paid by the defendant company; and we are asked to infer from these facts and circumstances that this one steam shovel and its outfit constituted a separate and distinct department of the defendant company's business, and that Butler was clothed with the complete control and management of such department. Such an inference is unwarranted. This point was expressly decided by this court in *Ruemmeli-Braun Co. v. Cahill*, supra, wherein it was said: "Such an one will be deemed a fellow servant with the person injured, even though he has power to employ and discharge hands and to oversee them and view and direct the work, unless his authority in his department is entire and absolute." It is a matter within the common knowledge of all persons of average intelligence, and of which this court takes judicial knowledge, that the Chicago, Rock Island & Pacific Railroad Company operates a great system of railways, traversing and reaching out into a dozen states and territories west of the Mississippi river, and that the steam shovel is one of the utilities in general use in modern railway construction, improvement, and repair; and to hold by inference that so extensive a system, covering so large an area, and including thousands of miles of track, had created a separate department for repairs of its roadway, and made it to consist of one steam shovel and half a dozen men, and placed the exclusive control and management of such department under Butler, is to infer the ridiculous.

There was no contention that the company had not exercised reasonable care in providing machinery and appliances that were reasonably safe to work with, and a place reasonably safe for one to work in, and workmen reasonably competent for their service and reasonably safe to work with. The engineer and operator of the steam shovel and the plaintiff were at the time of the alleged injury fellow servants, and the court committed no error in directing the verdict.

The judgment of the district court of Caddo county is affirmed, at the cost of the plaintiff in error. All the Justices concur, except GILLETTE, J., who tried the cause below, not sitting.

GRIFFITH *v.* LEXINGTON TERMINAL R. CO.

(Supreme Court of Georgia, Dec. 22, 1905.)

[53 S. E. Rep. 97.]

Master and Servant—Injury to Servant—Assumption of Risk.*—It appearing from the plaintiff's petition that he voluntarily assumed to perform for his master duties so perilous as to subject him to imminent danger to life and limb, and no facts being alleged which support the charge that the master was responsible for a resulting injury, the defendant's demurrer was properly sustained.

Same.—One who knowingly engages to do what no prudent man ought to risk his life in endeavoring to accomplish cannot, if injury ensues, rely upon the law to throw around him the protection of a fiction that his employer impliedly undertook to take steps to minimize the hazard assumed, at least to the extent of making performance possible.

(Syllabus by the Court.)

Error from Superior Court, Oglethorpe County; H. M. Holden, Judge.

Action by Joe Griffith against the Lexington Terminal Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The question presented for determination in this case is whether or not the trial court erred in sustaining a general demurrer to the plaintiff's petition. He alleged that he received permanent physical injuries while in the service of the defendant railroad company in the capacity of fireman and brakeman on its road, which extends from Crawford to Lexington, in this state. He further alleged that he was under the direction and subject to the control of another of the company's employees, who acted both as conductor and engineer upon the only train operated on that road, and that it was his duty to fire the engine, and also to leave it at certain points along the line in order to apply the brakes to the train, which was a train for the carrying of both freight and passengers. As to the circumstances under which he received his injuries, his petition furnishes the following account: In coming from Crawford to Lexington there is, near the latter station, a considerable downgrade, which makes it necessary that the brakes on the train should be applied in order to bring it to a stop at that station without injury to or strain on the engine or other machinery, especially when the train is in part made up of freight cars or cars other than the regular passenger coach; the train not being equipped with air brakes. When freight cars are attached between the engine and the passenger coach, it was the plaintiff's duty to leave the engine at this point while the train was in motion, stepping from

*See foot-note appended to *Lee v. Northern Pac. Ry. Co.* (Wash.), 17 R. R. R. 315, 40 Am. & Eng. R. Cas., N. S., 315; foot-notes appended to *Dalton v. Rhode Island Co.* (R. I.), 11 R. R. R. 575, 34 Am. & Eng. R. Cas., N. S., 575.

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the engine to the ground, and then to get upon the platform of the passenger coach while the train was still in motion, and there apply the brakes. He had been working on the road in the dual capacity of fireman and brakeman for several years. On the day of the injury several heavy cars were attached to the engine in front of the passenger coach, and, when the train was coming down the decline of downgrade near Lexington, the plaintiff, in the performance of his aforesaid duties and in obedience to the orders of his superior, who had charge of the train and authority to give such orders, undertook to alight from the engine to get upon the platform of the passenger coach to apply the brakes. He stepped from the engine to the ground, and then attempted to get on the platform of the passenger coach as it approached, but was thrown violently to the ground, and the coach ran over one of his feet. The "train, when he undertook to board the same, was moving at an unusually high rate of speed at this point, though petitioner was not aware of such unusual or dangerous rate of speed," and "just at that time passengers came out upon the platform of said passenger coach, and even upon the bottom steps of the same, and in the way of petitioner, as he undertook to perform said duties and to obey said orders." The plaintiff alleged that "the failure of said company to equip said train with air brakes, the requiring of petitioner to alight from and to board a moving train, the running of such train at such dangerous rate of speed, knowing that petitioner was required to perform these duties, and the allowing of passengers to occupy the steps of the platform of the passenger coach, under such circumstances, was each gross negligence in said company, and that his said injuries are the direct result of said negligence, and due in no way to any fault or negligence on his part." Plaintiff was a strong, healthy man, 32 years of age.

Haires Cloud and Joel Cloud, for plaintiff in error.

Jos. B. & Bryan Cuning and Hamilton McWhorter, Jr., for defendant in error.

CANDLER, J. (after stating the facts). The plaintiff, a man of mature years, had been in the service of the defendant company for a number of years, engaged in performance of the perilous duties assigned to him. If his master wrongfully called upon him "to alight from and to board a moving train" running at an obviously dangerous speed, he should have declined to obey. Having voluntarily assumed the risk incident to the discharge of services which were obviously attended with danger, he effectually cut himself off from holding the company accountable for any injury he may thus have brought upon himself. He cannot excuse his voluntary assumption of the risk on the occasion referred to in his petition by saying that a servant of the company, who was his superior in authority, ordered him to jump from the moving engine and board the passenger coach

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while the train was still in motion. He was merely ordered by his superior to do what he had engaged himself to the company to do. Besides, if the order was an improper one because it exposed him to imminent peril, he should have declined to execute it; the danger being as apparent to him as to his superior.

The train was not supplied with air brakes. This omission was not, as matter of law, a negligent failure of duty which the company was, relatively to him, bound to perform. A railway company is under no duty to equip its trains with the latest and most approved appliances, and the plaintiff does not undertake to assert, as matter of fact, that reasonably safe equipment necessarily includes the adoption and use of air brakes. Even were this otherwise, the petition discloses that the plaintiff knew that air brakes were not supplied by his master, and it was for this very reason that he was called on by the company to perform the perilous feat of jumping from the engine in order to apply the hand brakes upon the rear of the train. He remained in its service, well knowing of such increased risk, if any, to which the failure to equip the train with air brakes subjected him, and is therefore not now in a position to complain that the company disregarded its duty to him to furnish reasonably safe appliances. He accepted this increased risk, if there was one, instead of refusing to imperil his life by the continual use of appliances which were inadequate to the emergencies of the enterprise in which he engaged.

Passengers came out upon the platform, even occupying the bottom steps of the coach, and were in the way of the plaintiff when he attempted to board it. That the defendant company was negligent in "the allowing of passengers to occupy the steps of the platform of the passenger coach, under such circumstances," is a bare conclusion of the pleader, unsupported by the allegation of any fact or circumstance going to show wherein the company was remiss in performing any duty which it owed to the plaintiff. It is not negligence per se to fail to maintain such a surveillance over passengers as to render it impossible for them to get in the way of the employees whom a railway company engages to operate one of its trains. What precautions in this regard were, or were not, observed by the defendant, cannot be learned from the pleadings; nor does the petition disclose that the plaintiff was not familiar with the habits of passengers, under the regulations adopted by the carrier, touching their remaining within the coach while en route, nor that he did not have as much reason as did his superior to apprehend that they might leave their seats and go out upon the platform, where they might get in his way when he attempted to board the moving coach. He does not even assert that he did not at the time know of their presence, or that he had no opportunity of seeing them and noting their position before he undertook to mount the steps; nor does he in any way attempt to negative want of care on his part in assuming the risk of boarding the train while they were standing on the

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steps in his way. For aught that appears, the company was not responsible for their presence there, and the plaintiff, though aware of their presence, deliberately took the chance of probable injury in voluntarily endeavoring to board the train under the circumstances.

It was, he explains, at that time "moving at an unusually high rate of speed," though he "was not aware of such unusual or dangerous rate of speed." Why he was unaware that the train was running at an unusual and even a dangerous rate of speed is not disclosed. Accustomed, as he was daily, to performing the hazardous task of jumping off the engine onto the rear of the train while it continued its journey, he should have offered at least some excuse for not observing the speed of the train and realizing the danger of attempting to board it. If the engineer was chargeable with knowledge that the train was running at an unusual rate of speed, it would seem that the plaintiff ought as well to have known the fact. The danger present was different only in degree from that which he engaged himself to daily ignore. One who knowingly engages to do what no prudent man ought to risk his life in endeavoring to accomplish cannot, if injury ensues, rely upon the law to throw around him the protection of a fiction that his employer impliedly undertook to take steps to minimize the hazard assumed, at least to the extent of making performance possible. For the reasons above stated, we concur with the trial judge in the view that the plaintiff's petition did not set forth a cause of action.

Judgment affirmed. All the Justices concurring.

WESTON *v.* BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, Essex, Feb. 26, 1906.)

[76 N. E. Rep. 1050.]

Carriers—Delay in Transportation—Damages.*—Where scenery and theatrical properties were shipped under a written contract, but the carrier knew that they were to be used at destination in a widely advertised exhibition, and that the shipper was under a great expense in their use, in an action for negligent delay in transportation, in which no loss of special profits was sought to be recovered, plaintiff was entitled to recover his ordinary gross earnings, less such expenses, if any, as the deprivation of the use of the property saved him from.

*For the authorities in this series on the question as to what are the elements and measure of the damages recoverable for delay or loss of freight, see foot-note appended to *Traywick v. Southern Ry. Co.* (S. Car.), 17 R. R. R. 678, 40 Am. & Eng. R. Cas., N. S., 678; *Crutcher v. Choctaw, O. & G. R. Co.* (Ark.), 16 R. R. R. 661, 39 Am. & Eng. R. Cas., N. S., 661; foot-note appended to *Choctaw, O. & G. Ry. Co. v. Rolfe* (Ark.), 16 R. R. R. 525, 39 Am. & Eng. R. Cas., N. S., 525; *American Express Co. v. Jennings* (Miss.), 16 R. R. R. 546, 39 Am. & Eng. R. Cas., N. S., 546.

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Exceptions from the Superior Court, Essex County; Chas. A. De Courcy, Judge.

Action by one Weston against the Boston & Maine Railroad. Judgment for plaintiff granting insufficient relief, and he brings exceptions. New trial ordered.

Sanborn & Sanborn, for plaintiff.

Henry F. Hurlburt and Damon E. Hall, for defendant.

LORING, J. This case presents in different forms but one question, namely: To what damages is the owner of a theatrical exhibit entitled in case of a negligent delay in the transportation of his scenery and other theatrical properties by a carrier who had full knowledge that they were to be used in an exhibition previously widely advertised at the place of destination, and that the owner was under an expense of \$300 or \$400 a week in that connection. The judge ruled that the plaintiff was limited to \$4, "the actual money lost or expended in looking up the goods."

The first ground on which the defendant has undertaken to support this ruling is that the shipping receipt, or the shipping receipt and the shipping order, constitute a written contract between the parties, by which, and by which alone, their rights are to be determined. No authorities have been cited for this contention, and we conceive that none can be found to support it. We assume, for the purposes of this decision, that this shipping receipt, or at any rate the shipping order and this receipt taken together, constitute a written contract. But it is always competent to show knowledge by the contracting parties to a written contract of the circumstances on the basis of which it is made, for the purpose of showing what was within the contemplation of the parties in making the contract. Knowledge of the circumstances which form the basis on which the contract is made is competent on the question as to what damages were in contemplation of the parties to it, whether a party seeks to recover ordinary or special damages. That has been laid down in all the cases on the subject. See, for example, *Scott v. Boston & New Orleans Steamship Co.*, 106 Mass. 468; *Harvey v. Connecticut & Passumpsic River Railroad*, 124 Mass. 421, 26 Am. Rep. 673; *Mather v. American Express Co.*, 138 Mass. 55, 52 Am. Rep. 258; *Loneragan v. Waldo*, 179 Mass. 135, 60 N. E. 479, 88 Am. St. Rep. 365; *Hadley v. Baxendale*, 9 Ex. 341; *Horne v. Midland Railway*, L. R. 7 C. P. 583 (s. c., Ex. Ch. L. R. 8 C. P. 131); *Simpson v. London & Northwestern Railway*, 1 Q. B. D. 274; *Grebert Borgnes v. Nugent*, 15 Q. B. D. 85.

The next ground on which the defendant has sought to support the ruling is on the authority of *Waite v. Gilbert*, 10 Cush. 177; *Harvey v. Connecticut & Passumpsic River Railroad*, 124 Mass. 421, 26 Am. Rep. 673; and *Swift River Co. v. Fitchburg Railroad*, 169 Mass. 326, 47 N. E. 1015, 61 Am. St. Rep. 288. But the plaintiffs in those cases were confined to the damages to which the plaintiff was confined in the case at bar, for want of

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proof of notice, while in the case at bar proof of the necessary notice was plenary. Where a plaintiff is deprived of the use of property valuable for use, and the property is something that can be replaced, his damages are the expenses of hiring the property which he is forced to substitute for it. But, if the property is such that it cannot be replaced, the measure of the damages is what such property is ordinarily worth for use. See *Fletcher v. Tayleur*, 17 C. B. 21, 28; *Cory v. Thames Iron Works & Ship-building Co.*, L. R. 3 Q. B. 181; *Ex parte Cambrian Steam Packet Co.*, L. R. 6 Eq. 396, 308 (S. C. L. R. 4 Ch. 112, 117). There are no cases in this commonwealth very near to the one under discussion. Perhaps the nearest are the cases in which it is held, in an action of trover, that where the property converted has no market value, but has a special value to the plaintiff, he can recover that value. *Stickney v. Allen*, 10 Gray, 352; *Green v. Boston & Lowell Railroad*, 128 Mass. 221, 35 Am. Rep. 370; *Mather v. American Express Co.*, 138 Mass. 55, 52 Am. Rep. 258. See, also, in this connection, *Wall v. Platt*, 169 Mass. 406, 48 N. E. 270.

Where the article of the use of which the plaintiff has been wrongfully deprived cannot be replaced, and the plaintiff recovers for being deprived of the use of what such property ordinarily earns, he recovers profits in one sense of the word, but not in that sense of the word in which it is used when it is said that profits cannot be recovered because too remote. What is meant by that is that the plaintiff cannot recover for the loss of special profits, such as a particular bargain which he has lost. For a good statement of the distinction, see *Masterton v. Mayor of Brooklyn*, 7 Hill (N. Y.) 62, 42 Am. Dec. 38. There are cases where contracts are made with reference to such special profits, and where such special profits can be recovered. Such profits were recovered in *Grebert Borgnes v. Nugent*, 15 Q. B. D. 85; and it was such special profits that were unsuccessfully sought for in *Waite v. Gilbert*, 10 Cush. 177; *Harvey v. Connecticut & Passumpsic River Railroad*, 124 Mass. 421, 26 Am. Rep. 673; *Swift River Co. v. Fitchburg Railroad*, 169 Mass. 326, 47 N. E. 1015, 61 Am. St. Rep. 288; *Hadley v. Baxendale*, 9 Ex. 341; and *Horne v. Midland Railway*, L. R. 7 C. P. 583 (s. c., L. R. 8 C. P. 131). The difference between those cases and the case at bar is this: Delay in the delivery of scenery and the other properties of a traveling theatrical company ordinarily means no performance by the company. But delay in the transportation of the broken shaft of a mill, for example, as in *Hadley v. Baxendale*, *supra*, does not ordinarily mean that the mill will stop.

We construe the statement of the plaintiff's counsel in the case at bar, "that he claimed no loss of profits and no loss in the market value of the goods by reason of the delay in the delivery of the goods, but that he did claim loss in the rental value or the loss of the use of the property," to be a statement that he did not

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ask for loss of special profits, but for loss of the ordinary earnings of the property here in question. The case at bar is not a case of special profit or special damage, but a case of the ordinary damages consequent on a delay in the delivery of scenery and other properties of a traveling theatrical company. That a common carrier with notice is liable in such a case is plain from the decision made in *Simpson v. London & Northwestern Railway*, 1 Q. B. D. 274, as to delay in the delivery of samples to be exhibited at a cattle show. The ordinary damages in case of a delay in the transportation of such property as we have in the case at bar are different from the ordinary damages in case of a delay in the transportation of ordinary merchandise, and for that reason carriers usually put such property in a different classification from that in which ordinary merchandise is put. The question, however, is the ordinary damage from a delay in the transportation of that kind of freight. To get those ordinary damages, notice that the freight to be transported is that kind of freight, and that it is to be used at its destination, must be given to the carrier; and the damages recoverable are the ordinary earnings of the property in question. See *Cory v. Thames Iron Works & Shipbuilding Co.*, and *Ex parte Cambrian Steam Packet Co.*, *ubi supra*.

The case at bar presents a further question not raised by the facts of the case last cited. There was evidence here that the plaintiff told the defendant that he was "under a big expense, between \$300 and \$400 a week," in the use of the thing delayed in transportation. In such case, since the owner has to pay the expenses or some of the expenses incident to using the property, he can recover, not the ordinary net earnings, but the ordinary gross earnings, less such expenses, if any, as the deprivation of the use of the property saved him from. The concession made by the plaintiff's counsel, that he did not ask for special profits, saves us from considering the suggestion thrown out in *Loneragan v. Waldo*, 179 Mass. 135, 138, 60 N. E. 479, 88 Am. St. Rep. 365, that it may be that the fact that a carrier cannot refuse to carry goods offered to him for transportation prevents him from being held for special damages or special profits, as to which see *Kelly, C. B.*, in *Horne v. Midland Railway*, L. R. 8 C. P. 131, 136, 137, and *Mayne, Damages* (7th Ed.) 42.

The defendant raised a question as to whether an exception was properly taken to the offer to prove the expense the plaintiff was under while waiting for the goods in question. But since, in our opinion, the case must go back for a new trial by reason of his other exceptions, it is not necessary to decide whether that exception was properly saved or not.

The plaintiff is entitled to a new trial on the question of damages. So ordered.

WEINSCHENCK *v.* NEW YORK, N. H. & H. R. R. (two cases).
(Supreme Judicial Court of Massachusetts, Norfolk, Jan. 5, 1906.)

[76 N. E. Rep. 662.]

Carriers—Injuries to Passengers—Care Required.*—Where the servants of the carrier left the car door open, by reason of the closeness of the air in the car, the carrier was not bound to keep it from closing at a time when the car was in motion and before the next station was called.

Same.*—It is generally known that the catches on car doors are not intended to hold the doors securely against being shut, but only to guard against their being easily moved; and it cannot be inferred from the mere closing of a door, caused by an unusual jolt of the car, whereby a passenger was injured, that there was a defective fastening, or that there had been negligence in putting the door on the catch by the servant who opened it.

Exceptions from Superior Court, Norfolk County; Loranus E. Hitchcock, Judge.

Separate actions of Sally A. Weinschenck and Carl H. Weinschenck against the New York, New Haven & Hartford Railroad. From a judgment for defendant, plaintiffs bring exceptions. Exceptions overruled.

Edward E. Elder, Albert R. Mackusick, and John G. Brackett, for plaintiffs.

Choate, Hall & Stewart, for defendant.

SHELDON, J. These were two actions of tort brought to recover damages for personal injuries to the female plaintiff, who was the wife of the plaintiff in the second suit. At the trial the presiding judge ruled that on the pleadings and evidence the plaintiffs could not recover, and ordered a verdict for the defendant in each case; and the cases are here on the plaintiff's exceptions to that ruling. No question, however, was raised as to the pleadings.

There was evidence that on the evening of September 24, 1904, the plaintiffs took a train on the defendant's road at Atlantic, for the purpose of going to Harrison Square, where they were to change cars and take another train to Mattapan. They entered the second car of the train, and took seats at the front end of the car. The train stopped at Pope's Hill, the last station before reaching Harrison Square, and there a man in

*For the authorities in this series on the subject of a carrier of passengers' duties and liabilities with respect to vehicles, see foot-notes appended to *Willworth v. Boston Elevated Ry. Co.* (Mass.), 16 R. R. R. 69, 39 Am. & Eng. R. Cas., N. S., 69; foot-notes appended to *Harold v. Baltimore & O. R. Co.* (C. C. A.), 15 R. R. R. 303, 38 Am. & Eng. R. Cas., N. S., 303.

As to the carrier's duties with respect to opening and closing car doors, see note, 4 R. R. R. 227, 27 Am. & Eng. R. Cas., N. S., 227.

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uniform, either a conductor or a brakeman, opened the car door, and it remained open without swinging until the plaintiffs left the train. As the train was approaching Harrison Square, just before it stopped and before the brakeman had called the station, the husband arose from his seat, and went out upon the platform to alight, and the wife followed behind him. Just as she stepped upon the threshold, there was an unusual jolt of the car. She felt as if she were swaying forward and going to fall, and she testified that she grabbed the first thing to protect herself, which was the jamb of the door. She stepped on the platform, and then the door closed on her fingers, causing the injuries complained of. It was a comfortably warm evening, the car was well filled, and the air in the car was very close before the door was opened. She testified that she had plenty of time to get the train which she and her husband desired to get at Mattapan, but he testified that he expected to find the connecting train already in the station, did not know how much time they had to get it, but did not think it was very much, and he intended to get out without losing any time.

On this testimony, it is at least difficult to say that the female plaintiff was in the exercise of due care. The train had not reached the station, and no call of the station had been made. Trains cannot be run without some jolts, especially in stopping; and this is a matter of common knowledge. She knew that the door was open. There was no evidence that it was fastened back, or that she believed it to be fastened back; and it is generally known that the catches of car doors are not intended to hold them securely against being shut, but only to guard against their being lightly or easily moved. This is all that she would have had a right to infer even if she had believed or known that the door was held by a catch. It has been said in a later case that a passenger in a railroad car, who is voluntarily standing when there are plenty of vacant seats, cannot recover for an accident which it is manifest would not have happened to him if he had been sitting down. *Farnon v. Boston & Albany Railroad*, 180 Mass. 212, 217, 62 N. E. 254. See *Worthen v. Grand Trunk Railway*, 125 Mass. 99; *Barden v. Boston, Clinton & Fitchburg Railroad*, 121 Mass. 426. This woman had voluntarily left the inside of the car, and put herself in a position where she might be hurt if she should lose her balance by reason of a jolt of the car.

But however this may be, we do not think that there was any evidence of negligence in the defendant. The jolt of the car was described as an unusual one; but it does not appear to have been due to any defect in track or car, or to any carelessness in the running of the train. *Timms v. Old Colony Street Railway*, 183 Mass. 193, 66 N. E. 797; *Byron v. Lynn & Boston Railroad*, 177 Mass. 303, 58 N. E. 1015. Nor could it be found that the defendant was careless in the management of the door. Apparently it had been left open for the reason of the closeness of the

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air in the car; and the defendant was not bound to keep it from closing at a time when it was not called upon to anticipate that passengers would be standing upon the threshold or the platform. Nor could it be inferred, from the mere closing of the door, either that there was a defective fastening or that there had been negligence in putting the door on the catch, for the reasons stated in speaking of the plaintiff's own care. It is not a case to which the doctrine of *res ipsa loquitur* can be applied, as was done in *White v. Boston & Albany Railroad*, 144 Mass. 404, 11 N. E. 552. It does not appear that this door worked by a spring or catch, as did the window in *Faulgner v. Boston & Maine Railroad*, 187 Mass. 254, 72 N. E. 976. Nor is there anything to help these plaintiffs in *Gee v. Metropolitan Railway*, L. R. 8 Q. B. 101, in which a closed door opened when it ought not to have done so.

There was no evidence that the injuries of Mrs. Weinschenck were due to any negligence of the defendant.

Exceptions overruled.

AMMONS v. SOUTHERN RY. CO.

(Supreme Court of North Carolina, Dec. 12, 1905.)

[52 S. E. Rep. 731.]

Carriers—Ejection of Passengers—Actions—Damages.*—To entitle a passenger to exemplary damages for his wrongful expulsion from a train, such expulsion must be attended by rudeness, insult, or aggravating circumstances calculated to humiliate the passenger, and an award of such damages is unwarranted, where the passenger is merely told by the conductor that he must get off unless he pays the fare demanded, and on the passenger's refusal stops the train about a quarter of a mile from a station, and the passenger alights without anything further being said.

Same.†—Where a passenger is wrongfully ejected from a train, his

*For the authorities in this series on the question of the right to recover punitive or exemplary damages for injuries to passengers, see foot-notes appended to *Peterson v. Middlesex Somerset Traction Co.* (N. J.), 15 R. R. R. 672, 38 Am. & Eng. R. Cas., N. S., 672; *Dagnall v. Southern Ry. Co.* (S. Car.), 15 R. R. R. 59, 38 Am. & Eng. R. Cas., N. S., 59; *Southern Ry. Co. v. Lanning* (Miss.), 15 R. R. R. 1, 38 Am. & Eng. R. Cas., N. S., 1; *Pickett v. Southern Ry. Co.* (S. Car.), 15 R. R. R. 269, 37 Am. & Eng. R. Cas., N. S., 269; *Yazoo & M. V. R. Co. v. Mattingly* (Miss.), 14 R. R. R. 48, 37 Am. & Eng. R. Cas., N. S., 48.

†See foot-note appended to *Louisville, etc., Ry. Co. v. Covetts* (Ky.), 15 R. R. R. 63, 38 Am. & Eng. R. Cas., N. S., 63; foot-notes appended to *Miller v. Southern Ry. Co.* (S. Car.), 15 R. R. R. 33, 38 Am. & Eng. R. Cas., N. S., 33; foot-notes appended to *Southern Ry. Co. v. Lanning* (Miss.), 15 R. R. R. 1, 38 Am. & Eng. R. Cas., N. S., 1; *Cain v. Louisville & N. R. Co.* (Ky.), 14 R. R. R. 376, 37 Am. & Eng. R. Cas., N. S., 376.

For the authorities in this series on the question, when, and when not, recovery may be had on account of mental suffering, see foot-notes appended to *Southern Pac. Co. v. Hetzer* (C. C. A.), 17 R. R. R. 724, 40 Am. & Eng. R. Cas., N. S., 724.

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demand may be considered as one in tort, and he may recover as actual or compensatory damages, a fair and just compensation for the wrong, including his actual loss in time or money, and the physical inconvenience or mental suffering or humiliation endured, and which occurs as a reasonable and probable result of the wrong, and he is not limited in his recovery to mere pecuniary loss.

Appeal from Superior Court, Swain County; Ferguson, Judge.

Action by W. R. Ammons against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Moore & Rollins, W. B. Rodman, and A. B. Andrews, Jr., for appellant.

F. C. Fisher and A. J. Franklin, for appellee.

BROWN, J. This case was before the court at the last term and the facts are fully stated. 138 N. C. 555, 51 S. E. 127. The case comes back upon one exception only by the defendant to the refusal of the judge to give the following instruction: "That in no aspect of the case can the plaintiff recover punitive damages." The court erred in refusing the instruction. Damages are classified generally as "compensatory" and "punitive." The latter are termed also vindictive or exemplary damages. Compensatory damages are defined by Joyce and other text-writers as "those by which the actual loss sustained is measured and the injured party recompensed therefor." Joyce on Damages, § 26. Punitive damages are independent of the injury inflicted or the legal wrong committed, and are allowed in excess of simple compensation upon a theory of punishing the wrongdoer for the wrong inflicted, with the view to prevent similar wrongs in future. Where a trespass is committed deliberately in violation of plaintiff's rights, in a manner and under circumstances of aggravation and humiliation, showing a reckless and lawless disregard of the plaintiff's rights, the law allows damages beyond the strict measure of compensation by way of punishment. *Champion v. Vincent*, 20 Tex. 811; Joyce on Damages, § 28, and notes.

The facts are, as testified to by the plaintiff, that he applied to the defendant's agent at Almond for a ticket to Noland. The agent said he did not have any, and that "I could get on, and he would speak to the conductor about it, and that the fare would be 40 cents. I rode down the road about quarter of a mile, and the conductor came to me and said he wanted a ticket, and I handed him 50 cents, and said I wanted to go to Noland's Creek, and he looked at his book and said it would be 75 cents, and I asked him if he was not mistaken, and he said 'No,' and I told him I would not pay 75 cents, and so he told me I would have to get off. I told him I had applied for a ticket and the agent said he didn't have any, and he said they did have tickets, and I told him I didn't know anything about it, only what they told me; that they told me they didn't have any tickets, and the fare would be 40 cents, and he told me then I would have to get off.

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So I told him, if he put me off, I would sue the railroad company, and he pulled the cord and stopped the train and I walked out. Q. What did he say in reply to you when you said you would sue the railroad company? A. He said he could not help that. Q. Is that all he said? A. I believe that is all he said. Q. Can't you remember what he did say when you said to him that you would sue the company? A. He said several words. I don't remember every word he said. Q. Think if you know anything else? A. I don't think of anything else. Q. Where did he put you off? A. I got off by his instructions. He told me to get off. Q. Where? A. About a quarter of a mile this side of Almond. Q. How far is the station you wanted to go to from there? A. About 14 miles by rail. Q. What were you doing at that time? A. I was working on Noland's Creek. Q. What were you getting a day? A. Dollar and twenty-five cents. Q. Did you put in a day's work? A. No, I walked in in the evening, and went to work the next morning. I didn't hire anything. I walked. I just lost a day's work, is all. Q. How much did you lose? A. The day. Q. Is that all you recollect about this transaction? A. Yes, I believe it is."

To entitle a passenger to such damages, his wrongful expulsion from the train must be attended by such circumstances as tend to show rudeness, insult, "aggravating circumstances calculated to humiliate the passenger. * * *" *Holmes v. Railroad*, 94 N. C. 318; *Rose v. Railroad*, 106 N. C. 170, 11 S. E. 526; *Knowles v. Railroad*, 102 N. C. 66, 9 S. E. 7. The subject of punitive and compensatory damages has been discussed in many cases in our own reports. In the opinion in this case at the last term, Mr. Justice Walker called attention to some of the more important. The plaintiff's testimony fails to bring his case within the authority of any of these precedents so as to justify the awarding of punitive damages. On the next trial of this case, it will be the duty of the trial judge to explain to the jury the meaning of, and difference between punitive and compensatory damages, and to instruct them upon the plaintiff's own testimony, as herein set out, that he is entitled to compensatory damages only.

The findings upon the several issues are set aside, and a new trial ordered.

New trial.

SPOONER v. OLD COLONY ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Bristol, Jan. 5, 1906.)

[76 N. E. Rep. 660.]

Carriers—Injuries to Passengers—Care Required.*—When plaintiff's intestate became a passenger on defendant's street railway, it became defendant's duty to provide for his benefit proper facilities for transportation, including proper servants, and to carry him safely over his route to destination.

Same—Position of Passenger—Contributory Negligence.—Where a street car from which the intestate was thrown, though an open one, was provided for the accommodation of passengers and by its arrangement passengers were invited to sit on a rear seat facing the rear of the car, intestate was not guilty of negligence in seating himself in such a seat.

Same—Ordinary Jolts.†—Ordinary jolts or lurches of a street car occasioned by its operation over the track are fairly incidental to that mode of travel, and the annoyance therefrom is assumed or contemplated by the passenger.

Same—Death of Passenger—Statutory Liability—Gross Negligence.—Rev. Laws, c. 111, § 267, provides that, if the life of a passenger is lost by reason of the unfitness or gross negligence of the carrier's servants, his personal representatives may recover damages occurring to the degree of culpability. Held that, while "gross negligence" as used in such section requires something more than mere want of common prudence, the difference is one of degree, and the term is satisfied by proof of a reckless or willful disregard of consequences on the part of the carrier's servants.

Same—Evidence—Findings.—In an action for death of an infirm passenger by being thrown from his seat in defendant's street car as it was rounding a curve, evidence held to justify a finding that defendant's servants operated the car in a reckless, willful, or wanton disregard of existing conditions, within Rev. Laws, c. 111, § 267, authorizing a recovery for the death of a passenger caused by gross negligence of the carrier's servants.

Exceptions from Superior Court, Bristol County; Frederick Lawton, Judge.

Action by Arthur C. Spooner, as administrator of Philip H. King, deceased, against the Old Colony Street Railway Company. A verdict was rendered in favor of plaintiff, and defendant brings exceptions. Overruled.

J. B. Tracy and W. A. Swift, for plaintiff.

Frederick S. Hall and Charles C. Hagerty, for defendant.

*For the authorities in this series on the subject of a carrier of passenger's duties and liabilities with respect to vehicles, see foot-notes appended to *Willworth v. Boston Elev. Ry. Co.* (Mass.), 16 R. R. R. 69, 39 Am. & Eng. R. Cas., N. S., 69; foot-note appended to *Harold v. Baltimore & O. R. Co.* (C. C. A.), 15 R. R. R. 303, 38 Am. & Eng. R. Cas., N. S., 303.

†For the authorities in this series on the subject of the liability of the carrier for injuries to passengers from jerks or jolts of trains or cars, see foot-note appended to *Conroy v. Detroit United Ry.* (Mich.), 16 R. R. R. 671, 39 Am. & Eng. R. Cas., N. S., 671; foot-notes appended to *Hatch v. Philadelphia & R. Ry. Co.* (Pa.), 16 R. R. R. 586, 39 Am. & Eng. R. Cas., N. S., 586.

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BEALEY, J. By the provisions of St. 1886, c. 140, now Rev. Laws, c. 111, § 267, if the life of a passenger is lost "by reason of the negligence or carelessness of a corporation operating a street railway, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business," his personal representatives may recover damage for the use of the widow or children, to be assessed within a minimum and maximum limit, according to the degree of culpability. *Holland v. Lynn & Boston Railroad Co.*, 144 Mass. 425, 11 N. E. 674. When the plaintiff's intestate became a passenger, the defendant engaged to provide proper facilities of transportation, including competent servants, and to carry him safely over its route to where, at the end of the transit, he would leave the car. In occupying the seat which faced the fender at the rear, and in taking the position which he assumed after seating himself, the decedent did nothing unusual or that could be found to have been inconsistent with ordinary prudence. The car, although an open one, was provided for the accommodation of passengers, who by this arrangement were invited by the company to choose and use this seat among others, and the intestate had the right to assume that in inviting and permitting its use it was suitable for him to occupy, and where he could ride in safety while being transported.

It is a matter of common knowledge that, either from inequalities of surface or necessary curves in the construction of the roadbed, the cars of a railroad operated by steam, or a street railway, may in passing over the track occasionally jolt or lurch, without this motion being caused by a defect in the track or in the car. Whenever this occurs, though it may be disturbing and annoying, yet it is considered as fairly incidental to the mode of travel, and must be held to have been contemplated by the passenger. *Stewart v. Boston & Providence Railroad Co.*, 146 Mass. 605, 16 N. E. 466; *Holland v. West End Street Railway Co.*, 155 Mass. 387, 29 N. E. 622; *McCauley v. Springfield Street Railway Co.*, 169 Mass. 301, 47 N. E. 1006; *Byron v. Lynn & Boston Railroad Co.*, 177 Mass. 303, 58 N. E. 1015. Inasmuch as there is no evidence that the roadbed was not properly constructed, or the car suitably equipped or managed by competent employees, the plaintiff fails to show any act of negligence by the defendants under the statute, and if this, also, is true of the conduct of the motorman and conductor, the verdict must be set aside.

Upon taking his seat, the intestate sat with his legs crossed below the knees, and his hands folded. While in this position he was observed by the motorman and conductor; the latter especially noticing that he "seemed quite exhausted." From this evidence the jury could find that both knew he was on the rear seat in the situation described. By reason of his weight and the distance from the outer rail of the track where his body was found, they further could have found that his ejection was due

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to the rapid swaying of the car. See *Evensen v. Lexington & Boston Street Railway Co.*, 187 Mass. 77, 72 N. E. 355. But ordinary carelessness by either the conductor or motorman, which, if he had survived, would have been sufficient to support an action against the defendant, is not gross negligence, for which the company is liable. Before taking up the evidence for the purpose of determining this question, it may be well to refer to the meaning of the statutory term "gross negligence."

We have uniformly held that, while something more than a mere want of common prudence is intended and must be proved, yet the difference is one of degree, and when a reckless or willful disregard of consequence is manifest such conduct is evidence of great or gross negligence. *Galbraith v. West End Street Railway Co.*, 165 Mass. 572, 579, 581, 43 N. E. 501, and cases there cited; *Emery v. Boston & Maine Railroad Co.*, 173 Mass. 136, 139, 53 N. E. 278; *Banks v. Braman*, 188 Mass. 367, 74 N. E. 594. The route of the car was about 9 miles, over which it was expected to pass in 30 minutes, and, with the usual delays to take on and leave passengers, the average speed was 18 miles an hour. The witnesses differed as to the rate through the curve; those for the plaintiff estimating it to be from 12 to 15 miles an hour or more, while the motorman and conductor fixed it at from 5 to 6 miles. Accompanying their testimony was the evidence of the defendant's experts that a car moving from 12 to 15 miles an hour would smoothly and safely pass over the curve; and, if this testimony stopped at this point, it would be evident that proof of recklessness by either of the defendant's employees was lacking. But, when the conductor saw the body of the deceased passing through the air from the car to the ground, he gave the usual signal to stop, and in a few seconds rang the emergency bell, and, although the brake was immediately applied at a point about 30 or 35 feet from where the intestate fell, the car, with the brake set, ran over a dry rail about 365 feet further before it was finally stopped. Upon this conflicting evidence the jury could have found, from the evidence of the conductor and motorman, that reducing the speed from 18 to 5 or 6 miles when entering upon and in going through the curve indicated what rate in their judgment was reasonably proper.

Although the experts of the defendant were of opinion that, if the car was moving from 12 to 15 miles, it would not take on an unusual or unsafe swaying motion, the weight to be given their evidence was for the jury, in connection with the fact that, if no greater rate of speed was employed than the maximum estimate given by them, the intestate would not have been subjected to an impetus by which he was instantly thrown from the car. But there was proof of a greater rate of speed even than that fixed by the experts as safe. Two of the witnesses called by the plaintiff had observed the car as it passed them about a quarter of a mile distant from the scene of the accident, and according to the evidence of one it was 12 minutes late, and by

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the evidence of the other it was "going so fast" that he looked at his watch to ascertain the time. Another witness, who was the only passenger besides the intestate, gave evidence that between the time the signal was given and the car stopped perhaps 10 seconds elapsed. If his evidence was believed, then within this period the car had moved a distance of at least 365 feet, which would indicate that it was running slightly in excess of 20 miles an hour. From the testimony of these witnesses an inference fairly could be drawn that as it approached the curve the car was not only running to make up time, but its velocity was greater than its customary speed of 18 miles. This view would be materially corroborated and strengthened by the further uncontroverted fact that upon application of the brake to a substantially empty car, and under such conditions that it must have effectually gripped the wheels, its momentum had become such that it continued under way for the distance already stated. We are of opinion that it was open upon all the evidence for the jury to find that an old man plainly seen to be in somewhat feeble health had been accepted as a passenger, invited and permitted to take a seat in a place provided for this purpose, but which might become dangerous if an undue rate of speed was maintained in passing over this curve, and thereafter in reckless or willful or wanton disregard of these conditions the car was so managed, and controlled by those in charge, as to wrongfully cause his death.

The defendant suggests that the present case should be governed by *Witherington v. Lynn & Boston Railroad Co.*, 182 Mass. 596, 66 N. E. 206, but the facts are widely dissimilar. In that case the intestate fell from an open car while standing near the edge of the rear platform, and the track, though curved, was nearly straight. It is distinctly said in the opinion, "This is not a case where the speed was so great as to result in any unusual motion or jar of the car," and it also was held that there was no negligence on the part of the defendant in not warning the passenger of the obvious danger of standing close to the side of a rapidly moving car. Here it could be found that the deceased did not fall, but by the excessive force of the lateral motion was lifted bodily from his seat and thrown out of the car.

In the opinion of a majority of the court the order must be: Exceptions overruled.

BENNETT v. LOUISVILLE RY. CO.

(Court of Appeals of Kentucky, Feb. 20, 1906.)

[90 S. W. Rep. 1052.]

Appeal—Review—Verdict—Preponderance of the Evidence.—The Supreme Court will not disturb a verdict as against the preponderance of the evidence.

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Carriers—Injury to Passenger—Street Cars—Negligence in Starting Car.*—It is not negligence for the operatives of a street car to fail to keep the same stationary until a passenger has seated himself, unless he is crippled or in some condition making it reasonably apparent to those in charge of the car that the passenger needs unusual care.

Same.—The fact that one taking passage on a street car was large and fleshy did not render it negligence for the operatives of the car to fail to keep it stationary until he had seated himself.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

"To be officially reported."

Action by Mary E. Bennett against the Louisville Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

R. C. & J. J. Davis, for appellant.

Fairleigh, Strauss & Fairleigh, Kohn, Baird & Spindle, and *Greene & Van Winkle*, for appellee.

NUNN, J. Appellant instituted this action against the appellee to recover damages for injuries received upon one of its street cars, as she alleged, by the negligent management and operation thereof by the motorman. On the trial the jury returned a verdict in favor of the appellee, and she has appealed.

She alleged in her petition, in substance, that the motorman stopped the car for her, and as she entered the door of the car, and was in the act of taking her seat, the motorman negligently turned on the current, and started the car, she alleged, with a sudden and unusual jerk, by which she was thrown with great force and violence against the end or edge of the seat, by reason of which she received painful injuries to her body and spinal column; that she was made sick and sore, and confined to her bed for a long time, suffering great pain, and was compelled to undergo a serious and painful operation, in the removal of the lower end of her spinal column; that her loss of time and medical expense amounted to \$500; and was otherwise injured and damaged to the extent of \$5,000. The appellant asked for a reversal, for the reason that the verdict was against and contrary to the evidence. That the court erred in giving to the jury instructions 2 and 3.

The appellant and one witness sustained her allegation that the jerk in starting the car by the motorman was a sudden and unusual one, and that by reason thereof she was injured, and in

*For the authorities in this series on the question of the care required in taking on passengers, see foot-notes appended to *Atchison, T. & S. F. Ry. Co. v. Holloway* (Kan.), 17 R. R. R. 648, 40 Am. & Eng. R. Cas., N. S., 648; *Talbert v. Charleston & W. C. Ry. Co.* (S. Car.), 17 R. R. R. 53, 40 Am. & Eng. R. Cas., N. S., 53; foot-notes appended to *Redington v. Harrisburg Traction Co.* (Pa.), 16 R. R. R. 600, 39 Am. & Eng. R. Cas., N. S., 600; *Hatch v. Philadelphia & R. Ry. Co.* (Pa.), 16 R. R. R. 586, 39 Am. & Eng. R. Cas., N. S., 586; note, 3 R. R. R. 589, 26 Am. & Eng. R. Cas., N. S., 589.

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the way and manner and to the extent stated. There was no contrariety of evidence as to the extent of her injuries. The appellee introduced one witness, whose testimony tended to show that the jerk made in starting the car, was not sudden or unusual. We are of the opinion that the preponderance of the evidence favored claim of appellant, but we are not authorized to reverse the judgment of the lower court on that account.

Instruction No. 3 complained of by appellant is an instruction in the usual form upon the question of contributory neglect. The objection to this instruction is that there was no evidence upon which to base it. It is true that there was a bare scintilla of evidence, if any, to authorize it. It is a doubtful question as to whether or not it should have been given, but in our opinion the giving of it did not prejudice the substantial rights of the appellant.

Instruction No. 2 reads as follows: "It was not the duty of the agent and servant of the defendant in charge of the car to have the car remain standing until the plaintiff was seated in said car; and unless you believe from the evidence that the said agent or servant in charge of the car failed to exercise that degree of care with which he was charged, as set out in instruction No. 1. and by a reckless or unnecessary jerk or lurch of said car started the same, and the plaintiff was injured thereby, the law is for the defendant, and you should so find." By the first instruction the court, in effect, instructed the jury that it was the duty of the agent of appellee in operating the car upon which appellant was a passenger to observe the highest degree of care, which a prudent person would exercise under like circumstances, in the management and control of the car, to enable appellant to board it with safety, and if the jury believed from the evidence that the agent in charge failed to exercise the degree of care stated, and by a reckless or unnecessary jerk or lurch of the car, started the same, and appellant was thereby thrown against her seat and injured, then the law was for her.

The appellant complains of that part of the second instruction which told the jury that it was not necessary for the agent in charge of the car to have it remain standing until the appellant was seated. This instruction seems to be in conformity with the rule enunciated in the case of *L. & N. Railroad Company v. Hale*, 44 S. W. 213, 19 Ky. Law Rep. 1652, 42 L. R. A. 293, and *Sheffer v. L. H. & St. L. R. R. Co.*, 60 S. W. 403, 22 Ky. Law Rep. 1305. Both of these cases, however, were against steam railways, but we can see no reason why the same rule should not be made applicable to street railways. It would be impracticable to require in every instance those in charge of a street car to have it remain still until every passenger that boards it takes a seat. This would make street car travel slow, vexatious, and inconvenient.

There are instances in which a car should be permitted to remain still until the passenger is seated; that is, where the passenger is old, feeble, crippled, or in any condition which makes

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it reasonably apparent to those in charge of the car that the person needs unusual care and precaution for his or her protection. But the case at bar does not come within this rule. It is true that she was proven to be large and fleshy, but there was no proof that her flesh was any great burden to her, nor was there anything proven which might have indicated to the motorman in charge of the car that any extra precautions were required on his part for her safety.

The judgment is affirmed.

NICOLETTE LUMBER CO. v. PEOPLE'S COAL CO.

(Supreme Court of Pennsylvania, Jan. 2, 1906.)

[62 Atl. Rep. 1060.]

Carriers—Demurrage—Lien.*—A carrier has no lien on freight for demurrage for delay in unloading the barges on which it was carried at their point of destination, and has no right to retain possession of the goods until the demurrage is paid.

Appeal from Superior Court.

Action by the Nicolette Lumber Company against the People's Coal Company. Judgment for defendant was affirmed by the Superior Court, and plaintiff appeals. Reversed.

The facts appear by the opinion of the Supreme Court and by the report of the case in 26 Pa. Super. Ct. 575.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

William M. Hall, Jr., for appellant.

Henry A. Davis, for appellee.

BROWN, J. This is an action of replevin brought for the recovery of possession of lumber, which had been transported on barges of the defendant from the mill of the plaintiff in West Virginia to Pittsburg, under a freight contract of \$2 per thousand feet. This charge was paid before the institution of the replevin, and is not involved in the case. It seems there was a delay of some days after the lumber reached Pittsburg before the plaintiff or its consignees demanded the barges from the defendant for the purpose of taking them further up the Allegheny river to the point of delivery designated in the contract. The delay is alleged to have been due to the low state of the water, rendering navigation impossible. Be this as it may, the instructions to the jury were that if the plaintiff or its consignees neglected to receive the barges upon their arrival at Pittsburg, after reasonable notice from the defendant to do so, it was entitled to a verdict

*For the authorities in this series on the subject of the right to impose demurrage charges, see foot-note appended to *Southern Ry. Co. v. Lockwood Mfg. Co.* (Ala.), 15 R. R. R. 306, 38 Am. & Eng. R. Cas., N. S., 306; *Yazoo & M. V. R. Co. v. Searles* (Miss.), 14 R. R. R. 465, 37 Am. & Eng. R. Cas., N. S., 465.

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for demurrage, for the reason that it had a lien on the lumber for such claim. Under these instructions, there was a finding for the defendant for \$525.40. On appeal from the judgment on this verdict the Superior Court affirmed it, holding that the defendant, as a common carrier, had a claim for demurrage which was a lien on the lumber, by virtue of which it had a right to retain the property until the amount of the lien was paid.

The question on this appeal is not as to the right of the appellees to demand and recover compensation for the detention of its barges, if they were unreasonably detained by the appellant, but is as to its right of lien upon the lumber, entitling it to retain possession of the same until its alleged lien was paid. If it had such a lien, it was entitled to retain possession of the property until the lien was discharged; if it had not, it unlawfully detained the lumber from the plaintiff, even if its barges had been unreasonably detained. In an action of replevin nothing can be tried but the right of possession of the property in controversy. In this case the lumber admittedly belonged to the plaintiff, which could not be denied the possession of it by the defendant, unless the latter had a superior right of possession. A mere claim for compensation for the prolonged use of its barges could give it no such right, unless the right to such compensation created a lien on the property on the barges—a lien on the lumber for the demurrage. Even if it be conceded, as held by the Superior Court, that the appellee was a common carrier, by what rule of the common law, or by what statute, had it any such lien as it asserted, and as the Superior Court recognized? The parties to the contract for carrying the lumber might have provided for it in their contract, and if so, the appellant would be bound by it; but there was no such agreement. That none exists in the absence of it is so well settled that we need do nothing more than to call attention to some of the many authorities upon the subject.

When a shipper of goods commits them to a common carrier for shipment to a given point, he does so under a contract that fixed freight charges shall be paid. The business of the common carrier is to carry freight, and to carry it for compensation to be paid either at the time of shipment or before the consignee is entitled to receive it. The amount to be paid is as well known to the shipper as to the carrier, and, as it is to be paid before the consignee receives the goods, it is a lien upon them until paid. But in the absence of any provision in the contract for demurrage, caused by the shipper or his consignee, it is not taken into account; for it is not reasonably to be anticipated in any case, either by the shipper or carrier. It is the exception in connection with the business of the common carrier, and therefore there is no rule of the common law applicable to it beyond the one that requires the delinquent shipper or consignee to pay for his detention of the cars, not anticipated or provided for in the contract of shipment. This is the liability that attaches to every one to pay reasonable compensation for the use and occupation of the

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property of another not used or occupied in pursuance of any contract; but out of such a condition no lien on the personal property on the premises so used and occupied can arise, because, if for no other reason, the amount of the liability is not fixed. For what amount is a common carrier, in any case, to have a lien for demurrage when the amount to be paid for it has not only not been fixed by a contract, but is in dispute and is to be settled by a jury?

If any lien could exist in the present case, it would be a common-law lien, which is "a right in one man to retain that which is in his possession belonging to another, till demands of him, the person in possession, are satisfied. * * * It is founded upon the immemorial recognition of the common law of a right to it in particular cases, or it may result from the established usage of a particular trade." 19 Am. & Eng. Ency. of Law (2d Ed.) p. 7. "The lien allowed to the carrier by the law extends only to his charges for the transportation of the goods, and does not include expenses for warehousing them; nor damages for the breach of collateral contracts or covenants by the shipper, even when incorporated in the bill of lading; nor extend to the payment of port charges; nor to damages for detention beyond the time fixed by the contract for receiving, or loading or unloading the goods; nor to compensation for delay in the nature of demurrage." Hutchinson on Carriers, § 478. "There is no lien for demurrage unless it is stipulated for in the contract." 9 Am. & Eng. Ency. of Law (2d Ed.) p. 270. All liens are created by law or by contract of the parties; and when the law gives none, neither party can create one without the consent or agreement of the other. Hence the consignee of goods shipped by railroad is not bound by rules and regulations of the company providing for a lien for demurrage, though published, without his or the consignor's assent thereto when the contract for shipping the goods was made. Even a knowledge of such rules, without assent thereto, will not affect the shipper or consignee. A common carrier has no lien upon goods for damages arising from the neglect of the consignee to take them away within a reasonable time after notice to him of their arrival. *Chicago & Northwestern Ry. Co. v. Jenkins*, 103 Ill. 588. The inconvenience or expense occasioned by the detention of cars constitutes a claim in the nature of a demurrage, but the carrier must seek his redress in the ordinary manner for the breach of an implied contract to pay for the use and occupation of the cars. He cannot enforce it by a detention of the goods. *Crommelin v. New York & Harlem Railroad Co.*, *43 N. Y. 90. "The right of a common carrier to a lien extends to charges connected with the expenses of transportation strictly." 2 Redfield on Railways (6th Ed.) p. 193. Attention need not be called to more authorities upon this subject. The judgment of the Superior Court, affirming the judgment of the court below, must be reversed.

Judgment reversed, and a venire facias de novo awarded.

DIECKMANN v. CHICAGO & N. W. RY. CO.

(Supreme Court of Iowa, Jan. 10, 1906.)

[105 N. W. Rep. 526.]

Carriers—Depots—Care Required of Carrier—Furnishing Escort for Passenger.*—Where a passenger, in order to take his train, was required to cross tracks at the station, he having been in full possession of his faculties, familiar with the station, and having had ample warning of the approach of a train, there were no circumstances requiring the railroad company to furnish him an escort across the tracks.

Same—Negligence—Necessity of Crossing Tracks.—It is not negligence for a railroad station to be so arranged that passengers are obliged to cross tracks in order to reach their trains.

Same—Contributory Negligence.—Where a railroad station was so arranged that it was necessary for a passenger to cross the track on which his train was approaching, and the headlight could be seen plainly for two miles before it reached the station, and the whistle was sounded and the bell rung, and he was killed by being struck by the train, he was guilty of contributory negligence.

Same—Escort for Passenger—Evidence—Sufficiency.—In an action for the killing of a passenger at a railroad station, evidence held not to show that at the time of the accident deceased was being escorted across the tracks by an agent of defendant.

Appeal from District Court, Linn County; Benj. H. Miller, Judge.

Suit to recover damages caused by the death of Frederick J. Dieckmann. There was a directed verdict for the defendant. The plaintiff appeals. Affirmed.

Chas. A. Clark & Son and W. G. Clark, for appellant.

Grimm, Trewin & Moffit, Clark & McLaughlin, and James C. Davis, for appellee.

SHERWIN, J. Frederick J. Dieckmann was killed by one of the defendant's westbound trains at De Witt, Iowa, at about 11 o'clock at night. The track of the defendant at that point is double; the north track being used by the east-bound trains, and the south track by those going west. The depot is north of both tracks, and passengers going west are required to cross them to a platform south thereof, from which the west-bound train is boarded. There is a planked way for passengers between the depot platform and the one south of the tracks. On the night of his death, deceased went to the station for the purpose of taking the west-bound train that was due there at about 11 o'clock. He remained in the depot until the approach of the train was an-

*For the authorities in this series on the duties relating to taking on passengers, see foot-notes appended to *Atchison, T. & S. F. Ry. Co. v. Holloway* (Kan.), 17 R. R. R. 648, 40 Am. & Eng. R. Cas., N. S., 648; *Talbert v. Charleston & W. C. Ry. Co.* (S. Car.), 17 R. R. R. 55, 40 Am. & Eng. R. Cas., N. S., 53; foot-notes appended to *Redington v. Harrisburg Traction Co.* (Pa.), 16 R. R. R. 600, 39 Am. & Eng. R. Cas., N. S., 600; *Hatch v. Philadelphia & R. Ry. Co.* (Pa.), 16 R. R. R. 586, 39 Am. & Eng. R. Cas., N. S., 586.

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nounced, when he left it and started to cross over to the south platform. He was killed by the train that he intended to take.

The appellant contends that the defendant was bound to furnish a safe way to the train and to give passengers time and opportunity to reach the same in safety; and, further, that it is its duty to escort and direct them, if it be reasonably necessary to do so. The first two legal propositions are not questioned, and they undoubtedly state the law; but the evidence shows that ample time to cross to the south platform before the arrival of the train was given the deceased, and that the way was safe for a person exercising ordinary care, unless we hold, as a matter of law, that when double tracks are used the railway company operating them is bound to provide either an overhead crossing or an underground way. This is a matter for the Legislature, and not for the courts. We can imagine cases where the duty of escorting a passenger to the train might arise, but this case cannot in our judgment be brought within such a rule. The deceased was a vigorous young man in full possession of his senses of seeing and hearing, and possessed also of normal understanding. He was familiar with the station in question and with the passage of trains and the manner of boarding them. There were no special circumstances demanding an escort over the tracks to the south platform, and the defendant did not owe him the duty of furnishing one. *Raben v. Central Iowa Railway Company*, 74 Iowa, 738, 34 N. W. 621.

It is claimed that the train was approaching the station at a dangerous rate of speed, and that the question of the defendant's negligence on account thereof should have been submitted to the jury. There was no ordinance limiting the speed of trains on the track in question, and the engineer's testimony was to the effect that the train was moving at the rate of about eight miles an hour when it struck the deceased. While any rate of speed is not per se negligence, in the absence of a controlling statute or ordinance, it is possible that there was enough in the whole record to require the submission of this question to the jury, if a finding thereon adverse to the defendant could have warranted a verdict for the plaintiff. *Cohon v. Railway Co.*, 90 Iowa, 169, 57 N. W. 727; *Johnson v. Railway Co.*, 75 Iowa, 158, 39 N. W. 242. If the deceased was guilty of contributory negligence, however, there could be no recovery, and the verdict was properly directed, notwithstanding the negligent rate of speed. The track east of De Witt was straight for a long distance, and the headlight on the engine of the approaching train could be plainly seen from a point two miles away until it reached the station. The station whistle was sounded, and the bell was continuously rung as the train approached. There was nothing to obstruct the view of the deceased, and had he looked or listened he could not have failed to see and hear the train or to realize his danger in attempting to cross the track in front of it. That it was his duty to exercise ordinary care to protect himself is well settled.

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Although required to cross these tracks for the purpose of reaching the train that he intended to take, it was his duty to look and listen and to exercise ordinary care for his own safety, and, if he neglected to do so and was killed as a consequence of such neglect, no recovery can be had therefor. *Banning v. Railway Co.*, 89 Iowa, 76, 56 N. W. 277; *Moore v. Railway Co.*, 89 Iowa, 227, 56 N. W. 430; *Crawford v. Railway Co.*, 109 Iowa, 435, 80 N. W. 519; *Camp v. Railway Co.*, 124 Iowa, 242, 99 N. W. 735. The deceased was waiting for that particular train and had been warned of its approach from three to five minutes before he was killed. He was familiar with the operation of trains at that point, and knew the track on which his train would pass the station, and that he must cross the track before boarding it. The train could readily be seen and heard, and yet the deceased undertook to cross the track ahead of it, and in so doing he was clearly negligent. If he failed to look and listen, he was negligent; and, if, after seeing the train, he undertook to cross in front of it, he was equally as much at fault. *Cowles v. Railway Co.*, 102 Iowa, 511, 71 N. W. 580; *Moore v. Lindell Railway Co.* (Mo. Sup.) 75 S. W. 676.

It is further contended, however, that the station agent undertook to escort the deceased across the tracks to the south platform and led him into the danger. If this were true, an entirely different question would be presented for determination, but there is no evidence sustaining the proposition. Two witnesses saw the fatal accident, one of whom testified that he and the agent went to the south platform together and were standing thereon waiting for the train which was then near. That the deceased started across afterward and fell on the north track and again on the south track. That when he fell the second time the agent went to his assistance, and while trying to get him away from the danger was himself killed. The other witness who saw the accident was the engineer. He testified that he got a momentary glimpse of the two men just before they were struck, and that it seemed to him that they were both running south, and that the agent was behind the other man. Giving to the testimony of this witness its fullest weight in favor of the appellant, it is evident that it does not support his theory that the agent was escorting the deceased over to the platform. On the other hand, there was positive evidence that such was not the case.

The plaintiff did not make a case for the jury, and the judgment should be, and it is, affirmed.

INGRAHAM *v.* PULLMAN CO.

(Supreme Judicial Court of Massachusetts, Suffolk, Jan. 2, 1906.)

[76 N. E. Rep. 237.]

Carriers—Breach of Contract—Damages.*—Where a carrier sold a ticket for a drawing-room on a sleeper, when there was no drawing-room in that car, it appearing that drawing-rooms were largely used by invalids, possible injury to health by reason of a breach of the contract might be presumed to have been within the contemplation of the parties.

Same—Evidence—Admissibility.—Where a carrier sold plaintiff a ticket for a drawing-room on a sleeper which had no drawing-room, and on discovering the mistake at the train plaintiff entered an ordinary car and sat up all night, which aggravated a heart difficulty, in an action for damages, evidence showing that other accommodations in the sleeper were offered plaintiff was admissible to show that the alleged consequences of breach of contract could have been avoided by plaintiff.

Exceptions from Superior Court, Suffolk County; Schofield, Judge.

Action by one Ingraham against the Pullman Company. Judgment in favor of plaintiff, and defendant brings exceptions. Exceptions overruled.

J. J. Feely and Roger Clapp, for plaintiff.

Benj. N. Johnson and Ripley L. Dana, for defendant.

MORTON, J. The plaintiff had a first-class ticket over the Pennsylvania Railroad from Jersey City to Washington, and purchased of the defendant a ticket for a drawing-room in a car forming part of a train which was to leave Jersey City that night, January 22, 1902, arriving at Washington at 3:45 a. m. The car was described on the ticket as "Car No. 1," and the ticket permitted the drawing-room to be occupied till 7 a. m. the next morning. The plaintiff and a friend, who was to accompany him presented themselves at the train, and were told by the conductor that there was no drawing-room in car No. 1 on that train. A section was offered the plaintiff, which he declined, and entered an ordinary passenger car not belonging to the defendant, which had no sleeping accommodations, and traveled therein to Washington, sitting up all night. There was evidence tending to show that the plaintiff had a valvular disease of the heart, which was aggravated by his sitting up all night, and that in consequence thereof he was sick after his arrival at Washington, and unable to work regularly till March 1st. It appeared that the next train for Washington left at 12:30 a. m., arriving there at 7:19 a. m., and the defendant was permitted, subject to the

*For the authorities in this series on the duty of the injured person to minimize the resulting damages, see foot-notes appended to *Louisville & N. R. Co. v. Sullivan Timber Co.* (Ala.), 13 R. R. R. 836, 35 Am. & Eng. R. Cas., N. S., 836.

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plaintiff's objections and exceptions, to introduce evidence tending to show that the plaintiff was offered a drawing-room in a car attached to that train, which would be ready for occupancy at 10 o'clock, and which was in all respects equal to the drawing-room called for by his ticket, but he refused to accept it. Similar testimony was introduced, also subject to the plaintiff's objections and exceptions, of other accommodations offered to him and refused. The jury returned a verdict for the plaintiff for nominal damages, and the case is here on exceptions by the plaintiff to the introduction of the evidence above referred to, and to the refusal of the court to give certain rulings that were requested, and to the charge, so far as inconsistent with the rulings thus asked for.

It is clear that there was a breach of its contract by the defendant. And, if the injury to the plaintiff's health was the direct and proximate result of the breach, there would be strong ground for holding that the defendant was liable in damages therefor, and for any inconvenience to which the plaintiff was subjected. There was testimony tending to show that drawing-rooms were largely used by invalids, and possible injury to health by reason of a breach of the contract might, therefore, fairly be presumed to have been within the contemplation of the parties to it. But in the present case the injury to the plaintiff's health was not the direct and proximate result of the breach by the defendant of its contract. There was an intervening cause, which was the plaintiff's refusal to accept the accommodations which the jury must have found were tendered to him, and his conduct in going into an ordinary passenger car and sitting up during the night's ride to Washington. *Dodd v. Jones*, 137 Mass. 322. When he found that he could not get the drawing-room for which his ticket called, he was bound, in the exercise of ordinary prudence, to adapt himself as well as he reasonably could, considering his health, business, and other matters, to the circumstances in which he was placed, and to avail himself, within those limits, of such accommodations as were offered by the defendant. In other words, it was incumbent on him to do what he reasonably could, taking all the circumstances into account to lessen the injury, and not to aggravate it. *Loker v. Damon*, 17 Pick. 284; *Sutherland v. Wyer*, 67 Me. 64; 1 *Sedgwick on Damages* (8th Ed.) § 201 et seq.

The evidence that was objected to was rightly admitted for the purpose of showing that the alleged consequences of the breach of its contract by the defendant could have been avoided by the plaintiff by the exercise of reasonable care and prudence on his part. We see no error in the instructions that were given, or in the refusal to give those that were requested.

Exceptions overruled.

CENTRAL OF GEORGIA RY. CO. *v.* HALL *et al.*

(Supreme Court of Georgia, Nov. 20, 1905.)

[52 S. E. Rep. 679.]

Carriers—Loss of Freight—Limiting Liability.*—A common carrier cannot limit his legal liability by any notice given, either by publication, or by entry on receipts given or tickets sold. By the special contract, he may relieve himself of his common-law liability as an insurer, and may contract against liability arising from certain losses which do not involve negligence of the carrier or his servants; but he cannot, even by special contract, exempt himself from liability for loss of goods intrusted to him, where the loss arises from his negligence or that of his servants.

Same—Live Stock Shipment.—A common carrier of goods which transports live stock is as to the latter property also a common carrier. There are, however, certain inherent differences between live stock and inanimate property offered for transportation.

Same—Liability for Gross Negligence.*—A carrier of live stock may by special contract so limit its liability for loss or damages that it will be liable only in the event that it is guilty of gross negligence.

Same—Limitation as to Value.*—A railway company, in its capacity as a common carrier, may, as a basis for fixing its charges and limiting the amount of its corresponding liability, lawfully make with a shipper a contract of affreightment, embracing an actual and bona fide agreement as to the value of the property to be transported; and in such case the latter, when loss, damage, or destruction occurs, will be bound by the agreed valuation. But a mere general limitation as to the value, expressed in a bill of lading, and amounting to no more than an arbitrary preadjustment of the measure of damages, will not, though the shipper assent in writing to the terms of the document, serve to exempt a negligent carrier from liability for the true value.

Same.—Where there is an issue of fact as to whether there was an actual bona fide valuation or a mere arbitrary effort to limit liability, the question is one for the jury; but where the written contract shows that it falls within the latter description, and there is no issue of fact on that subject, it is proper for the court to construe the contract.

Same—Fraud of Shipper.—The evidence in this case was not sufficient to show the perpetration of any fraud by the shipper on the company.

Same—Act of God.—Where the common-law rule applies, under which no excuse avails a common carrier in cases of loss unless it was occasioned by the act of God or the public enemies of the state, if a locomotive engineer desired to leave his train and proceed with the engine some distance to a water tank for the purpose of obtaining water, and thereupon caused the flagman to uncouple the engine from the cars, which were left standing on the track while the engineer, in company with the conductor (who had authority to control him) and the fireman, proceeded on the engine to the water tank, obtained the water, and returned to where the cars were, but the engineer caused the engine to run at such a rate of speed as to be evidently dangerous, and to result in wrecking one of the cars, and causing the loss of property being transported, even if he were insane at the time, the loss could not be attributed to the act of God, within the meaning of the rule of law referred to, so as to excuse the carrier.

*See foot-notes appended to *Peerless Mfg. Co. v. New York, etc., R. R. (N. H.)*, 17 R. R. R. 13, 40 Am. & Eng. R. Cas., N. S., 13.

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Same.—The meaning of "the act of God" falling within the rule discussed.

Same—Burden of Proof.—In this state it is the general rule that, in order to avail himself of the act of God as an excuse, the burden is upon the common carrier to establish not only that the act of God ultimately occasioned the loss, but that his own negligence did not contribute thereto.

Same—Diligence of Carrier—Evidence.—Where, under a special contract for the shipment of live stock, the common-law liability of the common carrier was so modified that the carrier was liable for injuries arising only from fraud or gross negligence, it was admissible to defend by pleading and proving that its engineer upon the train on which the goods were shipped suddenly became insane at the time of the transaction complained of; and it would be for the jury to say whether the carrier did not know, or could not by the exercise of proper care have known of it, and whether it exercised due diligence in view of the situation and circumstances disclosed by the evidence.

Trial—Argument of Counsel.—Where an action was brought against a railroad company for loss alleged to have arisen from negligence, and the defendant in its answer denied the negligence, and some two years thereafter, pending the trial of the case, amended its pleadings by setting up that the engineer in charge of its engine became suddenly insane at the time of the transaction complained of, and that it was thereby relieved from liability, counsel for the plaintiff could legitimately comment upon the time when this amendment was made and this defense set up.

Damages—Elements—Interest.†—Where a suit is brought for damages arising from the destruction of property, and there is a basis of calculation as to the value, interest is not recoverable *eo nomine*. But the jury may consider the length of time damages have been withheld, the character of the tort, the conduct of the defendant, and all the circumstances of the transaction, and may in their discretion increase the amount of damages by adding to the value of the property destroyed a sum equal to the interest on such value; the entire sum found being returned as damages, and not exceeding the amount sued for.

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Action by J. S. Hall and others against the Central of Georgia Railway Company. From the judgment defendant brings error, and plaintiffs assign cross-error. Judgment on main bill of exceptions affirmed, and on cross-bill dismissed.

Hall and Crawford brought suit against the Central of Georgia Railway Company to recover damages for the killing of a mare. There was no conflict in the evidence as to the following facts: One White, acting for the plaintiffs, who were the owners of the mare, shipped her from Augusta to Bishop, Ga., along with several other horses, over the defendant's railroad. The train came to a standstill, and was divided into two sections, with one of which the engineer proceeded. At a point on the road

†For the authorities in this series on the subject of the right to interest on the amount of damages recovered in negligence and eminent domain cases, see foot-notes appended to *St. Louis, etc., Ry. Co. v. Cleere* (Ark.), 17 R. R. R. 61, 40 Am. & Eng. R. Cas., N. S., 61.

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the engineer said that the engine was out of water, and that he must go on to the water tank. The engine was cut loose from the cars, and went on to the tank, where water was obtained. The conductor and fireman accompanied the engineer. On the return the speed at which the engineer ran the engine was 20 or 25 miles an hour. The conductor warned him three or four times that he should reduce the speed, or the engine would run into the cars. He replied that he knew where the train was. There was a collision. The car containing the mare was wrecked, and she was killed. The defendant denied negligence, and pleaded that the engineer was stricken with sudden insanity at the time and while the transaction was in progress, that his acts were due thereto, and that there was no negligence on the part of the defendant. The plaintiff demurred to the plea, but the demurrer was overruled. Evidence was introduced as to the market value of the horse. The jury found for the plaintiff \$800. The defendant moved for a new trial, which was denied, and it excepted. Plaintiff filed a cross-bill of exceptions, complaining of the allowance of the plea setting up a sudden access of insanity, and the refusal to sustain the demurrer thereto. The other facts, so far as necessary, are stated in the opinion.

Dessan, Harris & Harris, for plaintiffs in error.

Saml. H. Sibley, for defendant in error.

LUMPKIN, J. 1-3. In cases of loss the presumption of law is against a common carrier, and no excuse avails him unless it was occasioned by the act of God or the public enemies of the state. "A common carrier cannot limit his legal liability by any notice given, either by publication, or by entry on receipts given or tickets sold. He may make an express contract, and will then be governed thereby. Civ. Code 1895, §§ 2264, 2276. Construing these two sections together, the latter does not intend to permit a common carrier to relieve himself of the duty of exercising diligence, but by special contract to relieve himself of his common-law liability as an insurer, and to contract against liability arising from certain losses which do not involve negligence of the carrier or his servants. The requirement of diligence on the part of a common carrier is one involving public policy, and it would be contrary to such policy to allow him to relieve himself from his duty in this regard by contract. A common carrier cannot, therefore, by special contract exempt himself from liability for loss of goods intrusted to him, where the loss arises from his own negligence. *Berry v. Cooper*, 28 Ga. 543; *Purcell v. Southern Exp. Co.*, 34 Ga. 315; *Southern Exp. Co. v. Purcell*, 37 Ga. 103 (2), 92 Am. Dec. 53; *Western & Atlantic R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102; *Georgia R. Co. v. Gann & Reaves*, 68 Ga. 350; *Central R. Co. v. Pickett & Blair*, 87 Ga. 734, 13 S. E. 750. In *Savannah. F. & W. Ry. Co. v. Sloot*, 93 Ga. 803, 20 S. E. 219, it was said that the question as to how far a shipper might, by express

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agreement signed by him, contract against liability on the part of a common carrier for injuries arising from negligence, was still an open question. But in the next case reported in the same volume it was said: "But carriers cannot by any special contract exempt themselves from liability for loss occasioned by their negligence." *Georgia R. Co. v. Keener*, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197. The carrier referred to was a common carrier. See, also, *Wood v. Southern Exp. Co.*, 95 Ga. 451, 452, 22 S. E. 535; *Central Ry. Co. v. Murphey & Hunt*, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720. This ruling is not dependent upon our statute, but accords with the decisions of other courts, though it is not universally so held. 6 Cyc. 387, 388. A common carrier of goods which transports live stock is as to the latter property also a common carrier. *Hutchinson on Carriers* (2d Ed.) § 221; 5 Am. & Eng. Enc. Law (2d Ed.) 428. It has nevertheless been held that a carrier of live stock may by special contract so limit its liability for loss or damage that it will be liable only in the event it is guilty of gross negligence. *Cooper v. Raleigh & G. R. Co.*, 110 Ga. 659, 36 S. E. 240; *Georgia Railroad v. Spears*, 66 Ga. 485, 42 Am. Rep. 81; *Central R. Co. v. Bryant*, 73 Ga. 722; *Cincinnati Ry. Co. v. Disbrow*, 76 Ga. 253. If it were an original question, it might well be argued that it is somewhat anomalous to hold that such a carrier is a common carrier of live stock, that extraordinary diligence is required of it, now so declared in the statutes of this state, and that it is contrary to public policy to allow a common carrier to contract against liability resulting from its own negligence, and yet to say that in regard to live stock it may contract against such liability except as to gross negligence. See 6 Cyc. 391, 392, and citations; *New York Cent. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *E. T. Y. & G. R. Co. v. Johnston*, 75 Ala. 596-605, 51 Am. Rep. 489. But the ruling seems to be established in this state. Perhaps the difference between live stock and inanimate freight may furnish the basis for this holding. In the case at bar the contract provided that the owner or shipper assumed and released the railroad from "all other damages incident to railroad transportation which shall not have been caused by fraud or gross negligence of said company." This became the measure of the negligence which would render it liable. The presiding judge, in effect, so charged, and we do not think his charge, taken as a whole, was subject to the criticisms made upon it as to this point.

4. It was contended that under the contract the defendant was not liable for the value of the horse beyond the sum of \$125. Was the contract relied on by the defendant an actual bona fide agreement as to the value of the property lost, or was it a mere general limitation as to the value, amounting to an arbitrary preadjustment of damages? The former would be valid; the latter not. *Central Ry. Co. v. Murphey*, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720; *Georgia R. Co. v. Keener*, 93 Ga.

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808, 21 S. E. 287, 44 Am. St. Rep. 197; Georgia Southern Ry. Co. v. Johnson, 121 Ga. 231, 48 S. E. 807. The contract, which was included in the bill of affreightment and signed by the agent of the owner and the agent of the company, contained the following provisions: "And it is further agreed that should any damage occur for which the company may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed, for a stallion or jack, \$200, for a horse or mule, \$125, cattle, \$40, other animals, \$20." This was upon a printed blank containing these amounts already prepared. It did not purport to put a valuation upon the particular horse or horses shipped, but limited the amount to be claimed for any horse, regardless of its real or estimated value, to \$125. It had a prearranged amount to which its liability should be limited as to various animals. If this could be treated as a bona fide estimate or valuation as to the horse which was killed, it might equally be said to be a valuation of every possible horse which might be shipped, before it was ever seen or heard of by the company's agent. The expression "other animals \$20" would thus be treated as being a bona fide valuation of any other animal, regardless of what was its nature, character, or actual value. A rabbit, a hog, or an elephant might equally fall under the designation of "other animals," and the arbitrary limitation of \$20 would apply equally to each of them. Moreover, it will be noticed that, in case of loss, the company does not agree that the value of the horse shall be fixed at \$125, but the agreement is that "the amount claimed shall not exceed" that sum. This was clearly an attempt to limit the liability, not to determine value. As was said in the opinion in Central Ry. Co. v. Murphy: "Could any fair and reasonable mind ever reach the conclusion that there was between the plaintiffs and the defendant any agreement at all respecting the value of this particular car load of grapes, or that there was even a remote intention to make such an agreement?"

5. Should the presiding judge have submitted the question to the jury to decide as to whether this contract amounted to an actual bona fide valuation? On its face, it did not do so. Outside of the paper, there was no evidence of any actual valuation of this particular horse. It, with several others, was delivered to the railroad company together with certain sulkies, which seemed to have indicated that the horses were to be used otherwise than as common draft animals. Eight horses were also shipped in two cars, and an attendant went with them. No inquiry was made as to their nature or value. The company had two kinds of blanks, one for use where live stock was shipped "released, the other where it was not. An agent of the defendant asked the plaintiff's agent if he wished to ship the horses "released," and, upon receiving an affirmative answer, filled one of the blanks, except as to the rate, which was filled in by the rate clerk. There is only one "release rate" for horses. The rate clerk has

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the classification of the state railroad commission, and fills in the rate that belongs to that agreement. A witness for the defendant testified that the rate was fixed at \$27 per car between the points included in the transportation, "based on the valuation of \$125," but he admitted that nothing was said to the shipper as to valuation. This was the entire transaction. True, the shipper admitted that he knew that if he had named a higher valuation on the horses he would have had to have paid a higher rate, and that if he had not shipped "released" the rate would have been much higher. But there was nothing in what transpired between the parties to show a bona fide effort to fix a value on the horse which was killed, or on any or all of the horses. Every shipper who is asked whether he will ship "released" probably knows that if he does not do so the rate will be higher. But this does not change an effort to limit liability into an actual valuation of property.

The construction of the contract made in this case is controlled by the decisions in *Georgia R. Co. v. Keener*, supra, and *Central Ry. Co. v. Murphey*, supra. The decision in *Southern Railway Co. v. Horner*, 115 Ga. 381, 41 S. E. 649, is cited to sustain the contention that the case should have been submitted to the jury. In that case it is stated, in the report of facts, that "the testimony was in direct conflict as to the making of a special contract of shipment, * * * and that Lee [the defendant's agent] gave him a rate based on a valuation of \$100 for the horse, and explained to him that the tariff required an addition of fifty per cent. for each additional \$100 of valuation." The contract contained the following terms: "The said shipper or the consignee is to pay freight thereon to the said carrier at the rate of — per —, which is the lowest published tariff rate, based upon the express condition that the carrier assumes liability on the said live stock to the extent only of the following agreed valuation, upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event. * * * If horses or mules, not exceeding 100, \$100 each." It was held that, under the terms of this contract and the evidence introduced, an issue was made as to whether in fact there was a valuation or an arbitrary preadjustment of damages, and that this was properly submitted to the jury. The difference between submitting to the jury to determine, under the evidence, whether terms of this character inserted in a contract of affreightment constituted a bona fide and actual valuation or a mere preadjustment of damages, and, on the other hand, submitting to the jury the construction of the contract alone, which plainly on its face was not a valuation, but an effort to limit damages, is clear. The case of *Central Ry. Co. v. Glascock*, 117 Ga. 938, 43 S. E. 981, is also cited as authority to show that the present case should have been submitted to the jury. On a casual inspection, it might appear to be so, but an

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examination of the record in that case shows that the contract contained language somewhat similar to that considered in the case of Southern Ry. Co. v. Horner, supra. After stating that, if the carrier should be liable, the value at the place and date of shipment should govern the settlement, in which the amount claimed should not exceed certain specified sums, it was added: "Which amounts, it is agreed, are as much as such animals as are herein agreed to be transported are reasonably worth," and stamped across the face of the contract was the statement: "The attention of shippers has been called to the terms, conditions, values, etc., herein named." These facts do not appear as fully in the printed report as in the record of file in this court. This made a question for submission to the jury. In the case at bar there was nothing to show that there had been an actual valuation.

6. It was contended that the evidence in this case was sufficient to show fraud on the part of the shipper, and that the question of its existence should have been submitted to the jury. We cannot concur in this view. There is nothing to show that there was any misrepresentation, concealment, or artifice which would deceive the agent of the carrier as to the nature or character of the property. It appears to have been openly shipped, and, as already mentioned, in such a way as to indicate that the horses were not mere common animals shipped in car load lots. They were open to the inspection of the agent. He took no precaution, and asked no questions as to their value. He asked alone as to whether they should be shipped "released." He relied on the making of the contract, which, as to this point, was not binding under the law. The Civil Code of 1895 (section 2290) reads as follows: "The carrier may require the nature and value of the goods delivered to him to be made known, and any fraudulent acts, sayings, or concealment by his customers will release him from liability." In Southern Express Co. v. Everett, 37 Ga. 688, it was held that if a shipper at the time of the delivery of the goods for shipment practices any fraudulent acts, sayings, or concealment upon the carrier as to the value of the parcel, or resorts to any artifice to give a box containing a valuable diamond breastpin a mean appearance, and thereby induces the carrier to think it of trifling value, and so prevent him from making inquiries, this would operate as a fraud, and relieve him from liability. In Green v. Southern Exp. Co., 45 Ga. 305, the evidence for the defendant was to the effect that the plaintiff valued the property involved in the controversy at \$100. He testified that he shipped a trunk, and was asked its value, but failed to give it. In Savannah, F. & W. Ry. Co. v. Collins, 77 Ga. 376, 3 S. E. 416, 4 Am. St. Rep. 87, the property was shipped as a bundle of bedding, nothing being said about wearing apparel, and after loss the shipper sought to recover the value of certain wearing apparel claimed to have been wrapped up in the bedding. In Southern Exp. Co. v. Wood, 98 Ga. 268, 25 S. E.

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436, the conduct of the shipper was calculated to mislead the agent of the railroad, and conceal the true character of the contents of the package delivered for transportation. In *Georgia Southern Ry. Co. v. Johnson*, 121 Ga. 231, 48 S. E. 807, the shippers sent candy to a railroad for transportation. It was in boxes, and the contents of the packages were unknown to the company. Candy could be shipped in either of two classes, having different freight rates. The shipper classified the candy as of the lower grade, and thus prepared shipping tickets, using a form containing the words, "candy released, six cts. per pound valuation," and obtained a lower rate of freight. On this the railroad received the goods. It was held that, upon damage or loss occurring, the shippers could not recover at a higher valuation than that so fixed. In the case under consideration there was nothing to mislead the carrier, or prevent its agents from making inquiries as to its value.

7, 8. The defendant pleaded that its engineer in charge of its train became suddenly insane, and lost his power of mental control and discretion; that this was unknown to the defendant, or any of its agents or employees, until after said transaction, and could not have been known to it by the exercise of all the diligence required of it by law; and that all the acts of the engineer complained of were due to the sudden insanity, which developed at the time and while the transaction was going on, unmixed with any negligence of the defendant. The plaintiff demurred to this plea, and the demurrer was overruled. The court charged, in effect, that if the engineer suddenly became insane, and thereby became demented to such an extent as to lose his reason, and render him totally irresponsible for his act, such insanity, and acts growing out of it, would, in a legal sense, be the act of God. To this charge the defendant excepted. The determination of the defendant's liability in the present case does not rest upon the common-law liability of common carriers as insurers, but upon a special contract; but as the judge charged as above stated, and the question has been argued before us, the writer deems it not improper to discuss the case as it would stand at common law, in the absence of a limiting contract.

Much learning and ability has been expended on the subject of what constitutes an "act of God" which will relieve a common carrier. Lord Coke made frequent use of the expression, applying it to death, sudden tempests, and the like. In *Forward v. Pittard*, 1 Term. R. 27-33, Lord Mansfield used the following oft-quoted language: "Now what is the act of God? I consider it to mean something in opposition to the act of man, for everything is the act of God that happens by his permission; everything by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tem-

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pests." Some courts have held that the terms "act of God" and "inevitable accident" are synonymous, but others have held that there was a distinction. For interesting discussions and illustration of acts which fall within the designation "acts of God" see *Pandorf v. Hamilton*, L. R. 17 Q. B. 670; *Nugent v. Smith*, L. R. 1 Com. Pl. Div. 423 et seq.; *Hays v. Kennedy*, 41 Pa. 378, 80 Am. Dec. 627. In an elaborate and able note to *Coggs v. Bernard*, 1 Smith's L. C. (8th Ed.) 422 et seq., the cases are reviewed, and it is said: "Upon the whole, it would seem that an act of God signifies the extraordinary violence of nature, * * * and these cases now express the more commonly recognized law, that the act of God which excuses the carrier must be a direct and violent act of nature." In these authorities are also discussed the terms "unavoidable accident," "inevitable accident," "perils of the sea," and similar expressions, frequently used in bills of affreightment. See, also, *Stroud's Jud. Dict.*; *Bouvier's Law Dict.*; *Black's Law Dict.*; *Anderson's Law Dict.*; words "acts of God," "common carrier," and citations; 3 *Wood's Ry. Law*, 1574; 2 *Kent's Com.* 598; 5 *Thomp. Nég.* 6456; *Story, Bailm.* (9th Ed.) § 25. In *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393, the liability of common carriers and their right of defense on the ground that the injury was occasioned by the "act of God" was considered. *Nisbet, J.*, in the opinion used the following language: "Unavoidable accidents are, in our opinion, the acts of God. The latter words express the same acts, and no more than the former; the two phrases mean the same thing. See *Story on Bailm.* §§ 25, 511; 2 *Kent's Com.* 597. What, then, are acts of God or unavoidable accidents? For it is from these only that this party is protected. By the act of God is meant any accident produced by physical causes which are irresistible, such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death, or illness. *Story, Bailm.* § 25; 2 *Kent's Com.* 597. The act of God excludes all idea of human agency. *McArthur & Hurlbut v. Sears*, 21 *Wend.* 190. In this case it is said: 'No matter what degree of prudence may be exercised by the carrier or his servants, although the delusion by which it is baffled or the force by which it is overcome be inevitable, yet if it be the result of human means the carrier is responsible.' See, also, *Backhouse v. Sneed*, 1 *Murphy*, 173; *Ewart v. Street*, 2 *Bailey*, 157, 23 *Am. Dec.* 131; *Smyrl v. Niolon*, 2 *Bailey*, 421, 23 *Am. Dec.* 146." In *Central Line of Boats v. Lowe*, 50 Ga. 509, Judge *McCay*, delivering the opinion, said: "There is, doubtless, a distinction between an 'act of God' and an 'unavoidable accident.' The former covers only natural accidents, such as lightning, earthquakes, tempests, and the like, and not accidents arising from the negligence or act of man." In *Doster v. Brown*, 25 Ga. 24-26, 71 *Am. Dec.* 153, *McDonald, J.*, delivering the opinion, said: "While every shower of rain that falls upon the earth is the act of God in contradistinction to the act of man, yet an ordinary freshet is not the act of God, in the legal sense

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which protects a man against responsibility for the nonperformance of a contract like that made by this plaintiff." See, also, *Cannon v. Hunt*, 113 Ga. 501-509, 38 S. E. 983; *Young v. Waldrip*, 91 Ga. 765, 18 S. E. 23; *Richmond R. Co. v. White*, 88 Ga. 805, 15 S. E. 802; *Carr v. Houston Warehouse Co.*, 105 Ga. 268, 31 S. E. 178. In the case of *McArthur v. Sears*, 21 Wend. 190, which is cited as authority in the case of *Fish v. Chapman*, *supra*, a steamboat had been driven on shore by a previous gale. As a second steamboat later approached the harbor at night, the weather was hazy and snow was falling. Those in charge were misled by the light of the boat on shore, and the second boat struck the shoal. It was held not to excuse the carrier. In *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292, it is said: "By the 'act of God' is meant something which operates without any aid or interference from man. When the loss is occasioned or is the result in any degree of human aid or interference, the case does not fall within the exceptions of the carrier's liability." See, also, *New Brunswick Steamboat, etc., Co. v. Tiers*, 24 N. J. Law, 697, 64 Am. Dec. 394. The maxim that "the act of God is so treated by the law as to affect no one injuriously" (*actus Dei nemini facit injuriam*) has a general application, and is not limited to cases affecting common carriers. *Broom's Legal Maxims* (8th Ed.) 229, 230. Nevertheless, in 16 Am. & Eng. Enc. Law (2d Ed.) 622, it is said: "A lunatic is not responsible for crime, because he is not a free agent, capable of intelligent voluntary action, and therefore is incapable of a guilty intent; but in a civil action for an injury done to the person or property of another, the intent is generally immaterial, and the rule is that an insane person is liable for his torts the same as a sane person, except for those torts in which malice, and therefore intention, is a necessary ingredient. * * * In respect to this liability, there is no distinction between torts of nonfeasance and of misfeasance, and consequently an insane person is liable for injuries caused by his tortious negligence. Insane persons are held to this liability on the principle that where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it. This position is sustained by a number of authorities. *Cooley on Torts* (2d Ed.) 115, m. p. 99 et seq.; *Cross v. Kent*, 32 Md. 581; *White v. Farley*, 81 Ala. 563, 8 South. 215; *Behrens v. McKenzie*, 23 Iowa, 333, 92 Am. Dec. 428; *Avery v. Wilson* (C. C.) 20 Fed. 856; *Krom v. Schoonmaker*, 3 Barb. 647; *Jewell v. Colby*, 66 N. H. 399, 24 Atl. 902 (holding that the damages recoverable are limited to compensation for actual loss sustained by the injured party); *Morse v. Crawford*, 17 Vt. 499, 44 Am. Dec. 349; *Williams v. Hays*, 143 N. Y. 442, 38 N. E. 449, 26 L. R. A. 153, 42 Am. St. Rep. 743; *Id.*, 157 N. Y. 541, 52 N. E. 589, 43 L. R. A. 253, 68 Am. St. Rep. 797.

When the case of *William v. Hays* was first before the Court of Appeals of New York, it was decided that: "If one of several

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owners of a ship is in charge thereof under a contract with the others as lessee or bailee, and on his attention being called to its peril refuses to believe in such peril, though apparent, or to take any measures to avert it, and thereby the ship is lost, he is answerable to his co-owners for his negligence, though it was induced by his insanity at the time." Earle, J., delivered a learned opinion, citing many authorities on the subject. In the course of it he made use of this expression: "If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with." "When the case was before the Court of Appeals for the second time, it was held that this question should be submitted to the jury; Bartlett, J., dissenting. Indeed, a little reflection will suffice to show that the injury in this case could not fairly be considered as arising from the act of God. For this defense to be available as an excuse to a common carrier, the act of God must be proximate cause of the loss or injury. Hutchinson on Carriers (2d Ed.) §§ 179, 180 (a). If insanity were to be analogized to sudden or overpowering illness, which renders it impossible for a person to perform an act or discharge a duty, nevertheless in this case the act of God was not the immediate or proximate cause of the loss, unaffected by human agency. If insanity be treated as an act of God, it was not insanity alone which killed the horse. The engineer, conductor, and the flagman were all concerned in separating the engine from the cars, and leaving them apparently without light or warning signal upon the track. The engineer, the fireman, and the conductor all went together to the water tank. The engineer set the engine in motion at a rapid speed while returning to the cars. It is not pretended that he was stricken with illness or even insanity after he did this, so as to prevent his stopping the engine; but the contention is that, because of unsoundness of mind, he did careless or reckless acts. Suppose that, instead of having killed the horse by the collision, the engineer had stolen the horse, would it be contended that, by showing insanity on his part, the larceny became the act of God? Or, if the agent of the company had made a mistake, and delivered the plaintiff's horse to some other person, whereby it was lost to the plaintiff, would it be urged that, if the agent were insane, the delivery of the horse to the wrong person was an act of God? Surely not. Sudden death or sickness of such character as to render action impossible may sometimes excuse nonaction; but tortious action does not become the act of God because the person acting may be sick.

9. There is a further reason why, under the evidence in this case, this defense could not avail the defendant. In *Richmond R. Co. v. White*, 88 Ga. 805, 15 S. E. 802, it was said: "And generally, in order for the carrier to avail himself of the act of God as an excuse, the burden of proof is upon him to establish, not only that the act of God ultimately occasioned the loss, but that his own negligence did not contribute thereto, for 'in cases

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of loss the presumption of law is against him.'” *Central R. Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 838 (3), 44 Am. St. Rep. 37; Civ. Code 1895, § 2265. Here the presiding judge charged that gross negligence took the place of negligence in stating the rule.

10. The present case, however, does not rest on the common-law liability of common carriers. A special contract in regard to the shipment of live stock was made, which exempted the carrier from all liability incidental to railroad transportation, except for fraud or gross negligence on its part. Under such facts, does the rule that a tortfeasor is not generally excused from liability for actual damages by reason of insanity apply also to an insane agent, so that the principal is liable for an injury committed by such an agent if the latter becomes suddenly and totally insane, and the principal and his other agents are without fault? The reasoning that if the loss must be borne by one of two innocent parties, it should be borne by him who occasioned it, is not to be carried to the extreme of holding that the mere fact of the occurrence of loss necessitates a recovery in all cases, regardless of whether there was negligence or any violation of legal duty. On the general subject see *Brown v. Collins*, 53 N. H. 443, 16 Am. Rep. 372.

This is not a case of a physical injury to the person, and does not fall within the principle of law codified in Civ. Code 1895, § 3826, which declares as follows: “A physical injury done to another gives a right of action, whatever may be the intention of the actor, unless he is justified under some rule of the law. The intention should be considered in the assessment of damages.” But even this was held not to create liability for a personal injury resulting from falling into an elevator shaft, in the absence of negligence of the owner. *Whately v. Block*, 95 Ga. 15, 21 S. E. 985. Nor is the present action for conversion. It is a suit for damages claimed to have resulted from gross negligence. Aside from the common-law liability of carriers, or any statutory provision, the general rule is stated in *Angell & Ames on Corp.* (11th Ed.) § 310, thus: “As natural persons are liable for the wrongful acts and neglect of their servants and agents, done in the course and within the scope of their employment, so are corporations, upon the same grounds, in the same manner, and to the same extent.” See, also, sections 382, 383; *Morawetz, Priv. Corp.* §§ 725, 730. Suppose that the agent of an individual should become suddenly and wholly insane without the knowledge of the principal, would the latter be responsible for all his acts, both of omission and commission, in the absence of any wrongful act or failure of duty on his own part or that of his other agents? In such examination as I have been able to make, I have found no case which extends the doctrine of liability of a person for his own torts, regardless of his insanity, to liability of a principal for the negligent torts of an insane agent, unless the principal commanded or assented to the act, or knew of the insanity, or he or his other agents failed in some respect

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in their duty. In *Buswell on Insanity*, §§ 355, 356, the author recognizes the rule that, "although a lunatic may not be punishable criminally, he is liable in a civil action for any tort he may commit." Yet he says (section 357): "It would seem that if one knowingly employs an insane person as his servant or agent, he will be liable for damages to third parties resulting from acts done by the insane person in the scope of his employment." By analogy to this principle, it was held in *Cole v. Nashville*, 4 Sneed (Tenn.) 162, that if a municipal corporation, "knowing a person to be a lunatic, commission him by its license to follow within its limits a dangerous avocation, the exercise whereof requires great caution and circumspection, and while such person is so engaged under said license any injury be done to an individual by the act of such person in the pursuit of his business, the corporation is liable in damages to the injured party." In *Christian v. Columbus & R. Ry. Co.*, 79 Ga. 460, 7 S. E. 216, the declaration alleged that the railroad company knowingly employed an insane agent, who committed a homicide while in charge of its office. In the opinion it was said: "We think, also, that if the homicide was the result of insanity, and the railroad company was faultless in regard to employing the agent, anything that would excuse the agent criminally for the act would excuse the railroad company civilly." As it was alleged that the company employed the agent knowing of his insanity, the point now being considered was not directly involved, nor was this a conclusive holding that the test of criminal and civil liability is the same (see discussion in *Berkner v. Dannenberg*, 116 Ga. 954, 43 S. E. 463, 60 L. R. A. 559); but it is cited to show that this court did not treat the principal as at all events liable for the conduct of an insane agent. Insane persons are generally declared incompetent to be agents. *Story on Agency*, § 7; 1 Am. & Eng. Enc. Law (2d Ed.) 945. The Civil Code of 1895 (section 3001) says: "Any person may be appointed an agent who is of sound mind." If a principal selects a sane agent, he takes the risk of the possible negligence or tortious conduct of such agent acting within the scope of his agency; but becoming insane is an abnormal condition, and is not ordinarily one of the risks in contemplation. Of course, if the principal knowingly appoints an insane person as his agent, or permits such a one to act for him after knowledge of the insanity, he will not be excused by reason of it.

We concur with the trial judge in holding that to be an excuse the insanity must be so sudden that the principal was not charged with notice of it, or with want of proper care after its discovery, and total in character, so as to practically make the agent incapable of committing a voluntary act. So long as it is merely a partial derangement, he remains to some extent a sentient agent, acting for his principal; and it would involve a maze of uncertainty to undertake to hold the principal partially liable and partially not. Indeed, Prof. Wharton contends that an irre-

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sponsible man is not to be considered as a judicial cause, but rather like a weapon of wood or stone, incapable of intelligent choice, and acting only as it is employed or compelled. Whart. Neg. (2d Ed.) § 88. Under the law of this state, on proof of the loss a presumption of negligence arose against the railroad company, and the burden was on it to show, not only the insanity of the engineer, but also that it or its agents were not chargeable with gross negligence contributing to the injury. If they were so, the defense would fail.

From a careful examination of the evidence, we are of the opinion that it failed to show a sufficient defense. There was no evidence of any sudden insanity coming on the engineer in the midst of this transaction. So far as the evidence tended to show insanity at all at that time, it indicated that certain symptoms, such as irritability, moodiness at times, etc., had been observed before the occurrence. The engineer was not discharged because he was insane, but because he was at fault. He continued to run an engine for months after this transaction, and a considerable time had elapsed before a physician advised that he was insane, and should be sent to the asylum. Moreover, the conductor was on the engine with him, and had authority to compel him to obey orders, and spoke to him of the danger, but permitted him to proceed, when he said that he knew where the other cars were. The presiding judge submitted the issue to the jury, and they found the defendant liable.

11. Complaint is made that the court permitted counsel for the plaintiff to comment upon the fact that no defense of insanity was set up when the action was originally brought in 1902, but was brought in by way of amendment to the defendant's answer pending the trial of the case in September, 1904. While an amendment, when allowed, generally relates back to the filing of the pleading amended, it is nevertheless legitimate for counsel to comment on the occurrence during the trial of the case, including the setting up of the defense of insanity, which was not originally referred to in the pleadings. *Inman v. State*, 72 Ga. 269; *McBride v. Macon, Tel. Pub. Co.*, 102 Ga. 422, 30 S. E. 999.

12. The headnote sufficiently states our ruling on the subject of adding interest to the value of the property destroyed. *Western & A. R. Co. v. McCauley*, 68 Ga. 818; *Central R. Co. v. Sears*, 66 Ga. 499; *Western & A. R. Co. v. Brown*, 102 Ga. 13, 29 S. E. 130. Where the damages found are discretionary or punitive, this rule does not apply. *Western & A. R. Co. v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; *Ratteree v. Chapman*, 79 Ga. 574, 4 S. E. 684.

A consideration of all the grounds of the motion for a new trial satisfies us that there were no errors requiring a reversal.

Judgment on the main bill of exceptions affirmed; cross-bill dismissed.

All the Justices concur, except BECK, J., not presiding.

KANSAS CITY, M. & B. R. CO. *v.* HEARD.

(Supreme Court of Mississippi, Feb. 5, 1906.)

[39 So. Rep. 1011.]

Carriers—Injuries to Live Stock—Exceptions in Contract—Burden of Proof.*—Where a contract for the shipment of cattle provides that the carrier shall not be liable for any damage caused by defects in cars used in transporting the cattle, or in consequence of the escape of the cattle through the doors of the cars, or from fright, crowding, etc., the burden is on the carrier to show that any injury to the cattle resulted from an excepted cause for which it is not liable under the contract.

Appeal from Circuit Court, Monroe County; E. O. Sykes, Judge.

Action by J. W. Heard against the Kansas City, Memphis & Birmingham Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. Buchanan, for appellant.

Gillylen & Leftwich, for appellee.

HARPER, Special Judge. This is an action of tort, brought by J. W. Heard against the Kansas City, Memphis & Birmingham Railroad Company for its failure to deliver safely certain cattle intrusted to it for shipment from Sulligent, Ala., to New Orleans, La. There was judgment in the lower court for the plaintiff, and the defendant appealed.

The proof for the plaintiff tended to show that he delivered to defendant 120 head of cattle, consisting of calves, yearlings, and cows, for shipment; that when the cars were delivered to the M. & O. Railroad Company at Tupelo there were 25 missing, 5 dead, and many of the remainder seriously bruised, scarred, and otherwise injured. The defendant undertook to show by its employees that it had exercised due care, that it delivered to the connecting line all the cattle intrusted to it, and that they were in good condition when so delivered. The defendant also offered in evidence a bill of lading, containing provisions as follows: "(1) The shipper hereby agrees that he will select the car or cars to be used for transportation of such stock, and before making such selection he will carefully examine and inspect the same, and each one of them, and will only select such cars as are in good and suitable condition, and after such stock is loaded and before the same leaves the first station above named he will again examine said car or cars, and will see that all the doors and openings in said cars are closed, and so fastened, and afterward kept so closed and fastened, as to prevent the escape of said stock therefrom, and that he will at once notify the company

*See generally, foot-note appended to *Chicago Great Western Ry. Co. v. Dunlap* (Kan.), 17 R. R. R. 655, 40 Am. & Eng. R. Cas., N. S., 655; *Southern Ry. Co. v. Levy* (Ala.), 17 R. R. R. 50, 40 Am. & Eng. R. Cas., N. S., 50.

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of any defect in the floors, doors, fastenings, or slats on said cars, and the manner in which such doors or slats are placed upon or attached thereto, and in case of finding any such defect will demand in writing another car or cars in lieu of such car or cars so found defective. * * * (3) For the consideration aforesaid, it is further agreed that neither the company nor any connecting carrier shall be responsible for any damage or injury sustained by said live stock, by reason of any defect in the cars used in the transportation thereof, in consequence of the escape of the said live cattle through the doors and openings in said cars, or by reason of the stock being wild, unruly, weak, maiming each other or themselves, or from fright of animals, or from crowding of one upon another, or from heat or suffocation, whether caused by overloading of said cars or otherwise." The defendant also offered evidence that tended to show that the cattle were poor and in bad condition when shipped, and that too many had been crowded into the cars. Whereupon the plaintiff offered proof which tended to show that he had performed everything required of him in the foregoing provisions of his contract, that the cattle were in fair condition for shipment, and that the cars were not overcrowded.

The defendant asked and obtained an instruction as follows: "(3) The court charges the jury that, if they believe from the evidence that the injury to plaintiff's stock was the result of their poor condition and overcrowded cars, then there can be no liability on the defendant, and the jury will find for the defendant." The main effort of defendant in the court below seemed to be to show by its employees that all the cattle it had received had been delivered to the connecting carriers and that they were in good condition when so delivered. There was no effort to show how the loss and injury of the cattle occurred, for that was denied. There was some proof that the cattle were in poor condition for shipment, and that if there were 120 head of cattle in the two cars, as claimed by plaintiff, such would have been an overloading. But plaintiff's evidence contradicted this, and was properly submitted to the jury, who found for plaintiff. In the very case cited by appellant (*Chicago R. R. Co. v. Abels*, 60 Miss. 1023) this court has said: "The carrier must show full performance of duty with respect to what was shipped according to its nature, and when that showing is made, and that the injury was from an excepted cause in the contract, liability cannot be fixed on the carrier, except by proof of a want of due care and diligence." In the instant case the defendant failed to show "that the injury was from an excepted cause in the contract" to the satisfaction of the jury, and hence the defendant failed to overcome the prima facie case made out by the plaintiff. The other errors complained of by appellant seem to be without merit.

The judgment of the lower court is therefore affirmed.

KIBBY v. MICHIGAN CENT. R. CO.

(Supreme Court of Michigan, Dec. 15, 1905.)

[105 N. W. Rep. 769.]

Carriers—Injuries to Freight—Connecting Roads—Limitation of Liability.*—A carrier may stipulate for immunity from responsibility for damages resulting on connecting roads after his discharge of his full duty of delivering them to another road.

Same—Failure to Furnish Suitable Car—Liability.†—Defendant railroad contracted to transport a car load of potatoes for plaintiff, the car to be sent over defendant's road to a certain point, and thence forwarded over connecting roads. The shipping order provided that no carrier should be liable for loss or damage not occurring on its own road or its portion of the through route, nor after the property was ready for delivery to the next carrier. After the car was transferred to a connecting road the potatoes were injured by rain, by reason of the defective condition of the car roof. Held, that defendant was not absolved from liability by the shipping order, as by its contract it was bound to furnish a suitable car for the entire trip and deliver the car and cargo to the connecting line in good condition.

Error to Circuit Court, Ingham County; Howard Wiest, Judge.

Action by Myron T. Kibby against the Michigan Central Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued before MOORE, C. J., and MCALVAY, GRANT, BLAIR, and HOOKER, JJ.

Clarence D. Clark, for appellant.

Thomas, Cummins & Nichols, for appellee.

HOOKER, J. On November 4, 1902, the plaintiff shipped from Lansing, Mich., to the state of Georgia, a car load of potatoes, in a car furnished by defendant for the trip. It was agreed that plaintiff should go in the car to keep fire, if necessary, to prevent the potatoes from freezing. It was stipulated that the car should be sent to Jackson, over defendant's road, and it was to be forwarded from there over connecting roads agreed upon. A shipping order was signed by plaintiff, which by its terms provided that "it is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained, both on the face and the back hereof, and which are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable."

*See foot-notes appended to *Walter v. Alabama Great Southern R. Co.* (Ala.), 17 R. R. R. 42, 40 Am. & Eng. R. Cas., N. S., 42.

†See foot-notes appended to *St. Louis, etc., Ry. Co. v. Marshall* (Ark.), 16 R. R. R. 38, 39 Am. & Eng. R. Cas., N. S., 38.

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The following were among the conditions referred to: "(1) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto by causes beyond its control; or by floods or by fire from any cause or wheresoever occurring; or by riots, strikes, or stoppages of labor; or by leakage, breakage, chafing, loss in weight, changes in weather, heat, frost, wet or decay; or from any cause if it be necessary or is usual to carry such property upon open cars. * * * (3) No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee." At Jackson the car was transferred to a train upon the Cincinnati Northern Railroad, and while in transit to Cincinnati the rain ran through the roof of the car, which was old and leaky, wetting the potatoes and causing them to heat and decay, so that the plaintiff lost about half of them. This action was brought to recover damages for the value of the potatoes that were lost, expenses incurred in assorting and saving them, and a proportionate amount of the freight which the plaintiff was compelled to pay when the car reached its destination. The defendant has appealed from a judgment for plaintiff of \$237.87.

The single question argued by defendant's brief is that the conditions quoted limit its liability to damages sustained while the potatoes were being transported over its road, for the reason that plaintiff has so contracted. It is raised by the refusal of the court to so instruct the jury to render a verdict for the defendant. We have repeatedly held that a carrier may stipulate for immunity from responsibility for damages resulting upon connecting roads after his discharge of his full duty of delivering them to another road. See the following cases cited by the defendant: *Black v. Ashley*, 80 Mich. 90, 44 N. W. 1120; *Smith v. Express Co.*, 108 Mich. 572, 66 N. W. 479; *McEacheran v. Railroad Company*, 101 Mich. 264, 59 N. W. 612; *Hope v. Canal Co.*, 111 Mich. 209, 69 N. W. 487. These cases do not militate against the plaintiff's claim. The contract for defendant made it obligatory to furnish a suitable car for the entire trip, and deliver the car and cargo to the connecting line in good condition. It did not fully perform its duty of delivering to the connecting carrier the potatoes in a suitable car adapted to their transportation. This was a breach of their contract and they were liable for the consequences. See *Charles v. Alabama Railroad Company*, 69 Miss. 186, 13 South. 815, and *Id.*, 71 Miss. 744, 16 South. 255; *Shea v. C. R. R. (Minn.)* 68 N. W. 608; *Norfolk R. Co. v. Harman*, 91 Va. 601, 22 S. E. 490, 44 L. R. A. 289, 50 Am. St. Rep. 855; *Norfolk R. Co. v. Sutherland*, 89 Va. 703, 17 S. E. 127; *Fox v. B. R. Co.*, 148 Mass. 220, 19 N. E. 222; *Int. R. Co. v. Anderson*, 3 Tex. Civ. App. 8, 21 S. W. 691.

The judgment is affirmed.

SOUTHERN RY. CO. IN KENTUCKY *v.* THOMAS.

(Court of Appeals of Kentucky, Feb. 14, 1906.)

[90 S. W. Rep. 1043.]

Carriers—Connecting Carriers—Identity of Organization.—In an action against connecting railroads for injuries to live stock, evidence that the railroads were under the same executive control; that the checks to the men employed by one came from the headquarters of the other; that the stationery of the former was furnished by the latter; that the contract of shipment was made in the name of the latter, while the name of the former was stamped at the head thereof; and other evidence generally tending to show that the two roads were under the same management although using a distinct name and having a separate charter—was sufficient to authorize a finding that the railroads were not separate organizations, but that one was simply a division of the other.

Carriers—Injury to Live Stock—Damages—Instructions.—In an action against a carrier for damage to live stock, a charge that the measure of damages was the difference between the vendible value of the animals at destination in good condition and their vendible value in the condition in which they were delivered was not misleading, in that it failed to take into consideration the necessary deterioration in the animals during their journey, where the evidence was all directed to showing the difference between the value of the animals in the condition in which they were when delivered and their value in the condition in which they would have been if properly cared for during transit, and the court told the jury during the trial that the criterion of recovery was the difference between the vendible value of the animals at destination in good condition, if they had reached there in a reasonable time, and their vendible value at the time they did reach there and in the condition they were in, and the verdict of the jury was for the amount of such damage as shown by the evidence.

Appeal from Circuit Court, Shelby County.

"Not to be officially reported."

Action by B. A. Thomas against the Southern Railroad Company in Kentucky and another. From a judgment for plaintiff, defendant named appeals. Affirmed.

Willis & Todd and Humphrey, Hines & Humphrey, for appellant.

Beard & Marshall, for appellee.

HOBSON, C. J. B. A. Thomas, on November 28, 1902, shipped 28 mules in a car from Shelbyville, Ky., to Atlanta, Ga. The mules reached Atlanta on December 2d, and were unloaded about 3:15 p. m. They were in good condition when shipped, and, when unloaded, they were in a gaunted condition. Three of the mules died, and the others were sold at about \$20 less a head than they would have brought if in good condition. The bad condition of the mules was due to the fact that they had not been fed and watered, while on the journey, as they should have been. The testimony showed that they were fed and watered at Oakdale, Tenn., and only this one time during the whole trip. The mules were carried by the Southern Railway in Kentucky

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from Shelbyville to Burgin, and there delivered to the Cincinnati, New Orleans & Texas Pacific Railroad Company, which carried them to Chattanooga, Tenn., and there delivered them to the Southern Railway Company, which took them to Atlanta. The action was brought against the Southern Railway Company in Kentucky and the Cincinnati, New Orleans & Texas Pacific Railroad Company. The jury found a verdict in favor of the plaintiff against the Southern Railway Company in Kentucky for \$565, and against the Cincinnati, New Orleans & Texas Pacific Railroad Company for \$400. Judgment was entered on the verdict, and the Southern Railway Company in Kentucky appeals.

The proof shows that the mules were in good condition when delivered by the Southern Railway Company in Kentucky to the Cincinnati, New Orleans & Texas Pacific Railroad Company at Burgin. The injury to the mules occurred from the neglect to feed and water them while they were carried by the Cincinnati, New Orleans & Texas Pacific Railroad and by the Southern Railway. It is insisted for the Southern Railway Company in Kentucky that the verdict and judgment against it is unauthorized. The court gave the jury the following instruction: "If the jury believe from the evidence that the Southern Railway Company in Kentucky is a separate organization or corporation, and under a different management and control from the Southern Railway Company, and that it delivered the mules at the end of its lines, namely, Burgin, to the next connecting carrier en route to the point of destination of said mules in a reasonable time and without unreasonable delay, and in good condition, they will find for the defendant Southern Railway Company in Kentucky." This instruction was asked by the Southern Railway Company in Kentucky, and is the only instruction it asked on the subject.

The only question, therefore, that need be considered is, was there sufficient evidence to warrant the finding of the jury for the plaintiff under the instruction? The Southern Railway Company in Kentucky showed by its agent that it had no lines outside of the state of Kentucky, and that its line terminated at Burgin. But he also stated that Mr. Spencer, who is the president of the Southern Railway Company, was also the president of the Southern Railway Company in Kentucky. No charter of the Southern Railway Company in Kentucky was given in evidence, although the witness stated that the company had a separate charter from the Southern Railway Company, and it was shown that the two roads are under the same executive control. It was also shown that the checks to the men employed by the Southern Railway Company in Kentucky come from the headquarters of the Southern Railway, and that the stationery of the Southern Railway in Kentucky is furnished by the Southern Railway. The contract made with Thomas is made in the name of the Southern Railway, and not in the name

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of the Southern Railway in Kentucky, although its name is stamped at the head of the contract. There was other evidence tending to show that the Southern Railway in Kentucky is a division of the Southern Railway Company, and under the same management. Taking all the proof together, there was sufficient proof to warrant the jury in concluding that the Southern Railway in Kentucky is simply one of the divisions of the Southern Railway Company, and that, although a different corporate name is used, it is the same thing as the Southern Railway Company; the name only being changed by adding the words "in Kentucky." In determining the liability of the corporation the court will look at the substance, and not the mere form. *Davis' Administrator v. C. & O. R. R. Co.*, 75 S. W. 275, 25 Ky. Law Rep. 342.

It is also insisted for the appellant that the court erred in instructing the jury that the measure of damages was the difference between the vendible value of the mules at Atlanta in good condition and the reasonable vendible value of them in the condition they were when delivered. It is insisted that the mules would necessarily, in so long a journey, be somewhat gaunted up, and that they would not, if carried there with reasonable promptness, and properly fed and watered, be in good condition. But we do not see that the jury, under the evidence, could have been misled by the instruction. The words "in good condition" must be considered with reference to the circumstances, and it cannot be presumed that the jury understood that they were not to take into consideration the natural condition in which the mules might be expected to be, if carried promptly and properly cared for. The instruction must be read in the light of the evidence in the case, which was all directed to showing the difference between the value of the mules in the condition in which they were delivered and their value in the condition in which they would have been, if properly cared for. The verdict of the jury is for the amount as shown by this evidence, and shows that they assessed the damages under it. In addition to this, during the progress of the trial, when objection was made, the court stated to the jury, as shown by the bill of exceptions, that the criterion of recovery was the difference between the vendible value of the mules at Atlanta in good condition, if they had reached there in a reasonable time, and their vendible value at the time they did reach there in the condition they were in. In view of the admonition of the court to the jury, and the evidence which was admitted on the trial, the instruction could not possibly have prejudiced appellant.

Judgment affirmed.

CINCINNATI, N. O. & T. P. RY. CO. *v.* HARRIS.

(Supreme Court of Tennessee, Dec. 12, 1905.)

[91 S. W. Rep. 211.]

Carriers—Personal Indignities to Passenger—Evidence.—Evidence, in an action against a carrier for personal indignities offered a passenger by the conductors of the carrier, examined, and held to justify a verdict for plaintiff.

Same—Contract of Carriage—Ticket—Effect*.—The actual contract between a carrier and a passenger governs, notwithstanding the recitals of the ticket, which is but evidence of the contract.

Same.†—A passenger purchased from an initial carrier transportation on its and a connecting carrier's lines, and received an order on the agent of the connecting carrier for a ticket on that line. She was unable to procure a ticket on the connecting line because of the negligence of the agent. Held, that the passenger was entitled to travel on the connecting line, and the connecting carrier was bound to transport her safely, and was liable for indignities offered by its conductors.

Same—Indignities to Passenger—Excessive Damages.‡—In an action against a carrier for personal indignities offered a passenger, the evidence showed that the conductor demanded in a rude manner the payment of her fare, and that she told him she had an order for a ticket which she could not obtain because of the absence of the agent. A subsequent conductor, though informed why she had not procured a ticket in exchange of the order, became abusive, and threatened to put her off the train, and charged her with beating her way, and stated that he would have an officer for her at a station and put her off. The other passengers heard the conductor's remarks. The conductor's treatment caused her to become nervous and worried. Held, that a verdict for \$1,497 would not be set aside as excessive.

Appeal from Circuit Court, Roane County; Geo. L. Burke, Judge.

Action by Mrs. M. H. Harris against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Owings & Nicholas, for appellant.

Brown & Cassell, for appellee.

McALISTER, J. The plaintiff below recovered a verdict against the railroad company for the sum of \$1,800 as damages for the breach of a contract of carriage, and for personal in-

*See foot-note appended to *Pennsylvania Co. v. Loftis* (Ohio), 15 R. R. R. 850, 38 Am. & Eng. R. Cas., N. S., 850.

†For the authorities in this series on the subject of the liability of the carrier for the negligence and mistakes of its ticket agents, see foot-note appended to *Jevons v. Union Pac. R. Co.* (Kan.), 15 R. R. R. 679, 38 Am. & Eng. R. Cas., N. S., 679.

‡For the authorities in this series on the subject of the liability of carriers of passengers for insults by servants, and the damages recoverable therefor, see foot-notes appended to *Yazoo & M. V. R. Co. v. Mattingly* (Miss.), 14 R. R. R. 48, 37 Am. & Eng. R. Cas., N. S., 48; foot-notes appended to *Illinois Cent. R. Co. v. Winslow* (Ky.), 14 R. R. R. 432, 37 Am. & Eng. R. Cas., N. S., 432.

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dignities offered her while a passenger on one of defendant's trains. On motion for a new trial a remittitur of \$303 was suggested by the trial judge, which was accepted by the plaintiff, and a judgment pronounced on the verdict of the jury against the defendant company for the sum of \$1,497. The company appealed, and has assigned errors.

The record reveals that on the 15th of June, 1903, Mrs. Harris purchased from the agent of the Southern Railway Company at Asheville, N. C., transportation from Asheville to St. Louis and return, paying therefor the sum of \$20. The plaintiff was given a round-trip ticket over the Southern Railroad to Harriman Junction, and in addition an order on the ticket agent of the Cincinnati, New Orleans & Texas Pacific Railway Company at Harriman Junction for a first class round-trip ticket from Harriman Junction to St. Louis, Mo., via the Cincinnati, New Orleans & Texas Pacific Railway. The plaintiff left Asheville about 12 m. over the Southern Railroad, and reached Harriman Junction the same evening at about 10 o'clock. She immediately repaired to the ticket office of the Cincinnati, New Orleans & Texas Pacific Railway at said point for the purpose of getting a ticket for St. Louis, Mo., and return, in exchange for said order. It appears that the regular ticket agent was not in his office, and, although the train was delayed at Harriman Junction for over an hour on account of a wreck, and the plaintiff made several efforts to find said agent, he failed to put in an appearance. However, some one in the second story of the office, probably the train dispatcher, told her that she could get a ticket by presenting her order to the ticket agent of the Cincinnati, New Orleans & Texas Pacific Railway at Oakdale, a point on defendant's line about two miles from Harriman Junction. This person also stated to the plaintiff that he would telegraph said agent at Oakdale to furnish her a ticket, and further instructed her to hand her order to the sleeping-car porter and request him to exchange it for the ticket when the train arrived that night at Oakdale. The plaintiff accordingly turned her order over to the sleeping-car porter, who promised to exchange it as directed. The plaintiff thereupon went to her berth in the sleeping car, and retired for the night. It appears that, when the train reached Oakdale, it stopped for such a short time that the sleeping-car porter was prevented from procuring the ticket as directed, and afterwards returned the order to plaintiff, explaining his inability to have it exchanged for lack of time.

The record discloses that the plaintiff was a widow traveling alone with her son, a boy of tender years. She testifies that some time after midnight the conductor of the train, without giving her any warning, opened the curtains of her berth, where she was disrobed, and, throwing the light from his lantern into her face, demanded in a rude and angry manner the payment of her fare. The plaintiff explained to him that she had purchased

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a round-trip ticket at Asheville, N. C., to St. Louis, Mo., but had been prevented, without fault on her part, from getting her ticket order converted into a regular ticket at Harriman Junction. She further testified that the conductor would listen to no explanation, but demanded her fare under penalty of being put off the car. She thereupon paid him the sum of \$3 to cover the fare of herself and son from that point to Somerset, Ky., where this conductor was to leave the train. The plaintiff testified that at Somerset, Ky., the conductor, West, turned all his tickets over to another conductor, one O'Connell, and that neither one of these conductors made any effort to have her exchange order converted into a regular ticket, although West admits that he told O'Connell about the circumstance. According to the testimony of the plaintiff, after the train left Somerset the new conductor, O'Connell, came immediately to her berth and demanded the payment of her fare. Plaintiff explained to this conductor why she had not procured a ticket in exchange for the order. He became abusive, and threatened to put her off the train, and said "she was trying to beat her way—trying to steal a ride—that he had met people like this before, and that he was not going to fool with her." "He said he would put me and my child and baggage off at a place where there was no place to stop. He further stated that he would have an officer for me at Lexington, and put me off the train."

Robert Mitchell, who was a passenger on the train, corroborates the statement of Mrs. Harris as to her treatment by conductor O'Connell. This witness stated that he was sent for by Mrs. Harris about 6 o'clock a. m. on the morning of June 16th, and she related the fact that the conductor of the train at about 3 o'clock a. m., threatened to put her off the train and compelled her to pay fare. While he was talking to her about the matter, the train conductor came along and demanded of Mrs. Harris, in his presence, her ticket. He (Mitchell) explained to the conductor that she had a cash fare receipt calling for a ticket, and told him that he had tried, along with Mrs. Harris, to get the ticket for her at Harriman Junction, Tenn., but that they could not find any agent. The conductor said he could not tell about that; that he could not let her ride without a ticket, notwithstanding the fact that she showed him the receipt for which she had paid \$20 at Asheville, N. C., for transportation over this road to St. Louis and return. The conductor became very abusive and ugly, and said that he would put her off the train at the first station; that she was trying to beat her way; that he had been told by the first conductor (leaving the train probably at Somerset) that he did not propose to let her ride any further, but would put her off at the next station. The conductor and he (Mitchell) had a few words about the matter. The rest of the passengers began to crowd around, and the conductor made some very cutting remarks about Mrs. Harris trying to steal a ride. "He said again for her to get

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ready and get off the train at the next station, naming a place which I have forgotten, and which we were then nearing. I called the conductor to the front of the car and arraigned him bitterly for such harsh treatment of a lady. He said to me, 'Why don't you pay her fare?' I told him I would, if he would put her off; that I would pay her fare, and she would then make trouble for the railroad company. The conductor then said, 'I have never put a woman off the train yet,' and that his wife would rebuke him if he ever did. I suggested to the conductor that he get her ticket issued at the first station. When he came to Lexington he did this, and I went with him to the ticket agent (Queen & Crescent Route) and explained all the circumstances to the agent. Said agent then issued the ticket, and remarked, 'I am surprised the way this lady has been abused.' * * * When Mrs. Harris sent for me about 6 o'clock in the morning, I found her very nervous and excited, and extremely worried about the way the conductor had treated her, and she continued very much worried and nervous until we parted on the journey at Indianapolis. Mrs. Harris was polite to the conductor, and, so far as I know, gave no provocation for such treatment."

It is obvious from this statement of the case, without further elaboration of the facts, that there is sufficient evidence to sustain a verdict against the company for personal indignities offered this passenger by the conductors of the trains.

There was no controversy in the court below as to the authority of the Southern Railway to bind the Cincinnati, New Orleans & Texas Pacific Railway by contract for transportation of defendant over its line to St. Louis, Mo. It was admitted by counsel in open court below that the Southern was its agent and had a right to issue the exchange ticket or order.

The 1st, 2d, and 3d assignments of error raise cognate questions, and will be considered together. These assignments are based on the charge of the trial judge to the effect:

(1) That a failure of defendant company to have an agent at Harriman to exchange plaintiff's order for a ticket was an act of negligence, and, if said agent instructed plaintiff to get her exchange perfected at Oakdale, it was the duty of defendant company to give plaintiff an opportunity to make such exchange.

(2) If plaintiff failed to get exchange through no fault of hers, her right to continue her journey on that particular train would not be lost.

(3) If defendant's agent at Harriman Junction instructed plaintiff to place said exchange order in the hands of the porter, who would make the exchange for her at Oakdale, she had a right to believe the proper exchange would be made, and would have the right to remain on the train without the payment of additional fare.

It is insisted these instructions were erroneous for the reason that plaintiff had no ticket, and the exchange order expressly

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recited on its face that it was not good on trains. It is said the effect of the judge's charge was to tell the jury that the plaintiff, after having failed to see the company's agent at Harriman, and because he was not present to exchange or give her a ticket on the order, could then treat the order as a ticket, and thereafter ride on it. It is argued by counsel for the company that under the conditions stated plaintiff had two courses open to her:

(1) She could have elected not to proceed without a ticket, and brought suit for the breach of the contract in not supplying her with a ticket on the order, or,

(2) She could have continued on the train, paying her fare, and suing for the recovery of the money.

But it is insisted that, since the order itself recited it was not good on trains, plaintiff had no right to continue her journey on it, and that the conductor could lawfully demand payment of fare. In support of this view counsel cite *McKay v. Ohio River R. R. Co.*, 34 W. Va. 65, 11 S. E. 737, 9 L. R. A. 132, 26 Am. St. Rep. 913, in which it was held that, if a passenger pay a railroad agent fare for a certain trip and, by mistake of the agent, is given a ticket not answering for that trip, but one in an opposite direction, and the conductor refuses to recognize such ticket and demands fare, which the passenger fails to pay, ejection of the passenger from the train without unnecessary force will not be ground of action against the company as for tort, but the action may and must be based on the breach of the contract to convey the passenger. See, also, *Trezona v. Chicago Great Western Railway*, 107 Iowa, 22, 77 N. W. 486, 43 L. R. A. 136. Counsel also relies on the case of *Mosher v. St. Louis, Iron Mountain & Southern Railway*, 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249, and *Boylan v. Hot Springs Railroad Company*, 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290.

The argument of counsel for the company is that neither of the conductors on defendant's train could know what defendant in error did at Harriman Junction, or whether there was an agent there to give her a ticket, or whether she was the person who had purchased the ticket in the first instance at Asheville, N. C. It is said that conductors cannot be expected or required to carry on an investigation or try the facts necessary to be ascertained in such a matter; that it is their duty to look after the trains, take up tickets, and collect fare from the passengers, and if a passenger has no ticket, to eject him from the train upon his refusal to pay fare. In *Railroad v. Fleming*, 14 Lea, 128, it was said by this court that a passenger who loses or mislays his ticket after entering the cars has no right to supply its place by offering testimony that he actually bought the ticket and lost it, and the conductor or other employee, whose duty it is to take up the ticket cannot be required to hear testimony on the subject, or to determine its weight at the peril of the com-

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pany, under a rule which gives him no discretion. In the Fleming Case the passenger was at fault in losing or misplacing his ticket, but in the present case the passenger was at no fault whatever, but the negligence was wholly that of the company and its agents. In the later case of *O'Rourke v. St. Railway Company*, 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639, it was held that if a passenger on a street car, who has paid full fare and complied with all other reasonable and valid conditions to entitle him to passage, is expelled by the conductor on account of a defect in his ticket or transfer check, not imputable to any fault of the passenger, but solely to the fault and negligence of the company's agent who issued it, the passenger can maintain an action for damages for such expulsion, and cannot be required to pay a second fare, and seek redress by action for breach of contract or for negligence of agent who issued ticket. The actual contract, not the ticket, controls the rights and duties of carriers and passengers. The ticket is but evidence of the contract. It is the act of the carrier over which the passenger has no control. The carrier is alone responsible for mistakes therein and their consequences. The passenger has a right to presume and rely upon the ticket as correctly expressing the contract.

It will be observed that the rule announced in the latest deliverance of this court on this subject is that the actual contract between the carrier and passenger must govern, and not the recitals of the ticket, which is the mere evidence of the contract, and which is issued by the carrier and cannot be controlled by the passenger. It was said in *O'Rourke v. St. Railway*, *supra*, that:

"The undoubted right of a carrier to require passengers to procure and present tickets does not imply the right to expel passengers because the tickets they offer chance to be defective or void without their fault. * * * To justify expulsion of passengers on account of defective tickets, made so by the carrier's fault, is to visit upon the innocent passenger the consequences of the carrier's negligence."

We are of opinion that the principles enunciated in the *O'Rourke Case* are applicable to the facts of this case, and, although the passenger was not ejected from the train, there was, nevertheless, a breach of the contract of carriage by the personal indignity offered the passenger by the conductors of defendant's trains. Since the failure on her part to procure a ticket in exchange for her order was not attributable to any fault on her part, but was wholly the result of the negligence of the company and its agents, she was still entitled to ride, and the relation of carrier and passenger still existed between them. The carrier is under an obligation, not only to transport the passenger safely, but to protect him from trespasses or insulting conduct, either from other passengers on the train or its own employees.

In *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 53 S. W.

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557, 46 L. R. A. 549, it was held by this court that a common carrier is liable in damages to a passenger, not only for injuries to his person by the violence of its employees, but likewise for injuries to his feelings by the indecent and insulting language of its employees, upon the ground of breach of its contract that obligates the carrier, not only to transport the passenger, but to guaranty him respectful and courteous treatment, not only from strangers, but from its own employees.

We are further of opinion that the verdict of the jury, in view of the facts disclosed in this record, was not excessive—at least not so excessive as to evince partiality, prejudice, corruption, or unaccountable caprice on the part of the jury.

Let the judgment be affirmed.

FRASIER v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina, Dec. 20, 1905.)

[52 S. E. Rep. 964.]

Carriers—Injury to Freight—Limiting Liability—Action by Consignee.*—In an action against a carrier for injury to a horse shipped, where the carrier sets up a special contract limiting its liability, the consignee may show the contract was not binding on him because not signed by the shipper until after the injury, and on agreement that it should not affect the rights of the consignee.

Same—Special Contract.—Where, in an action to recover for injury to freight shipped from a foreign state, the carrier sets up a special contract, the consignee may show that the contract was void under the laws of the foreign state without pleading such laws.

Trial—Statutes—Foreign Laws—Construction.—The construction of the laws of a foreign state is for the court.

Carriers—Contract—Construction.—In an action by a consignee for damages arising from injuries to freight shipped from a foreign state, the contract must be construed according to the laws of the state in which it was executed.

Same—Limitation of Liability.*—Under the laws of Georgia a carrier cannot bind the shipper by a contract limiting the liability of the carrier, unless it is signed by the shipper at the time of the shipment.

Constitutional Law—Contract of Carrier—Equal Protection of Laws.†—Act Feb. 23, 1903 (24 St. at Large, p. 81), providing a penalty

*For the authorities in this series on the question whether the shipper's mere acceptance of a contract of shipment includes his assent to its terms, see foot-notes appended to *Powers Mercantile Co. v. Wells-Fargo & Co.* (Minn.), 12 R. R. R. 504, 35 Am. & Eng. R. Cas., N. S., 504; *Arthur v. Texas & P. Ry. Co.* (C. C. A.), 17 R. R. R. 17, 40 Am. & Eng. R. Cas., N. S., 17; *Patrick v. Missouri, etc., Ry. Co.* (Ind. Terr. App.), 16 R. R. R. 554, 39 Am. & Eng. R. Cas., N. S., 554; *Northern Pac. Ry. Co. v. American Trading Co.* (U. S.), 15 R. R. R. 745, 38 Am. & Eng. R. Cas., N. S., 745.

†For the authorities in this series on the constitutionality of statutes prescribing a penalty to compel common carriers to perform their duties to the public, see foot-note appended to *Lexington Grocery Co. v. Southern Ry. Co.* (N. Car.), 14 R. R. R. 349, 37 Am. & Eng. R. Cas., N. S., 349.

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against a common carrier for failing to adjust and pay within a specified time the claim of a shipper for loss or damage to goods, is not unconstitutional as denying to common carriers the equal protection of the laws.

Carriers—Injury to Live Stock—Instructions.—In an action against a carrier for injury to a horse shipped, an instruction that if defendant furnished a safe means of unloading the horse in question, and the injury did not occur on account of the unsafe condition of the same, plaintiff could not recover, was erroneous, in eliminating the question whether defendant was negligent in furnishing a suitable place for unloading and in the use of the appliances at hand.

Trial—Instructions.—An instruction assuming the existence of a contract in dispute was properly refused.

Carriers—Unloading Live Stock—Liability of Carrier.—Under a special contract making it the duty of a shipper to unload a horse, if the agent of the carrier is present and assisting in unloading the horse in an unsafe way, and the horse is injured, the carrier is liable.

Trial—Instructions—Assuming Disputed Facts.—Where a special contract was denied, an instruction that the shipper ratified the special contract limiting its liability by accepting reduced rates of freight was properly refused.

Appeal from Common Pleas Circuit Court of Abbeville County; J. A. McDonald, Special Judge.

Action by T. B. Frasier against the Charleston & Western Carolina Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

S. J. Simpson and Parker & Greene, for appellant.

Wm. N. Graydon, for respondent.

JONES, J. The plaintiff brought this action for damages for loss of a horse, which died from injuries received in transportation from Augusta, Ga., to Mt. Carmel, S. C., and for the penalty of \$50, as provided by statute, for failing to adjust and pay said claim within ninety days. The jury rendered a verdict for the whole amount claimed, including the penalty, and defendant now seeks to reverse the judgment thereon.

1. The first exception alleges error in refusing to strike out of the deposition of plaintiff's witness James S. Carswell so much of the testimony therein as sought to show when the contract of shipment was signed by him and why the same was signed. It is contended that plaintiff, having introduced said contract in evidence as the basis of his action, should not have been allowed to vary its terms, or impeach it, or relieve himself of its obligation. This exception is founded on a misconception of the circumstances. The plaintiff did not make said contract the basis of his action. The defendant by its answer set up a special contract limiting its liability, and evidence of such contract was sought to be brought out by defendant on cross-examination. The plaintiff was properly allowed to offer testimony that the said alleged contract was not binding on plaintiff, and that it

†See generally, extensive note, 9 R. R. R. 6, 32 Am. & Eng. R. Cas., N. S., 6.

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was not signed by the shipper until 10 days after the shipment and after the injury to the horse, and with the understanding that it would not be prejudicial to plaintiff's claim for damages.

2. The second exception assigns error in allowing the plaintiff to offer in evidence the Code of Georgia, when he had not pleaded the matters therein sought to be proved. The general rule is, "where a party seeks either to recover or defend under a foreign law, such law must be pleaded and proved like any other fact, since the court cannot ex officio take notice of the laws of a foreign state." 9 Ency. Pl. & Pr. 542. The plaintiff's cause of action did not arise in Georgia, nor does the complaint seek to establish a right founded on the laws of Georgia. He sues in tort to recover damages arising from a breach of the carrier's general duty under the law to safely deliver the freight consigned to him, a breach which occurred in this state. The law of Georgia not being essential to plaintiff's cause of action, it was not necessary to plead the same. The plaintiff merely sought to avail himself of the law of Georgia in reply to defendant's answer setting up a special contract made in Georgia, in which case it was clearly admissible for plaintiff, without having pleaded the same, to prove the law of Georgia in order to show the invalidity of the legal effect of the special contract alleged by defendant. In the case of *Rosemand v. Southern Ry.*, 66 S. C. 92, 44 S. E. 574, the cause of action arose in Georgia, and it was necessary to allege the laws of Georgia as one of the facts constituting plaintiff's cause of action. In the case of *Association v. Rice*, 68 S. C. 239, 47 S. E. 63, while it was not necessary for the plaintiff to anticipate a defense by way of counterclaim and allege in his complaint the law of Virginia, yet inasmuch as the Code requires a reply to a counterclaim, if it is to be contested, it was necessary to plead in reply to the counterclaim the law of Virginia relied on to defeat said counterclaim. These cases cited by appellant illustrate the general rule stated, but do not apply to this case, which is governed by the rule stated in *Price v. Railroad*, 38 S. C. 210, 17 S. E. 732, which allowed plaintiff to offer evidence to invalidate a release set up in the answer without having pleaded in reply, because under section 189 of the Code of Civil Procedure 1902 plaintiff was not required to reply to such defense, since the allegation of new matter in the answer, not relating to a counterclaim, is to be deemed controverted by the adverse party.

The third exception charges error in refusing defendant's motion for nonsuit on the ground that the evidence showed conclusively that the horse injured was not the property of the plaintiff at the time of the injury. There is no ground for this exception. The witness Carswell, who shipped the horse to plaintiff, testified that he sold the horse to plaintiff for \$125, and plaintiff testified he gave that sum for the horse.

The fourth exception imputes error in charging the jury as follows: "The statute law of Georgia has been introduced in

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evidence, which provides that a common carrier cannot limit its common-law liability, but they can make express contracts and be bound thereby. I charge you under that statute, and it construes the law of Georgia, that, when a bill of lading is issued and is signed only by the common carrier, the shipper is bound by all of the general provisions in that bill of lading, whether signed by the shipper or not. But any special contract limiting its liability, there must be a signing of the contract by the shipper, or he must expressly assent to the terms of the contract. The mere acceptance of a bill of lading by the shipper, and his acting upon it, will bind him so far as a general contract is concerned, but it will not bind him as to limiting the liability of the common carrier, but he must sign it at the time of shipping or expressly assent thereto. I charge you that is the law of Georgia. If you find from the testimony that at the time of this shipment this bill of lading was delivered to Mr. Carswell or some one acting as his agent, and he shipped it under the bill of lading, he is bound by the general provisions of that bill of lading, and so is the plaintiff in this case." The specifications of error are: (1) That plaintiff could not avail himself of the law of Georgia without having pleaded the same; (2) that the charge was upon the facts, in violation of article 5, § 26, of the Constitution; (3) that it was competent to show a ratification of the contract after shipment, such as would bind the plaintiff. The first specification above cannot be sustained for reasons given in considering the second exception.

3. The second specification cannot be sustained because the testimony as to the law of Georgia was documentary, and it was the duty of the court to construe it. "While it is true that what is the law of another state is a fact to be proven (*Horne v. McRae*, 53 S. C. 51, 30 S. E. 701), yet it is not a charge upon the facts for the court to construe the language of documentary evidence such as the statute of another state." *State v. Whittle*, 59 S. C. 304, 37 S. E. 923.

4. There was no evidence of any act on the part of the plaintiff or his alleged agent which tended to show a ratification of the alleged special contract, unless such ratification could be inferred from the mere acceptance of the bill of lading containing the special contract signed only by the carrier. The evidence was undisputed that the shipper did not sign the contract until 10 days after the shipment, when the shipper and the agent of defendant knew of the injury to the horse, and after representation by defendant's agent that such signing by the shipper would not hurt plaintiff's case. "A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold. He may make an express contract and will then be governed thereby." In order, therefore, to make a valid contract in Georgia so as to bind the shipper to stipulations limiting the carrier's common-law liability for injury not the result of the carrier's

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negligence, the shipper must expressly assent to such stipulations. "Mere acceptance of the bill of lading does not establish the shipper's assent to stipulations of this kind." *Central Railroad v. Hasselkus* (Ga.) 17 S. E. 838, 44 Am. St. Rep. 37. The special contract sought to be established by defendant contained, among other things, a provision limiting liability for damages for loss or injury to the horse to \$60. Such a contract when fairly made upon consideration is binding on the shipper. *Johnstone v. Railway Co.*, 39 S. C. 56, 17 S. E. 512. The circuit court, however, charged in effect that the existence and validity of the special contract set up in this case must be governed by the law of Georgia, where it was made, and that the shipper would not be bound by such stipulation in the bill of lading unless he expressly assented thereto. We think the circuit court was correct in this, and that all exceptions by appellants based upon a contrary view must be overruled. The general rule on this subject is that clearly stated in *Scudder v. Union Nat. Bank*, 91 U. S. 406, 412, 23 L. Ed. 245. "Matters bearing upon the execution, the interpretation, or validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought." In *Levy v. Boas*, 2 Bailey, 219, 23 Am. Dec. 134, approved in *Ayres v. Audubon*, 2 Hill, 604, it is declared that: "The *lex loci contractus* is to be observed in deciding on the nature, validity, and construction of the contract; but the form of the action, the course of judicial proceeding, and the time when the action must be commenced, must be directed exclusively to the laws of the state in which the action is brought." This general rule is well settled and understood, but the real contention in this case is whether the requirement by the Georgia law that the shipper shall expressly assent to the special contract, touches the validity of the contract or only the remedy upon it or the evidence of it. Upon a similar contract the Supreme Court of Massachusetts, in *Hoadley v. Northern Trans. Co.*, 115 Mass. 304, 15 Am. Rep 106, held that the question was one of evidence, and was to be determined by the law of the place where the suit is brought; while in Missouri, in the case of *Hartmann v. Louisville, etc., Ry. Co.*, 39 Mo. App. 88, it was held that the question related to the validity of the contract, and was governed by the law of the place of contract. We think this latter rule is the correct one. The contract was alleged to have been made in Georgia concerning a shipment from that state into South Carolina. It was therefore not to be fully performed in South Carolina, but was to be at least partly performed in Georgia, where made. It therefore falls within the general rule stated in 4 Elliott on Railroads, § 1506: "The law of the place where

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it is made and is to be performed, either in whole or in part, governs as to its nature, validity, and interpretation." To treat the question as relating to the remedy, or the evidence of the contract, is to assume that a contract has been made to be evidenced and enforced, whereas the real question is whether any such contract exists. By the law of Georgia, there is no contract limiting common-law liability, unless the shipper expressly assents thereto.

5. The seventh, ninth, and thirteenth exceptions raise the question that the act of February 23, 1903 (24 St. at Large, p. 81), providing a penalty against a common carrier for failing to adjust and pay within a specified time the claim of a shipper for loss or damage to goods while in the possession of the carrier, is unconstitutional, in that it denies to common carriers the equal protection of the laws. This question has been recently discussed in the case of *Seegers v. Seaboard Air Line Ry.* (decision filed November 13, 1905) 52 S. E. 797, and the constitutionality of the act was sustained, and we are satisfied that such conclusion is correct.

6. The appellant's fourteenth exception alleges error in refusing to instruct the jury as follows: "That under the contract offered in evidence in the case, it is provided that the owner or shipper, shall unload the horse shipped, and if in so doing, through any act or omission on his part solely the horse was injured, the plaintiff cannot recover." This request is faulty in assuming the existence of a special contract, a matter in controversy. Furthermore, the provision in the alleged contract was "that the owner and shipper is to load, transfer, and unload said stock, with the assistance of the company's agent or agents, at his own risk." It is a primary duty of the carrier to load and unload freight, and it cannot transfer to the shipper or owner the consequences of its own negligence in these particulars. *Crawford v. Railway Co.*, 56 S. C. 149, 34 S. E. 80. The complaint was based upon the charge that plaintiff's horse was injured through the negligence of the defendant in failing to provide a safe and suitable place at which to unload said horse, and in failing to provide a safe and suitable passageway or gangplank on which to unload said horse, and in carelessly leading said horse over a slick piece of iron. The evidence tended to show that the horse slipped and fell and was injured while being led from the car by plaintiff and defendant's agent over a slick piece of sheet iron used to connect the car with the platform. It may be true that, if the injury to the horse was caused solely by the negligence of the plaintiff while unloading, there should not be a recovery; but the request to charge was not so framed as to submit such question.

7. The fifteenth exception charges error in refusing to instruct the jury in these words: "If the jury find that the defendant furnished a safe and suitable means of unloading the horse in question, and that the injury did not occur on account of the

unsafe condition of the same, the plaintiff cannot recover." This request was incorrect in eliminating the question whether the defendant was negligent in furnishing a safe and suitable place for unloading and in the use of the appliances at hand. The court charged in lieu of such request: "If they furnished safe and suitable means to unload the horse, and an injury did occur, and did not occur from unsafe and unsuitable appliances, or from the negligence of the defendant, the plaintiff cannot recover." This modification of defendant's erroneous request to charge is not to be construed as leaving it open to the jury to consider acts of negligence on the part of the defendant not alleged in the complaint, but is to be construed with reference to the negligence alleged in the complaint.

8. The sixteenth exception assigns error in declining to charge the jury as follows: "If the defendant had suitable facilities for unloading stock, and the plaintiff failed to use the same, he cannot complain of the company on that account, but is himself responsible for any damage caused by a failure to use the same." The request was properly refused, as it is the duty of the carrier not only to furnish suitable facilities for unloading stock, but to use such facilities with due care. The request to charge was doubtless framed under appellant's view that plaintiff had made a valid contract exempting defendant from all duty with respect to unloading, except to place at the shipper's disposal appliances which, if used by him, would have resulted in a safe unloading. There was some testimony that there were some timber or skids at hand, which, if they had been placed as guards on the sides of the piece of sheet iron used as a gangway, would have prevented the horse from slipping and falling between the car and the platform, as happened; but, if the use of the slick sheet iron for that purpose without such guards was negligent, it was the negligence of the defendant, present and with the assistance of the plaintiff attempting to perform its duty as a carrier.

9. The seventeenth exception raises the question that, if Carswell, the shipper of the horse for plaintiff, signed the alleged special contract 10 days after the shipment and injury to the horse, that would bind plaintiff as a ratification of the contract. We have already alluded to the testimony as to the circumstances under which Carswell signed the contract, viz., that it was after the injury and upon representation by defendant's agent that plaintiff's case would not be prejudiced thereby. It would have been error to have instructed the jury in accordance with appellant's contention.

10. The eighteenth exception is as follows: "Because his honor erred in refusing the defendant's eleventh request to charge, as follows: 'If plaintiff, after receiving knowledge that the horse was shipped under a special contract limiting the liability to \$60, and with knowledge that such horse was so shipped, accepted the reduced rate of freight and thereby ob-

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tained for himself an advantage, he cannot repudiate the contract without paying or offering to pay the full rate of freight. In other words, he cannot accept the advantages under said special contract, with a knowledge of its terms, and repudiate the liabilities of such contract.' It is submitted that, if the plaintiff with such knowledge accepted the reduced rate of freight, he thereby ratified the contract of shipment upon which it was based, and it would be unjust, unreasonable, and illegal to allow him to recover more than the amount specified in said contract." The request was properly refused, as it assumed the vital question in issue as to whether there was any such special contract.

Such exceptions as may not have been specifically mentioned herein have been duly considered, and are controlled by the principles herein announced.

All exceptions are overruled, and the judgment of the circuit court is affirmed.

LOUISVILLE & N. R. Co. v. SMITHA.

(Supreme Court of Alabama, Nov. 15, 1905. Rehearing Denied Jan. 9, 1906.)

[40 So. Rep. 117.]

Carriers—Injuries to Live Stock—Negligence—Burden of Proof.*—Where plaintiff has shown injury to live stock while in the custody of a carrier, the burden is on the carrier to show that it did not result from any negligence on the part of its servants or agents, or that it was within one of the specified exceptions to the contract of affreightment.

Same—Care Required.†—A carrier assumes the same responsibility for the safe carriage and delivery of animals as in the carriage of other property, except injuries resulting from the nature, habits, propensities, viciousness, or other inherent qualities of the animals.

Same—Limited Liability—Negligence.‡—Where a carrier of live stock is entitled to limit its common-law liability by a contract of affreightment, it cannot exempt itself by contract from the negligence of its servants.

Same—Delay—Burden of Proof.—On proof that animals delivered to the carrier for transportation in good condition were not delivered safely and within a reasonable time, the burden is on the carrier to excuse itself from negligence.

*For the authorities in this series on the subject of the burden of proving whether or not a stipulation purporting to limit the carrier's liability applies, or does not apply, in a particular instance, see foot-note appended to *Chicago Great Western Ry. Co. v. Dunlap* (Kan.), 17 R. R. R. 655, 40 Am. & Eng. R. Cas., N. S., 655; foot-notes appended to *Southern Ry. Co. v. Levy* (Ala.), 17 R. R. R. 50, 40 Am. & Eng. R. Cas., N. S., 50.

†See foot-notes appended to *Southern Ry. Co. v. Levy* (Ala.), 17 R. R. R. 50, 40 Am. & Eng. R. Cas., N. S., 50.

‡For the authorities in this series on the power of a common carrier to limit its liability, see foot-notes appended to *Peerless Mfg. Co. v. New York, etc., R. R. (N. H.)*, 17 R. R. R. 13, 40 Am. & Eng. R. Cas., N. S., 13.

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Same—Shipper's Duty to Accompany Stock.—Where a contract for the shipment of live stock required the shipper or his agent to ride on the freight train on which the animals were being transported, the shipper's failure so to do was no defense to the carrier's liability for injuries to the stock, unless such failure contributed thereto.

Same—Duty to Feed and Water.—Where a carrier was aware that no one representing the shipper was traveling with certain stock as required by the shipping contract, it was the carrier's duty to feed, water, and exercise necessary care for them.

Same—Actions—Instructions.—In an action against a carrier for injuries to live stock, an instruction that the carrier owed no duty to guard the animals against fever was properly refused, as exempting the carrier from liability, though the fever resulted from its negligence.

Same—Unreasonable Delay—Instructions.—Where, in an action for injuries to stock, whether a delay in transportation was reasonable was a question of mixed law and fact for the jury, it was proper for the court to refuse to charge that the animals were not confined in the cars an unreasonable time.

Same—Rough Handling.—Where there was evidence justifying a finding of unreasonable delay in transportation of stock, an instruction that, if the stock were brought over defendant's line without any unnecessary jar or rough handling, defendant was not liable for injuries they received, was properly refused.

Same—Delay.—Where a car of stock was in transit more than a day longer than it should have been if running on schedule time, a request to charge that defendant was not bound to transport the stock on its fast train was properly refused as misleading.

Same.—Where, in an action against a carrier for injuries to certain stock, delay in delivery might have been the cause of damage to them, which delay was the result of defendant's negligence, a request to charge that plaintiff could not recover for delay in delivery was properly refused.

Appeal from City Court of Montgomery; A. D. Sayre, Judge.
"Not officially reported."

Action by T. G. Smitha against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This was an action by appellee against appellant railroad company, to recover damages for injury to stock alleged to have been delivered to defendant railroad company by appellee in good condition at East St. Louis, Ill., to be transported to Montgomery. The car is alleged to have contained 9 horses and 19 mules. There were 10 counts in the complaint, setting forth the injury to the different animals specifically, and alleging variously negligence on account of delay, negligence on account of want of proper care and feeding, imperfections in the car, etc. There were numerous demurrers, pleas, and replications, which are not necessary to be set out.

A number of charges were requested by and refused to the defendant:

Charge 1 was the general charge to find for the defendant.

§See generally, extensive notes, 11 R. R. R. 419, 34 Am. & Eng. R. Cas., N. S., 419; 9 R. R. R. 6, 32 Am. & Eng. R. Cas., N. S., 6.

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Charge B: "The court charges the jury that defendant was under no duty to guard the animals against fever."

Charge C: "The court charges the jury that the animals were not confined in said cars any unreasonable time."

Charge E: "The court charges the jury that there is no evidence in this case that the animals were confined any unreasonable time."

Charge F: "The court charges the jury that, if they believe from the evidence that the animals were brought over the line of defendant without any unnecessary jar or rough handling, then the defendant is not liable for the injuries they may have received."

Charge G: "The court charges the jury that defendant was under no duty to transport the stock testified about on its fast train."

Charge H: "The court charges the jury that the plaintiff cannot recover for the alleged delay and delivery of the stock in Montgomery."

Charge I: "The court charges the jury that under the terms of the contract sued on it was the duty of the plaintiff to see to the feeding and care of the stock while on the trip, and that he cannot recover for any damages that occurred to the stock for lack of feeding and attention."

Charge K: "The court charges the jury that the plaintiff cannot recover on account of any fever which naturally resulted from the travel testified about in this case."

Charge 2: "The court charges the jury that, if they are reasonably satisfied from the evidence that the injury to the animals was caused by fatigue and not by improper handling of said animals, then they must find for the defendant."

Charge 3: "The court charges the jury that, if they believe from the evidence that the plaintiff's stock were injured or died as the result of fever, then the defendant is not responsible for the injuries so caused."

Charge 5: "The court charges the jury that, if the evidence of the plaintiff leaves them in doubt as to what caused the injury, then they must find for the defendant."

Charge 6: "The court charges the jury that no sufficient cause has been shown why plaintiff did not accompany the stock."

Charge 7: "The court charges the jury that the defendant is not liable for any injury to the animals caused by their viciousness or fighting."

Charge 8: "The court charges the jury that, if it is believed from the evidence that the car received no unusual or rough handling en route from East St. Louis to Montgomery, then the defendant is not liable."

In his oral charge, the court says: "One of the terms of that contract was that the plaintiff was to go along on the same train with the animals. This contract has a clause of this sort in it, and therefore the defendant's plea was perfectly good, unless

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something has been done by the defendant to waive it. It was negligence on the part of plaintiff. There was some proof that although the defendant required of the plaintiff, for the benefit of getting this reduced rate, that the plaintiff should engage to go along, yet, notwithstanding this, the defendant through its agent treated the clause as if it were not to be executed, furnished plaintiff with a pass on another train, which renders it impossible that he should travel on the train with the animals, told him the time the train would come along, and, in addition to this, when the time came for this car to go, with knowledge of that fact that plaintiff was not on the train, pulled off without him. If that be true, then the defendant waived the stipulation of the contract which required that the plaintiff should go along with the animals. Did the defendant waive that stipulation? If so, then the defendant has lost no right by reason of the fact that plaintiff did not go along. What is the truth of that?" To this part of the oral charge, the defendant excepted.

The shipping contract was introduced in evidence, and the clause referred to therein is clause 8, and is as follows: "The shipper or his agent or agents in charge of said animals shall ride on the freight train upon which the said animals are transported."

Charles P. Jones and J. B. Jones, for appellant.
Hill, Hill & Whiting, for appellee.

HARALSON, J. 1. In cases of this character it may be stated, that when the plaintiff has shown injury to his stock while in the custody of the carrier, the onus is on the carrier to show that it did not result from any negligence on the part of its servants or agents, or that it was within one of the specified exceptions to the contract of affreightment. The carrier assumes the same responsibility for the safe carriage and delivery of the animals, as in the carriage of other kinds of property, except from injuries resulting from the nature, habits, propensities, viciousness or other inherent qualities of the animals. He may, however, contract for just and reasonable exceptions from the usual risks pertaining to the transportation of such freight. *W. R. Co. v. Harwell*, 91 Ala. 340, 8 South. 649.

When a contract of affreightment, such as was entered into in this case is shown, the carrier is relieved of its common-law liability, and is not responsible for loss except such as arises from its own or its servants' negligence. This it cannot exempt itself from by contract. *Harwell's Case*, supra; *L. & N. R. Co. v. Grant*, 99 Ala. 325, 13 South. 599.

The burden was on the plaintiff to show that the animals were in good condition when received. When this was shown by him, and that the stock was not delivered safely and within reasonable time, the burden was on defendant to excuse itself from negligence for such failure. *Richmond & D. R. Co. v. Trounsdale*, 99 Ala. 389, 13 South. 23, 42 Am. St. Rep. 69; *Harwell's Case*, supra.

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2. Following the assignments of error in order, as insisted on, it must be held, that the court did not err in refusing to give the general charge for defendant. This insistence proceeds on the theory, that plaintiff made a contract with defendant, that he was to go on the same train with the stock and accompany them to their destination. Under the contract, it may have been the duty of plaintiff to accompany the stock en route to Montgomery. It was his privilege to do so, but the evidence shows that defendant knew he would not return on the freight train. In fact, it furnished him a ticket to return home on a passenger train. Unless his failure to accompany the stock contributed to their injury, of which there is no evidence, such failure cannot be considered as a defense. To allow it to be so considered, would be to allow defendant to contract against its own negligence. *W. R. Co. v. Harwell*, supra.

The fact that the owner by agreement accompanies stock in their transportation, does not relieve the carrier from the duty to feed and water and otherwise care for them when necessary. If the carrier is aware that no one accompanies them, his duty to give them proper attention is the same as if no contract had been entered into. 6 Cyc. 438.

3. If defendant was under no special duty to guard the stock against fever, yet charge B, as requested, would exempt from liability even if the fever resulted from the negligence of the defendant, in the alleged unreasonable delay in the transportation of the stock, and from failure to feed and water them properly. Under the charge, if defendant was greatly negligent in these respects, and fever resulted and the stock was greatly damaged in consequence, defendant would not be liable therefor.

4. Charges C and E were well refused. What was an unreasonable delay in the transportation of the animals, was, under the evidence, a mixed question of law and fact for the jury. *Cotton v. Cotton*, 75 Ala. 345; *A. O. Ex. Co. v. Ryan*, 104 Ala. 274, 15 South. 807.

5. The charge marked F was an incorrect instruction. All there hypothesized might have been true, and yet, defendant may have been guilty of negligence from which the injury complained of arose.

6. The defendant, as acknowledged by its counsel, was under duty to transport the stock with reasonable dispatch and promptness, and, if in the exercise of reasonable care, it was best to transport them on its fast train, then that should have been done. Section 4386, Rev. St. U. S., forbids under penalty, any railroad to convey animals from one state to another, and confine them in cars, for a longer period than 28 consecutive hours, without unloading the same for rest, water and feeding, for a period of five consecutive hours, unless prevented from so unloading by storm or other accidental causes.

The evidence shows, that the car in which this stock was confined, left East St. Louis at 8:40 p. m., February 26, and arrived

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at Howell at 5:15 a. m., February 27th, and was sent to the stock yards at that place, about one hour after its arrival, to be unloaded on account of stock in car being down. There was no evidence that the animals were fed and watered at Howell. This car arrived in Nashville at 1 p. m., on February 28th, and departed March 1st at 10:50 a. m. It arrived at Decatur March 1st; that it took sixteen and one-half hours to run from Decatur to Montgomery, delayed on account of an engine ahead which had given way, and had to be pushed. It further showed that, meantime, the stock were fighting and kicking a good deal worse than the conductor ever saw.

The evidence further shows, that the schedule of the live-stock or fast freight trains from East St. Louis to Montgomery is 39 hours, which includes a 5 hours stop. It thus appears, that the car was out more than a day longer than it ought to have been, running on schedule time. Charge G was misleading and not improperly refused. If necessary, in the absence of due care, to transport the stock by the fast train, the defendant should have done so, and under all the evidence, it was open to the jury to find that the defendant was guilty of negligence in its transportation.

7. Delay in delivering the stock may have been the cause of the damage complained of, and this delay caused by the negligence of defendant, both, questions of fact for the jury under the evidence, which charge H sought to withdraw from them.

8. If it was the duty of the plaintiff to see to the feeding and care of the stock while on the trip, a proposition we must not be understood as conceding, yet, that did not relieve the carrier from the duty to feed and water and otherwise care for the animals. *Harwell's Case*, supra; 6 Cyc. 438b. Charge I was an improper one unless such failure on the part of the plaintiff proximately contributed to the injury the animals received.

9. From what has been said, it will also appear that there was no error in refusing charges K, 2, 3, 5 and 6.

10. Charge 7 was properly refused. Carriers are only relieved from liability where the injury to stock is the result of the inherent viciousness of the animals, not caused or aggravated by any negligence of the carrier. *Trounsdale's Case*, 99 Ala. 389, 13 South. 23, 42 Am. St. Rep. 69; *Johnson's Case*, 75 Ala. 596, 151 Am. Rep. 489.

Let the judgment below be affirmed.

DOWDELL, ANDERSON, and DENSON, JJ., concur.

GEER v. MICHIGAN CENT. R. CO.

(Supreme Court of Michigan, Dec. 30, 1905.)

[106 N. W. Rep. 72.]

Carriers—Passengers—Transportation—Train Schedules—Failure to Maintain—Penalties.*—1 Comp. Laws, § 6235, requires every railroad corporation to furnish sufficient accommodation for the transportation of passengers, etc., and declares that on refusal to transport any passenger without legal excuse it shall pay for such default damages or a penalty at the party's election. Held, that a carrier was not liable to a passenger under such section for failure to transport her by a particular train, which had been discontinued and proper notice given, provided the mistake in selling her a ticket for use on such train, was an error of the local ticket agent.

Same—Instructions—Modified.—In a suit by a passenger to recover a statutory penalty against a carrier for failure to transport her by a particular train for which defendant had sold her a ticket, defendant requested an instruction that, if defendant had given its agent at Y. notice of the change of poster discontinuing the train on or before June 14, 1903, plaintiff was not entitled to recover. The court modified the instruction by inserting the words "a reasonable time" before the word "on," and substituting "June 24th," which was the date on which the ticket was sold, for "June 14th." Held, that the instruction as modified was erroneous, as authorizing the jury to determine whether the countermand of the time-table was reasonable.

Same.†—Where a working time-table issued by a carrier was not intended for the information of the public nor as an advertisement, but was only for the information of employees, the company reserving the right to vary it at pleasure, it was error for the court, in an action for failure to transport a passenger on an advertised train, which had been discontinued, to refuse to charge that such working time-card was not for the information of the public, and that any information which plaintiff may have obtained therefrom, either directly or by statements made from it by defendant's agent, were not binding on defendant, and could not be considered in determining its liability.

Error to Circuit Court, Berrien County; Orville W. Coolidge, Judge.

Action by Florence Geer against the Michigan Central Railroad Company. From a judgment for plaintiff, defendant brings error. Reversed.

Argued before MOORE, C. J., and McALVAY, MONTGOMERY, OSTRANDER, and HOOKER, JJ.

G. M. Valentine and Humphrey S. Gray, for appellant.

John J. Sterling and Cady & Andrews, for appellee.

*For the authorities in this series on the subject of the liability of the carrier for the negligence or mistakes of its ticket agents, see foot-notes appended to *Texas & P. Ry. Co. v. Payne* (Tex.), 17 R. R. 89, 40 Am. & Eng. R. Cas., N. S., 89; *Jevons v. Union Pac. R. Co.* (Kan.), 15 R. R. 679, 38 Am. & Eng. R. Cas., N. S., 679; foot-notes appended to *Coleman v. Southern Ry. Co.* (N. Car.), 16 R. R. 32, 39 Am. & Eng. R. Cas., N. S., 32.

†For the authorities in this series on the subject of passenger schedules and time tables, see foot-notes appended to *Coleman v. Southern Ry. Co.* (N. Car.), 16 R. R. 32, 39 Am. & Eng. R. Cas., N. S., 32.

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MONTGOMERY, J. This is a companion case to that of *Van Camp v. Michigan Central Railroad Company*, 100 N. W. 771. The statement of facts in that case so far as it relates to the case made by the plaintiff will answer for a statement here. On the trial of the present case, however, the defendant introduced the testimony of its division superintendent and of its agent at Ypsilanti, his assistant, tending to show that the published time-card, which was intended to take effect on the 14th of June, and which showed a train from Kalamazoo to South Haven at 4:45 was canceled by telegram from the division superintendent to the agent at Ypsilanti, and a new time-card issued, and that the only printed matter before the agent who sold the ticket to plaintiff which showed such a train as the one in question was the working time-card intended for the employees alone. The plaintiff recovered, and the defendant brings error.

The law of this case was settled in *Van Camp's Case*, supra. From a perusal of that case it will be seen that, if the mistake in selling this ticket for use on a train which had been discontinued and proper notice of its discontinuance given was the error of the local agent who sold the ticket, no recovery can be had under this statute. The defendant claimed on the trial that the testimony of defendant's witnesses conclusively established such a state of facts. With some hesitation we have reached the conclusion that, while the testimony is quite persuasive, it is not so conclusive as to justify the withdrawal of that question wholly from the jury. The telegram to the local agent was not produced, and there was some discrepancy in the statements of the witnesses. If the question were before us on review of a decision of a motion for a new trial, other considerations might be open.

The defendant asked two instructions, as follows:

"If defendant company by its proper department and proper officers gave its agent at Ypsilanti notice of the change of poster on or before June 14, 1903, then the plaintiff cannot recover."

"The working time-card, so called, was not for the information of the public, and any information which plaintiff may have obtained from it, either directly or by statements made from it by defendant's agent, does not bind the defendant in this action, and such information or statements cannot be considered by you in determining your verdict."

The first of these instructions was modified by inserting the words "a reasonable time" before the word "on," and substituting "June 24th" for "June 14th"; thus leaving the jury to pass upon the question of what countermand of a time-table would be reasonable. This was error. If the countermand was given before the 14th, the day on which the schedule was originally designed to take effect, the company was not liable to a penalty for a failure to run its train according to an absolute schedule 10 days later; nor was it open to the jury to find such countermand unreasonable.

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Perhaps the most damaging error, and the one which may account for the verdict, was the failure to give the second request above quoted. When taken in connection with certain remarks of the trial judge during the trial, the refusal of this request would leave the jury to understand that, if the agent was misled into selling the ticket to plaintiff through having referred to the working time-table, the defendant was liable to this penalty. The evidence all shows that this working time-table was designed for the use of employees alone, and not intended for use in furnishing information to the public. It was the duty of the agent to keep posted the latest public time-table in the waiting room and in his office, and from these tables the information to be furnished the public was to be derived. On the face of this working time-table was printed these words: "This time-table is in no case intended for the information of the public, nor as an advertisement of the time or hours of any train. The company reserves the right to vary them at pleasure. It is for the information of employees only." The request should have been given. See *Beauchamp v. Railroad Company*, 56 Tex. 239; *Railway Company v. Pickard* (Colo. Sup.) 6 Pac. 149.

The judgment is reversed, and a new trial ordered.

SWEDISH-AMERICAN NAT. BANK OF MINNEAPOLIS v. CHICAGO, B. & Q. RY. CO.

(Supreme Court of Minnesota, Dec. 15, 1905.)

[105 N. W. Rep. 69.]

Evidence—Record Entries.—Action by an indorsee of certain bills of lading to recover the value of the property therein described, for the reason that the carrier failed to deliver it to the plaintiff. Held: Whether record entries relevant to the issue, made in the regular course of business, are properly verified as a basis for receiving them in evidence, is a question for the exercise of practical sense and sound discretion by the trial judge, and his decision of it will not be reversed on appeal, if there is any evidence reasonably supporting it. The entries here in question were properly received in evidence.

Bills of Lading—Failure to Deliver Goods to Carrier—Estoppel.*—A carrier, even as to an innocent indorsee, is not estopped by

*See notes, 8 Am. & Eng. R. Cas., N. S., 478 (bill of lading as evidence of delivery of freight to carrier); note, 2 Am. & Eng. R. Cas., N. S., 610 (how far bill of lading is conclusive as to matters contained therein); *Montpelier & W. R. R. v. Macchi* (Vt.), 5 R. R. R. 249, 28 Am. & Eng. R. Cas., N. S., 249 (admissibility of evidence of special agreement to pay freight entered into after delivery of bill of lading); *Washburn-Crosby Co. v. Boston & A. R. R.* (Mass.), 1 R. R. R. 794, 24 Am. & Eng. R. Cas., N. S., 794 (estoppel of plaintiff to assert invalidity of bill of lading); note, 13 Am. & Eng. R. Cas., N. S., 16 (parole evidence to contradict or explain receipt clause of bill of lading); notes, 2 Am. & Eng. R. Cas., N. S., 610, 10 Am. & Eng. R. Cas., N. S., 36, 20 Am. & Eng. R. Cas., N. S., 709 (admissibility of

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statements in a bill of lading issued by his agents from showing that no goods in fact were received for transportation, unless by his usual mode of doing business he has given to his agents authority to issue bills of lading for goods not received. *National Bank of Commerce v. Ry. Co.*, 46 N. W. 342, 560, 44 Minn. 224, 9 L. R. A. 263, 20 Am. St. Rep. 566, followed.

Same—Authority of Agent.—The evidence herein was not sufficient to sustain a finding that the defendant had authorized its agents to issue bills of lading for goods not received.

(Syllabus by the Court.)

Appeal from District Court, Hennepin County; Charles M. Pond and C. B. Elliott, Judges.

Action by the Swedish-American National Bank of Minneapolis against the Chicago, Burlington & Quincy Railway Company. Verdict for defendant. From an order denying a new trial, plaintiff appeals. Affirmed.

John Lind and *A. Ueland*, for appellant.

Young & Lightner, for respondent.

START, C. J. The defendant's freight agent at the city of Minneapolis on August 15, 1902, signed and delivered two bills of lading to the firm of Blew-Armstrong Company, hereafter referred to as the firm, each of which acknowledged the receipt of 350 sacks of bran to be transported to Marion, Ohio, there to be delivered to the consignee. On the same day the firm drew two drafts for \$280 each on the consignee, attached them to the bills of lading, and indorsed them to the plaintiff. In consideration thereof and relying thereon the plaintiff advanced to the firm the full amount of the drafts. The bran never reached its destination, the drafts have never been paid, the firm are insolvent, and this action was brought to recover the value of the bran. The defense was that the defendant never received the bran, and, further, that its agent had no authority to sign and deliver the bills of lading without a delivery of the bran. The trial court instructed the jury to the effect that if the bran was delivered to the defendant it was liable for the value thereof, but if it was not delivered to the defendant it was not liable. The jury returned a verdict for the defendant, and the plaintiff appealed from an order denying its motion for a new trial.

1. The defendant, as part of its evidence to show that the two cars of bran were never received by it, introduced in evidence over the objection of the plaintiff the car record of another carrier at Minneapolis which tended to show that the cars of bran were delivered to such other carrier and shipped out of Minne-

parole evidence to contradict or explain); *Tallassee Falls Mfg. Co. v. Western Ry. of Alabama (Ala.)*, 20 Am. & Eng. R. Cas., N. S., 455; *Lake Shore & M. S. R. Co. v. National Live Stock Bank (Ill.)*, 13 Am. & Eng. R. Cas., N. S., 1; *Mouton v. Louisville & N. R. Co. (Ala.)*, 20 Am. & Eng. R. Cas., N. S., 673; *Illinois Cent. R. Co. v. Lancashire Ins. Co. (Miss.)*, 21 Am. & Eng. R. Cas., N. S., 840 (delivery to carrier, bill of lading as conclusive evidence of, under Miss. Code, in action by carrier to recover over on indemnity policy).

apolis over its line. This is urged as error, for the alleged reason that the record was not verified, either as required by the common law or by the statute in relation to books of account. It was, however, shown that the record was made in the regular course of the business of such carrier, entries were made therein of every car coming into its possession and its movements within the city limits, and, further, that the entries were made under circumstances precluding any motive for misrepresentation and under conditions calculated to insure accuracy. Whether such entries in any particular case are properly verified as a basis for receiving them in evidence is a question calling for the exercise of practical sense and sound discretion by the trial judge, and his decision of it will not be reversed on appeal, if there is any evidence fairly sustaining his conclusion. Any other rule, in view of the magnitude, methods, and necessities of modern business enterprises, would result in great inconvenience and injustice. "In short, courts must here cease to be pedantic and endeavor to be practical." 2 Wigmore, Ev. 1530; 1 Greenl. Ev. § 115. The record here in question was properly received in evidence.

2. The trial court submitted only one question to the jury, which was whether the bran was ever delivered to the defendant, and directed them to return a verdict for the plaintiff if it was delivered, and for the defendant if it was not. In thus narrowing the issue the court must have ruled, as a matter of law, either that the evidence was practically conclusive that the defendant's agents had no authority, real or apparent, to issue bills of lading unless the property therein described had been delivered to the defendant, or that, whether the bills of lading were or were not issued by the authority of the defendant, it was not estopped from showing that the goods therein described were never delivered to it. It follows that, if either proposition was right, the court correctly instructed the jury, but otherwise if both propositions were wrong. It is the contention of the plaintiff that the evidence was sufficient to sustain a finding that the defendant authorized its agents to issue bills of lading without any delivery to it of the property therein described, and that if it did so it would be liable to third parties relying in good faith upon such bills. It was held in the case of *National Bank of Commerce v. Ry. Co.*, 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566, in accordance with the weight of judicial opinion, that a bill of lading issued by the shipping agent of a carrier without receiving the goods named in it does not estop the carrier from showing that no goods were in fact received for transportation as against an innocent consignee or indorsee for value. In the case cited the court, after stating the basis upon which the decision rests, stated incidentally that "no doubt a carrier might adopt a different mode of doing business by giving his agents authority to issue bills of lading for goods not received, so as to render him liable in such cases to third parties."

The plaintiff claims that the evidence brings this case within this apparent exception to the general rule, that the carrier is not estopped to show that he did not receive the goods described in the bill of lading. The exception, if given the broad application claimed for it by the plaintiff, would be inconsistent with the reasons upon which the rule is based, which are that liability of a carrier does not begin until the goods are delivered; that while bills of lading are symbols of the property therein described, and their transfer operates as a transfer of the property, yet they are not negotiable as bills of exchange and promissory notes are; hence the carrier may show, as against a bona fide holder of a bill of lading, that he did not receive the goods named therein. *Mo. Pac. Ry. Co. v. McFadden*, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944. The argument that the carrier should be estopped, as against a party who parted with his money upon the statement in the bill of lading made by the carrier or his agents that he had received the goods, is a strong one; but it was fully considered by this court in the case cited. The exception, then, to which we have referred, must be construed with reference to the rule adopted and the reason upon which it is based. So construed, the exception is limited to cases where the carrier by his usual mode of doing business gives to his agents authority to issue bills of lading for goods not received.

This brings us to the question whether the evidence, taking the most favorable view of it for the plaintiff, would sustain a finding by the jury that the defendant did so authorize its agents at Minneapolis to issue bills of lading for goods not received. The evidence tends to show that the defendant adopted printed rules for the conduct of its business, one of which was this, "Receipts, bills of lading, and live stock contracts must not be issued until entire shipment is in possession of the company, and the date shown thereon should be the date on which the shipment is completed;" that its general agent at Minneapolis never received any authority in any way from his superiors to depart from this rule; that it was customary for the agents in charge of the Minneapolis office, where the bills of lading in question were issued, to sign bills of lading presented by shippers whom they knew to be reputable without going out to ascertain whether the property therein described was on the track or in the cars; that at the time the bills of lading were delivered to the firm they were large and reputable shippers over the defendant's road, and the bills were signed by the agent for the reason that he assumed, because the shippers were reputable business men, that the goods had been delivered; and, further, that the agent never signed any bills of lading when he knew that the goods had not been delivered. We are of the opinion, and so hold, that the evidence was not sufficient to sustain a finding to the effect that the defendant by its mode of business gave to its agents authority to issue bills of lading for goods not received.

3. After the case had been submitted to the jury they returned into court for further instructions, and the plaintiff's counsel

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requested the court to give them the instruction following, namely: "In this connection I would ask your honor to state to the jury whether, if the Great Western should have carried the goods out—these same goods out of town—and the goods were actually in cars at the time when the receipts were given by the defendant company and before the Great Western had appropriated the goods and taken them out, whether it would not be a receipt of the goods by the defendant company." The court replied: "Oh, I think the instructions cover all the court ought to say on that subject. The plaintiff will be entitled to recover if defendant got these goods, got possession of these goods, as these shipping receipts purport to state. If they never received the goods, they are not liable." The refusal to give the request is assigned as error. It was not; for the facts assumed in the request would not, standing alone, show a receipt of the goods by the company.

Order affirmed.

ELLIOTT, J., took no part.

ATLANTIC COAST LINE R. CO. v. DEXTER *et al.*

(Supreme Court of Florida, Division B., Nov. 23, 1905.)

[39 So. Rep. 634.]

Evidence—Best and Secondary—Facts Described in Writing.*—

The fact of the delivery of freight to a common carrier for carriage may be proven by oral testimony, notwithstanding the existence of a receipt or bill of lading given by the carrier for such freight. Such receipt or bill of lading does not fall within the best-evidence rule as proof of such fact of delivery.

Carriers—Limitation of Liability—Acceptance of Bill of Lading—Knowledge of Shipper.†—

The settled rule in the United States is that an acceptance by a shipper or his agent of a receipt or bill of lading containing a limitation of the carrier's liability is binding on him when the limitation is not illegal or unreasonable; that it is not essential to the validity of such a limitation that it be shown that the shipper was aware of it, or that he had read it, or that it had been explained to him, or his attention called to it, provided the carrier made use of no improper means to prevent his noticing or objecting to it; and that every shipper is conclusively presumed, in such a case, to have read and assented to the provisions of the receipt or bill of lading given him, whether he in fact assented or not, and he is estopped from gainsaying or repudiating it.

*See foot-note appended to preceding case.

†For the authorities in this series on the question whether the shipper's mere acceptance of a contract of shipment includes his assent to its terms, see foot-notes appended to *Arthur v. Texas & P. Ry. Co.* (C. C. A.), 17 R. R. R. 17, 40 Am. & Eng. R. Cas., N. S., 17; foot-note appended to *Patrick v. Missouri, etc., Ry. Co.* (Ind. Terr. App.), 16 R. R. R. 554, 39 Am. & Eng. R. Cas., N. S., 554; *Northern Pac. Ry. Co. v. American Trading Co.* (U. S.), 15 R. R. R. 744, 38 Am. & Eng. R. Cas., N. S., 744.

For the authorities in this series on the subject of the burden of proving the shipper's assent to a contract of shipment, see foot-

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Same—Injury to Live Stock—Burden of Proof.‡—Where the shipper of live stock, or his agent, assumes to take care of the stock during its transportation, and it is found to be injured on arrival at its destination, the burden of proof under the Florida statute (chapter 4071, p. 113, Laws 1891) is upon the shipper plaintiff to prove at least that the injury to such stock was caused "by the running of the locomotives, or cars, or other machinery of the defendant company," before the burden shifts to the defendant carrier to show that the injury complained of was not the result of any negligence on its part.

Same—Limiting Amount of Liability.§—Provisions in contracts for the carriage of live stock limiting the amount for which the carrier is to be liable in any event for the complete loss or injury to such stock while in its charge are universally recognized to be reasonable, valid, and binding on the parties.

Trial—Demurrer to Evidence.—A demurrer to evidence is properly overruled, unless it sets forth all of the evidence intended to be admitted thereby.

(Syllabus by the Court.)

Error to Circuit Court, Suwannee County; B. H. Palmer, Judge.

Action by H. F. Dexter and S. B. Conner against the Atlantic Coast Line Railroad Company. Judgment for plaintiffs, and defendant brings error. Reversed.

The defendants in error, hereinafter referred to as the plaintiffs, sued the corporate plaintiff in error, referred to hereafter as the defendant, in the circuit court of Suwannee county, in an action of trespass on the case, and recovered judgment for \$235.13, and the defendant below brings the case here for review by writ of error. The declaration is as follows:

"And now comes the said plaintiffs, H. F. Dexter and S. B. Conner, partners doing business under the style and firm name of Dexter & Conner, by Rees & Rees, their attorneys, and complains of the said defendant, the Atlantic Coast Line Railway Company, a railway corporation doing business in and under the laws of the state of Florida, which has been summoned to answer the plaintiffs, that on the 9th day of February, A. D. 1904, the plaintiffs delivered to the Central of Georgia Railway Company at Atlanta, Georgia, twenty-two mules and three horses in good condition, to be shipped to plaintiffs at Live Oak, Suwannee county, Florida, via the G. S. & F. [R'y] and A. C. L. [R'y], and the same were received by the said Central of Georgia Railway Company for transportation for the usual rates and charges for such shipments, and the said defendant then owned and operated a line of railway between Jasper, in Hamilton county, Florida, and Live Oak, in Suwannee county, Florida,

notes appended to Powers Mercantile Co. v. Wells-Fargo & Co. (Minn.), 12 R. R. R. 504, 35 Am. & Eng. R. Cas., N. S., 504.

‡See foot-notes appended to Nelson v. Great Northern Ry. Co. (Mont.), 9 R. R. R. 311, 32 Am. & Eng. R. Cas., N. S., 311.

§See foot-note appended to Baltimore & O. R. Co. v. Hubbard (Ohio), 16 R. R. R. 71, 39 Am. & Eng. R. Cas., N. S., 71; foot-notes appended to St. Louis, etc., Ry. Co. v. Marshall (Ark.), 16 R. R. R. 38, 39 Am. & Eng. R. Cas., N. S., 38.

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and was then engaged in the business of a common carrier for hire and reward of both passengers and freights between said points last named, and did between the 9th and 13th of February, A. D. 1904, receive from the Georgia Southern & Florida Railway Company the said mules and horses for transportation to Live Oak, Florida, and delivery to plaintiffs, and it then became and was the duty of said defendant to, and it then undertook to, safely keep, transport, and deliver said horses and mules to the plaintiffs; but the defendant, its agents and servants, not regarding its duty as a common carrier, acted so carelessly and negligently in the operation of the cars in which said stock were being transported that by reason thereof one of said mules was bruised, crushed, wounded, injured, and hurt so that it died from such injury and was wholly lost to plaintiff, whereby plaintiff was injured and damaged to the sum of one hundred and fifty-seven dollars and fifty cents, the value of said mule, and the further sum of two dollars and sixty-three cents freight paid by plaintiff to defendant on said mule, to plaintiff's damage in the sum of three hundred dollars.

"And for that whereas, on or about the first of November, A. D. 1902, the plaintiff shipped from Morristown, Tennessee, over the Southern Railway, a car load of mules and horses, billed to Live Oak, Florida, and the said Southern Railway Company then received said car load of stock from plaintiff in good condition for transportation and shipment as a common carrier, and the said defendant was then and is yet the owner and operator of a line of railway between Savannah, Georgia, and Live Oak, Florida, and was engaged in the business of a common carrier of passengers and freight over its said line of railway for hire and reward, and did then receive at some point on its said line of railway unknown to plaintiffs said car load of horses and mules, then and there undertaking to safely keep and transport and deliver the same to plaintiff at Live Oak, Florida; but the defendant, its agents and servants, not regarding its duty as a common carrier, acted so carelessly and negligently in the operation of the car on which said stock were being transported that by reason thereof one of the mules composing said car load of horses and mules then and there the property of the plaintiffs were bruised, mashed, crushed, injured, and hurt, whereby plaintiffs suffered damage and loss in the value of said mule to the extent of seventy-five dollars. Wherefore plaintiffs sue and claim damage in the sum of three hundred dollars."

To this declaration the defendant demurred. The court overruled the demurrer, but as the assignment of error predicated on this ruling is expressly abandoned here it is unnecessary to mention it further.

The defendant filed two pleas to the declaration as follows:

"(1) Not guilty.

"(2) The defendant says that the injuries complained of in the two counts in said declaration to have been sustained by the stock of plaintiff were caused solely by the inherent viciousness

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of the stock and animals being shipped by the plaintiffs, and not otherwise."

Upon the issues thus made the trial was had.

John E. Hartridge and J. B. Johnson, for plaintiff in error.

TAYLOR, J. (after stating the facts.) To H. F. Dexter, one of the plaintiffs, as a witness on his own behalf, the following question was propounded: "Did you, on or about the 9th day of February, 1904, deliver to the Central of Georgia Railroad Company a car load of horses and mules?" The defendant objected to this question on the ground that the written receipt or bill of lading for the stock is the best evidence of the delivery of same to the railroad company. The objection was overruled, and the question allowed, which ruling is the second error assigned. The witness answered that "the Brady Union Stockyards delivered this car load for me. We usually had them to deliver the stock." There was no error in permitting the question. The receipt or bill of lading, if any, given by the railroad company for freight delivered to it for carriage, while strong evidence, is no better evidence of the abstract fact of such delivery than the testimony of a credible witness who knows of such delivery. No receipt or bill of lading may be issued at all, yet the fact of such delivery may exist without it, and may be testified to independently of a receipt or bill of lading for the goods delivered. *Boykin et al. v. State*, 40 Fla. 484, 24 South. 141.

After the defendant had introduced in evidence without objection the two "live stock contracts" or bills of lading under which it was admitted the railroad company received the stock for carriage and shipment, and had made H. F. Dexter, one of the plaintiffs, its witness, and had proved by him that he had received and ridden on a pass issued with such contract, the plaintiffs' counsel, on cross-examination of said Dexter, propounded to him the following question: "Were you acquainted with the terms of this bill of lading, and did you agree to the same?" To this question the defendant objected on the grounds: (1) The bill of lading had already been admitted by them to be the contract under which said stock was shipped; (2) the plaintiffs accepted the benefits of the free pass under the contract; and (3) the railroad companies were induced to accept the said stock by the acquiescence of the plaintiffs to the terms of the said bill of lading, hence they are estopped to deny the acceptance of same. These objections were overruled and the question allowed, which ruling is assigned as error. The witness answered as follows: "I didn't know anything about the terms of this bill of lading, neither did I agree to the same. Brady Union Stockyards took the bill of lading. Usually they ship the stock, take the bill of lading, and then the bill of lading and pass are sent to the hotel, and I know nothing about it until the bill of lading and pass get to the hotel." The court below erred in this ruling for various reasons.

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The rule is quite generally settled in the United States that an acceptance by a shipper or his agent of a receipt or bill of lading containing a limitation of the carrier's liability is binding on him, when the limitation is not illegal or unreasonable; that it is not essential to the validity of such a limitation that it be shown that the shipper was aware of it, or that he had read it, or that it had been explained to him, or his attention called to it, provided the carrier made use of no improper means to prevent his noticing or objecting to it; and that every shipper is conclusively presumed, in such a case, to have read and assented to the provisions of the receipt or bill of lading given him, whether he in fact assented or not. 5 Am. & Eng. Ency. Law (2d Ed.) pp. 293, 294, and numerous authorities there cited. The stock contract or bill of lading here inquired about had been admittedly received by the shipping plaintiffs, had been accepted and signed by their shipping agent, the Brady Union Stockyards, and the plaintiff had admittedly received and ridden upon a free pass issued to him by the railroad company as a part of the contract of shipment, and no obstacles were shown to have been thrown in his way to prevent his fully familiarizing himself with the terms of the contract and each and every of its conditions. Under these circumstances it made no difference whether the plaintiffs ever expressly assented to the contract or not, or even read or knew of its terms and conditions. They are fully bound thereby, and are estopped from gainsaying or repudiating it.

What is here said disposes also of the assignment of error predicated upon the ruling of the court in permitting one P. T. McGriff, a witness and shipping agent for the plaintiffs, to testify to his nonassent to and want of knowledge of the terms and conditions of the second live stock contract or bill of lading involved in the case.

The court gave to the jury the two following charges:

"(1) To plaintiffs' declaration in this case the defendant has filed two pleas. The first is a plea of general issue, and the second is a special or affirmative plea. [Here the court read the pleas to the jury.] Under the first plea it devolves upon the plaintiffs to prove their case by a preponderance of the evidence. If you believe from the evidence that this stock sued for was delivered to the railroad company in good condition, and that when same reached Live Oak it was injured and damaged as alleged in plaintiffs' declaration, then the court instructs you that the plaintiffs have made out a prima facie case and are entitled to recover, unless the defendant can show that said stock was injured by its own inherent viciousness, or from some other cause not the result of their negligence and for which it is not responsible.

"(2) If you find for the plaintiffs, you should fix their damage at the value of said stock after it had reached Live Oak, had same been uninjured."

Both of these charges are erroneous. The first is erroneous because in the admitted contract of shipment between the parties

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it is expressly provided that the shipping plaintiffs or their agent assume to take care of the stock during its transportation. In such cases the great weight of authority holds that, when the shipper assumes to take care of the stock during the transportation, he has the burden of proving that the loss was the result of the defendant company's negligence, whether the negligence consists in failing to furnish proper cars or in the transportation of the stock. The reason for this rule is thus given by Elliott, C. J., in *Terree Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. Rep. 239: "The effect of this agreement is to place the animals in their [the shippers'] immediate custody during transportation. Their agent is to care for them, and is to do the things expressly specified. The animals were not, therefore, in the exclusive custody and control of the carrier, so that the case is not within the reason of the rule that the carrier, and not the shipper, has the burden of proof, because the former has all the means of explanation and excuse at hand." The general rule referred to by Judge Elliott, to which the case of a shipper assuming the care of live stock during transportation forms an exception, is the same rule that is discussed in *Savannah, F. & W. Ry. Co. v. Harris*, 26 Fla. 148, 7 South. 544, 23 Am. St. Rep. 551; 5 Am. & Eng. Ency. Law (2d Ed.) p. 472, and cases cited in note 2; *Id.* p. 359, text. Our statute (chapter 4071, p. 113, Laws 1891) does not militate against this rule, since it does not cast the burden of proof upon, or presume negligence against, the carrier until it is shown at least that the injury complained of was caused "by the running of the locomotives, or cars, or other machinery of the defendant company." In the case of the transportation of live stock, with the undisputed special contract before the court between the parties, admitted in this case, providing for the carriage of these animals, it was error for the court to charge the jury in effect that if the animals were in good condition when delivered to the railroad company, and were found to be injured on their arrival at their destination, they could find for the plaintiffs, unless the defendant company could show that the injury was not caused by its negligence, or was caused by the innate viciousness of the animals themselves. The burden was upon the plaintiff shippers of proving at least that the injury to the animals complained of resulted from the operation by the defendant company of its cars; or in the discharge of some other duty that devolved upon it under its contract of carriage with the shipper.

The second of said charges is erroneous because it entirely ignores the provision in the admitted contract between the parties by which, in consideration of the reduced rates at which the carriers undertook to convey the freight, the amount of damages for which the companies were to be responsible for the complete loss or injury to such stock was limited in any event to not more than \$75 per head. The validity of such provisions in freighting contracts between shippers and carriers, particularly for the carriage of live stock, is almost universally recognized, and they

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are binding between the parties. 5 Am. & Eng. Ency. Law (2d Ed.) p. 328 et seq., and authorities there cited. Notwithstanding this, the court in this charge instructs the jury that they can assess the damage at the full value of the animals in an uninjured condition at their point of destination at Live Oak.

At the close of the evidence the defendant demurred to the evidence, but the court overruled such demurrer. This demurrer was defective in not stating all the evidence admitted thereby, and was therefore properly overruled. *Mugge v. Jackson*, 50 Fla. —, 39 South 157. In view of the evidence disclosed to us in the record here, the court erred in denying the defendant's motion for new trial on the ground that the verdict was not supported by the evidence. The plaintiff failed utterly to show when, where, or how the injury occurred to his property, and failed to prove any fact from which it could be presumed even that such injury occurred while such stock was in the hands of the defendant company. This being true, no case was made out against the defendant upon which a recovery could legally be had.

For the errors found, the judgment of the court below is reversed at the cost of the defendants in error.

HOCKER and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

MASON v. BOSTON & N. ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Middlesex, Jan. 5, 1906.)

[76 N. E. Rep. 717.]

Carriers—Injury to Passenger—Contributory Negligence.*—Where a passenger, while standing on the running board of an open car with his back to the front of the car, was struck by a pole erected by the company, the question of his contributory negligence was for the jury.

Exceptions from Superior Court, Middlesex County; Chas. A. De Courcy, Judge.

Action by one Mason against the Boston & Northern Street Railway Company. Verdict for plaintiff, and defendant brings exception. Exceptions overruled.

Henry H. Winslow and Henry J. Winslow, for plaintiff.

Richardsons, Trull & Wier, for defendant.

SHELDON, J. The plaintiff was a passenger on an open car of

*See foot-notes appended to *Bridges v. Jackson Elec., etc., Co.* (Miss.), 16 R. R. R. 512, 39 Am. & Eng. R. Cas., N. S., 512; foot-note appended to *Ft. Wayne Traction Co. v. Hardendorf* (Ind.), 15 R. R. R. 738, 38 Am. & Eng. R. Cas., N. S., 738.

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the defendant. The car was a long one, and was crowded when he got upon it, and at first he stood upon the running board, on the right-hand side of the car. Later he took a position with his back towards the front of the car, near the end of the seat which had for its back the partition behind the motorman, with one foot inside the car and the other hanging over the side of the car. He paid his fare while standing on the running board. The plaintiff's evidence tended to show that, when the car was about 70 or 75 feet from the place where he intended to alight, he signaled to the conductor, and, as the conductor apparently did not see him and did not ring the bell, he rang the bell himself for the car to stop. Shortly after ringing the bell, he stepped down on the running board and started to walk towards the rear of the car to get a bundle which he had left under the third or fourth seat from the front. While so doing, he was struck on the back of his head by a pole of the defendant, thrown down, and injured. This pole had been put in position on the day of the accident to replace an old pole which had been removed. This new pole was so placed that its foot was not quite three feet from the nearest rail. It slanted towards the track, which was laid here around a curve; this pole being on the inside of the curve. As is usually done, the outer rail of the track was laid higher than the inner rail, thus causing a car in going around the curve to lean towards the pole. By reason of the car and pole each leaning towards the other, the distance between them grew less as the distance above the ground increased, and at the height of seven feet from the ground, which was where the plaintiff's head would be when he was standing on the running board of the car, the distance between the pole and the handles on the outside of the car was less than a foot. The outer edge of the running board was 21 inches from the rail, and the distance from the outer edge of the running board to the pole at the ground was 1 foot and $2\frac{1}{2}$ inches. The old pole had been placed about half an inch farther on the ground from the car than the new one, and had stood straight. The inclination of the new pole was such that 7 feet above the ground it was 6 inches nearer the line of the rail than on the ground. There was evidence that a guard rail on the left side of the car was lowered when the plaintiff got on the car, but that it was afterwards raised; and that a guard rail on the right hand side of the car was not lowered at all, though as to this there was contradictory evidence. On this evidence, the defendant asked the court to rule that there was not sufficient evidence to warrant a verdict for the plaintiff. The judge who presided at the trial refused to do this, and submitted the case to the jury, with instructions not in themselves objected to and not reported. The jury found for the plaintiff, and the case comes before us on the defendant's exceptions to the refusal of the ruling which it requested.

1. The defendant contends that the plaintiff was not in the exercise of due care. It contends that the plaintiff by stepping upon the running board placed himself voluntarily, without in-

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vitiation by the defendant, and merely for his own convenience, in a place of danger, facing to the rear of the car, and taking no precaution to guard against the danger to which he was exposing himself. See *Cummings v. Worcester, Leicester & Spencer Street Railway*, 166 Mass. 220, 44 N. E. 126; *Moody v. Springfield Street Railway*, 182 Mass. 158, 65 N. E. 29. But we think that this was a question for the jury. *Powers v. Boston*, 154 Mass. 60, 27 N. E. 995; *Fleck v. Union Railway*, 134 Mass. 480. It was possible to find that the plaintiff did nothing different from what would have been done by other careful passengers under the same circumstances. *Fleck v. Union Railway*, supra. Riding on the running board of an open electric car cannot be said to be negligence of itself and as matter of law. *Morton, J.*, in *Moody v. Springfield Street Railway*, ubi supra; *Cummings v. Worcester, Leicester & Spencer Street Railway*, ubi supra. He might assume that the defendant had not placed obstructions so near to its track as to make it dangerous for him to prepare to leave its car in the ordinary manner. The defendant also contends that this case is governed by the doctrine of *Hall v. Wakefield & Stoneham Street Railway*, 178 Mass. 98, 59 N. E. 668. But the circumstances there considered were very different from those of the case at bar. There the action was brought by a servant against his employer to recover for damages caused by a permanent condition of the employment. This is an action by a passenger against the carrier, and the injury was caused by a pole which had been set up on that very day in such a manner as to be much more dangerous than that which it had replaced. Manifestly the rule of that case cannot be extended to such a case as this.

2. What we have already said is enough to show that this accident properly might be found to be due to the negligence of the defendant. *Cummings v. Worcester, Leicester & Spencer Street Railway*, ubi supra. Similar questions have been decided in the same way in other courts. See *Elliott v. Newport Street Railway (R. I.)* 31 Atl. 694, 23 L. R. A. 208; *Hesse v. Meriden Tramway Co.*, 75 Conn. 571, 54 Atl. 299; *North Chicago Street Railroad v. Williams*, 140 Ill. 275, 29 N. E. 672; *Id.* 40 Ill. App. 590; *West Chicago Railway v. Marks*, 82 Ill. App. 185; *Cummings v. Wichita Railroad & Light Co. (Kan.)* 74 Pac. 1104; *Withee v. Somerset Traction Co.*, 98 Me. 61, 56 Atl. 204; *Parks v. St. Louis Railway*, 178 Mo. 108, 77 S. W. 70, 101 Am. St. Rep. 425.

The ruling requested could not rightly have been given. Exceptions overruled.

GRAF v. WEST JERSEY & S. R. Co.

(Supreme Court of New Jersey, Nov. 13, 1905.)

[62 Atl. Rep. 333.]

Carriers—Injury to Passenger—Negligence—Jolting of Car.*—Where a train, just as it stopped, gave a lurch to one side, which caused the door of a car to shut upon the fingers of a passenger who stood in an open doorway, the facts did not warrant an inference of negligence; the motion of the car appearing to have been no more than the usual motion incident to stopping.

Appeal from District Court of Camden.

Action by Richard E. Graf against the West Jersey & Seashore Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued June term, 1905, before DIXON and SWAYZE, JJ.

Gaskill & Gaskill, for appellant.

Clarence T. Atkinson and Spencer Simpson, for respondent.

SWAYZE, J. The only question necessary to be considered is whether there was negligence on the part of the defendant. The only testimony of negligence is that of the plaintiff. He was a passenger, and when the conductor called the name of the station "got up and went to the forward end of the car, and in order to avoid the final jerk of the train, as it always gives a little kind of jerk, held his hand up and steadied himself on the jamb of the door; the door was open, and all of a sudden the train gave a kind of a lurch to one side, just the second that it stopped, and the door shut down on his fingers." He subsequently testified that the car went too far, and he naturally thought there would be a jerk. The motion of the car which caused the door

*For the authorities in this series on the question whether a presumption of negligence arises from the mere fact that a passenger is injured, see foot-notes appended to *State v. United Rys. & Elec. Co.* (Md.), 17 R. R. R. 624, 40 Am. & Eng. R. Cas., N. S., 624; *Blake v. Camden Interstate Ry. Co.* (W. Va.), 17 R. R. R. 619, 40 Am. & Eng. R. Cas., N. S., 619; *Patterson v. San Francisco & S. M. Elec. Ry. Co.* (Cal.), 17 R. R. R. 552, 40 Am. & Eng. R. Cas., N. S., 552; foot-notes appended to *Lincoln Traction Co. v. Heller* (Neb.), 17 R. R. R. 368, 40 Am. & Eng. R. Cas., N. S., 368; foot-notes appended to *Western Maryland R. Co. v. Shivers* (Md.), 17 R. R. R. 34, 40 Am. & Eng. R. Cas., N. S., 34; *Georgia Ry. & Elec. Co. v. Reeves* (Ga.), 17 R. R. R. 26, 40 Am. & Eng. R. Cas., N. S., 26; foot-notes appended to *Minahan v. Grand Trunk W. Ry. Co.* (C. C. A.), 16 R. R. R. 562, 39 Am. & Eng. R. Cas., N. S., 562; *Price v. St. Louis, etc., Ry. Co.* (Ark.), 16 R. R. R. 534, 39 Am. & Eng. R. Cas., N. S., 534; foot-note appended to *Fagan v. Rhode Island Co.* (R. I.), 16 R. R. R. 22, 39 Am. & Eng. R. Cas., N. S., 22.

For the authorities in this series on the liability of a carrier for injuries to its passengers from jerks and jolts of trains or cars, see foot-notes appended to *Conroy v. Detroit United Ry.* (Mich.), 16 R. R. R. 671, 39 Am. & Eng. R. Cas., N. S., 671; foot-notes appended to *Hatch v. Philadelphia & R. Ry. Co.* (Pa.), 16 R. R. R. 586, 39 Am. & Eng. R. Cas., N. S., 586.

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to close seems to have been no more than the usual motion which the plaintiff himself anticipated, and we think fails to warrant an inference of negligence. In this respect the case differs from *Field v. D., L. & W. R. R. Co.*, 69 N. J. Law, 433, 55 Atl. 241, where there was a jerk of sufficient violence to throw the plaintiff from a position inside the car over the chain on the opposite side of the rear platform, and from *Burr v. Pennsylvania R. R. Co.*, 64 N. J. Law, 30, 44 Atl. 845, where there was a very violent and unusual lurch of the car backward and forward. The trial judge should have granted the motion to nonsuit.

The judgment must be reversed, and there must be a new trial.

BILTON v. SOUTHERN PAC. CO.

(Supreme Court of California, Jan. 15, 1906.)

[83 Pac. Rep. 440.]

Railroads—Operation at Crossings—Measure of Care Required.*—Where the view of a railroad track near a street crossing is so obstructed that a person lawfully using the street cannot, before passing from a place of safety to a place of danger, see an approaching train in time to escape it, if it moves at a high rate of speed, it is the duty of the railroad either to moderate the speed of the train accordingly or make the approach of the train reasonably apparent by other methods.

Same—Negligence—Excessive Speed—Question for Jury.—Whether or not the rate of speed of a train at a street crossing is so dangerous or excessive as to constitute negligence depends upon the circumstances there existing, and is a question for the jury, if those circumstances are such that reasonable and impartial men may differ as to the conclusion to be drawn therefrom.

Same—Sufficiency of Evidence.—In an action against a railroad for the death of a driver of a wagon who was struck by a train at a street crossing, where his view of the train was obstructed, evidence held sufficient to show that the train, in running at a rate of speed of 35 miles an hour at the place in question, was negligently operated.

Same—Contributory Negligence.—In an action against a railroad for the death of a driver of a wagon, who was struck by a train at a street crossing where his view of the approaching train was obstructed, evidence held insufficient to show that the deceased was guilty of contributory negligence as a matter of law.

Same—"Look and Listen" Rule.†—The track of a steam railroad is of itself a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains, and if the view of the track is obstructed he should take greater pains to listen.

*For the authorities in this series on the subject of the care required in operating trains or cars at crossings where the view of highway travelers with respect to approaching trains is obstructed, see foot-notes appended to *Schwarz v. Delaware, etc., R. Co. (Pa.)*, 16 R. R. R. 441, 39 Am. & Eng. R. Cas., N. S., 441.

†For the authorities in this series on the question of the care required of a highway traveler before attempting to cross a railroad where the view of approaching trains is obstructed, see foot-notes appended to *Colorado & S. Ry. Co. v. Thomas (Colo.)*, 17 R. R. R.

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Same.†—It is not essential to the exercise of ordinary care on the part of one crossing the track of a railroad with a team at a crossing that he should stop and listen for any particular length of time; but if he looks and listens attentively, and cannot see or hear an approaching train, he is not guilty of negligence as a matter of law in starting forward to cross the track, and thereby leaving his place of safety and entering upon a place of danger.

Same—Actions in Perilous Situation.‡—One who has started to cross the track of a railroad, after having failed to see or hear an approaching train for which he looked and listened, and who is suddenly confronted with imminent peril by the appearance of the train after he has reached a place of danger on or near the track, need not exercise all the presence of mind and carefulness which are required of a prudent man under ordinary circumstances, but is only required to do what is reasonable under the existing circumstances.

Same—Question for Jury.—In an action against a railroad for the death of the driver of a wagon, who was struck by a train at a street crossing where his view of the train was obstructed, whether the efforts of deceased to escape danger from the approaching train were reasonable, in view of his peril and the other circumstances of the case, held a question for the jury.

Department 1. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Leonard Bilton against the Southern Pacific Company. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

Rehearing denied February 13, 1906.

W. H. Spencer, for appellant.

William J. Herrin and *R. V. Bouldin*, for respondent.

ANGELLOTTI, J. This action was brought by plaintiff to recover damages resulting from the death of his minor son, alleged to have been caused by the negligence of defendant. The case was tried by a jury, which rendered a verdict in favor of plaintiff for \$3,000, upon which judgment was entered. Defendant appeals from such judgment, and from an order denying its motion for a new trial.

167, 40 Am. & Eng. R. Cas., N. S., 167; foot-note appended to *Coffee v. Pere Marquette R. Co.* (Mich.), 16 R. R. R. 772, 39 Am. & Eng. R. Cas., N. S., 772.

†For the authorities in this series on the question of the care required of a highway traveler before attempting to cross railroad tracks, see foot-notes appended to *Greenawaldt v. Lake Shore*, etc., Ry. Co. (Ind.), 17 R. R. R. 816, 40 Am. & Eng. R. Cas., N. S., 816; foot-notes appended to *Rollins v. Chicago, M. & St. P. Ry. Co.* (C. C. A.), 17 R. R. R. 291, 40 Am. & Eng. R. Cas., N. S., 291; foot-notes appended to *St. Louis*, etc., Ry. Co. v. *Johnson* (Ark.), 16 R. R. R. 775, 39 Am. & Eng. R. Cas., N. S., 775; foot-note appended to *Louisville & N. R. Co. v. Bryant* (Ala.), 14 R. R. R. 734, 37 Am. & Eng. R. Cas., N. S., 734.

‡For the authorities in this series on the question whether failure to exercise good judgment caused by fright is contributory negligence, see foot-note appended to *Staines v. Central R. Co.* (N. J.), 17 R. R. R. 612, 40 Am. & Eng. R. Cas., N. S., 612; foot-notes appended to *Morey v. Lake Superior*, etc., Ry. Co. (Wis.), 16 R. R. R. 113, 39 Am. & Eng. R. Cas., N. S., 113.

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It is earnestly contended that the evidence was insufficient to sustain the verdict, for the reasons, first, that it failed to show any negligence on the part of defendant, and, second, that it showed that the deceased was guilty of contributory negligence precluding a recovery. The deceased, a boy within a few days of his seventeenth birthday, and possessed of all his faculties, was driving, in a light spring wagon, filled with groceries and drawn by one horse, across defendant's railroad track, where the same crosses Twelfth street, in the town of Paso Robles, when the wagon was struck by one of defendant's locomotives, and he was instantly killed. The locomotive was attached to a south-bound passenger train, which was coming into the town several minutes late, and there was evidence to the effect that it was running at an unusually high rate of speed for that place; some of the witnesses testifying to 35 miles an hour, and the evidence as to the space within which the train was brought to a stop tending to corroborate this. The Twelfth street crossing was about 1,200 feet north of the railroad station. The town was, according to the census of 1900, a place of 1,224 inhabitants. There was some testimony to the effect that the whistle of the locomotive was not sounded at the customary place, some blocks north of Twelfth street, and that the bell upon the locomotive was not rung. The evidence indicated that at the time of the accident, by reason of an embankment and a curve in the railroad track, one approaching the crossing on Twelfth street from the west, as was deceased, could not obtain a view of the track to the north of Twelfth street until within 30 or 40 feet of the crossing, and that from that point to a point 8 or 10 feet from the track one could see the track to the north only for a distance of about 120 feet. Changes have since been made, making the crossing less dangerous, but there appears to be no serious contention that at the time of the accident the situation was not as already stated. Fronting on the west side of the railroad right of way, and within 200 feet of the south side of Twelfth street, was a flour mill, the machinery of which was in operation at the time of the accident. There was evidence to the effect that the grade of Twelfth street from a point about 125 feet west of the crossing to the track is a downgrade of about 8 to 8½ feet to the hundred. The railroad track approaches this crossing from the north on a very slight upgrade. The accident occurred on the westerly one of the three tracks of the defendant crossing Twelfth street. The deceased had resided in Paso Robles for many years, and had been driving this wagon (a grocery delivery wagon) for several months, and was well acquainted with the crossing. There was evidence introduced on behalf of the plaintiff to the effect that the deceased drove his wagon down Twelfth street toward the track at a slow trot, until he came within about 8 or 10 feet thereof, when he brought his horse to a walk, momentarily paused, looked up the track, and apparently listened, and then proceeded on a walk across the track. The evidence of plaintiff's principal witness showed that after the train reached a

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place where it could be seen from within a few feet of the track, which must have been within 120 feet of the crossing, two or three short sharp blasts of the whistle were sounded as an alarm, and this is also the evidence of the engineer of defendant's train. If the train was traveling at the rate of 35 miles an hour, as we must assume it was in view of the verdict and the order of the trial court denying the motion for a new trial, it took only the merest fraction over two seconds to reach the crossing after the giving of such blasts.

There was a sharp conflict in evidence upon some of the points stated above, but, in view of the verdict and the order of the trial court denying the motion for a new trial, we must here assume the truth of the evidence most favorable to plaintiff. Upon these facts we have no doubt that the evidence was sufficient to support a finding that defendant was guilty of negligence. The crossing at Twelfth street was, in view of the facts already stated, an exceedingly dangerous one. The curve in the track and the embankment obstructing the view at a point 120 feet north of such crossing made it incumbent on defendant to exercise more care in approaching the crossing than could have been reasonably expected at a crossing where the view was unobstructed for a long distance. The obligation rested upon it of taking such care to prevent injury by its trains to those passing over the crossing as would, under the existing circumstances, be reasonable, and if the view of its track was so obstructed that a person lawfully using the street could not, before passing from a place of safety to a place of danger, see an approaching train just beyond the obstruction, in time to escape it, if it moved at a high rate of speed, it was its duty to moderate the speed accordingly, or make the approach of the train reasonably apparent by other methods to the user of the street. It is true that, in the absence of any statute or ordinance on the subject, no rate of speed is negligent per se. When taken in connection with other circumstances, however, the situation is very different. We can conceive of cases where, independent of any statute or ordinance, a speed of 35 miles an hour in approaching a crossing would, under the circumstances there existing, be so dangerous as at once to force all sensible and impartial men to the conclusion that those operating the train were not using reasonable care to avoid injury to others, and thus constitute negligence per se. However this may be, there can be no doubt that the question as to whether or not a rate of speed at a crossing is so dangerous or excessive as to constitute negligence must depend upon the particular circumstances there existing, and, if the circumstances are such that reasonable and impartial men may well differ as to whether the speed maintained at the particular place showed a want of reasonable care, the question as to whether the railroad company was guilty of negligence in maintaining such speed is one for the jury. See *Elliott on Railroads*, §§ 1160, 1161; *Cooper v. Los Angeles, etc., Co.*, 137 Cal. 229, 232, 70 Pac. 11.

Assuming that no warning was given of the approach of the

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train before it came into sight around the embankment, except such warning as was caused by the mere operation of the train over the track, and this, as already stated, must be here assumed in view of the evidence and the verdict, the jury were amply warranted in concluding that the situation at this crossing was such as to render the maintenance of this rate of speed negligence on the part of the company. Not more than the merest fraction over two seconds would elapse between the coming into sight of the train and the moment when it would reach the crossing, an interval so slight as to give one incumbered with a horse and vehicle very little opportunity to cross in safety, or withdraw, if, after stopping and listening, he had commenced to move forward and was already practically in a place of danger. In our opinion, the evidence was not such that it can be held as a matter of law that the deceased was guilty of contributory negligence.

Defendant relies upon the rule to the effect that, where a person about to cross a railroad track fails to take such precautions as the courts declare are as a matter of law essential to the exercise of ordinary care on the part of one so situated, the courts will hold as a matter of law that such person has been guilty of negligence. Those precautions, as stated by this court in *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 230, 53 Pac. 651, are as follows, viz.: "The railroad track of a steam railway must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains. What he must do in such a case will depend upon circumstances. If the view of the track is obstructed, he should take greater pains to listen. If, taking those precautions, he would have seen or heard the approaching train, the very fact of injury will raise a presumption that he did not take the required precautions." The rule here laid down must be considered the settled rule of this state (see *Green v. Los Angeles, etc., Co.*, 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68), and, if the evidence compelled the conclusion that the deceased failed to observe its requirements, there could be no escape from the conclusion that he was guilty of contributory negligence as a matter of law.

There was, however, evidence tending to prove that deceased took every precaution required by this rule. If he had not done this, but had continued on a trot across the track, without stopping, although he would have been guilty of negligence, he probably would have escaped injury. As, because of the obstruction to the view, he could not see up the track any considerable distance, it was doubtless his duty, on approaching the crossing, to reduce the speed of his horse and take greater pains to listen, and, perhaps, to stop, so that his hearing might not also be obstructed by any noises under his own control. *Pepper v. S. P. Co.*, 105 Cal. 389, 399, 38 Pac. 974; *Fleming v. W. P. R. R. Co.*, 49 Cal. 253; *Blackburn v. S. P. Co.*, 34 Or. 215, 221, 55 Pac. 225. There was evidence tending to show that he did all this at as late an opportunity as was given him, viz., within 8 or 10 feet

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of the track. According to that evidence, he there brought his horse to a walk, and then momentarily paused, facing partially in the direction from which the train was coming. The evidence warranted the conclusion that he could not then see the train. Unless we can say as a matter of law that the noise of the approaching train must necessarily have been apparent to him, if, while pausing, he had listened for it, we cannot assume that he was not listening. Apparently he was taking every precaution to observe whether or not a train was approaching. There was no evidence as to whether there was any wind. The train, it must be assumed, was behind a high embankment, which might have obstructed the sound of its movement on the rails, and did not indicate its approach by the ringing of bell or sounding of whistle. The machinery of a flourmill was in operation within a few hundred feet. Under all these circumstances we do not feel warranted in saying that the mere operation of the train over the rails must have been apparent to one listening from a point 8 or 10 feet west of the crossing. It was not essential to the exercise of ordinary care on the part of deceased that he should stop and listen for any particular length of time. If he looked and listened attentively, and could not see or hear the train, and proceeded to leave his place of safety and enter upon a place of danger only after so doing, it cannot be held that he was guilty of negligence as a matter of law in starting forward to cross the track.

Having once started, although not at once upon the track, he was already in a place of danger. It must be borne in mind that we are not considering the case of a pedestrian who is not in any danger until he has stepped within the reach of the train, and who, up to the very moment of so doing, has a sure and certain mode of escape clearly open to him, but the case of one on a loaded grocery wagon, driving a horse attached thereto, who has commenced to move down a grade toward a railroad track, and is already within a very few feet thereof. Probably the locomotive flashed into view of the deceased and gave its sharp alarm blasts before his horse was actually on the track, but it does not follow that he was guilty of negligence in attempting to escape the threatened danger by crossing in front of the train. The evidence warranted the conclusion that at this time the deceased was, without any negligence on his part, already in a position of great peril, and that immediate action on his part was necessary to avoid injury. Bewildered as he must have been by the sudden appearance of the train and the threatened peril, he was not required to exercise all that presence of mind and carefulness which are required of a careful and prudent man under ordinary circumstances. *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 521, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85. He was only required to do what was reasonable under the existing circumstances. It is possible that he might still have been able to so stop, back, and turn his horse and wagon as to entirely escape injury, although the evidence is not such as to make this

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clearly appear. The case was undoubtedly one where the reasonableness of the effort to escape injury after discovery of the danger was a question for the jury, to be determined by them in view of all the circumstances shown by the evidence. See *Harlington v. L. A., etc., supra*; *Liverpool, etc., Ins. Co. v. S. P. Co.*, 125 Cal. 434, 439, 58 Pac. 55. The evidence is such as to preclude us from disturbing their finding thereon.

In the matter of instructions to the jury there was no prejudicial error. The first instruction complained of, wherein the court stated the nature of the action, cannot reasonably be construed as assuming any wrongful act or negligence on the part of defendant. It may be conceded that the second instruction complained of stated a proposition of law that was "purely abstract as far as this case is concerned," but it was of such a nature that it could not have operated to the prejudice of defendant. The requested instruction as to the duty of one approaching a railroad crossing, taken from the opinion in *Herbert v. S. P. Co., supra*, was fully covered by other instructions given.

The judgment and order denying the motion for a new trial are affirmed.

We concur: SHAW, J.; HENSHAW, J.

CENTRAL OF GEORGIA RY. CO. v. DUGGAN.

(Supreme Court of Georgia, Dec. 21, 1905.)

[52 S. E. Rep. 768.]

Railroads—Killing Stock—Evidence.*—The facts of this case bring it within the decision announced in *Central Ry. Co. v. Neidlinger*, 35 S. E. 364, 110 Ga. 329, wherein this court ruled that where stock is killed, not at a public road crossing, but some distance beyond, and the stock suddenly came on the track at a point so nearly in front of the locomotive that, notwithstanding all possible efforts, the progress of the train could not be arrested before the stock was struck, the owner could not recover of the railway company in a suit for damages, although it appeared that in approaching the crossing the engineer did not observe the requirement of the law as to checking the speed of the train; his failure so to do not being the proximate cause of the injury.

(Syllabus by the Court.)

*For the authorities in this series on the question what is, and is not, the proximate cause of an injury, see foot-notes appended to *Greenawaldt v. Lake Shore, etc., Ry. Co. (Ind.)*, 17 R. R. R. 816, 40 Am. & Eng. R. Cas., N. S., 816; *Gilliam v. Texas & P. Ry. Co. (La.)*, 17 R. R. R. 786, 40 Am. & Eng. R. Cas., N. S., 786; *Ramsbottom v. Atlantic Coast Line R. Co. (N. Car.)*, 17 R. R. R. 776, 40 Am. & Eng. R. Cas., N. S., 776; *St. Louis & S. F. R. Co. v. League (Kan.)*, 17 R. R. R. 772, 40 Am. & Eng. R. Cas., N. S., 772; *Alabama Great Southern R. Co. v. Vail (Ala.)*, 17 R. R. R. 718, 40 Am. & Eng. R. Cas., N. S., 718; *Lewis v. Vicksburg, etc., Ry. Co. (La.)*, 17 R. R. R. 714, 40 Am. & Eng. R. Cas., N. S., 714; *Phillips v. Durham & C. R. Co. (N. Car.)*, 17 R. R. R. 704, 40 Am. & Eng. R. Cas., N. S., 704; *Anderson v. Southern Ry. (S. Car.)*, 17 R. R. R. 701, 40 Am. & Eng. R. Cas., N. S., 701; *Illinois Cent. R. Co. v. Watson (Miss.)*, 17 R. R. R. 199, 40 Am.

Wallace v. North Alabama Trac. Co

Error from Superior Court, Effingham County; P. E. Seabrook, Judge.

Action by James Duggan against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

A. C. Wright and Lawton & Cunningham, for plaintiff in error.

R. F. C. Smith, for defendant in error.

EVANS, J. Judgment reversed. All the Justices concurring.

WALLACE *v.* NORTH ALABAMA TRACTION CO.

(Supreme Court of Alabama, June 30, 1905.)

[40 So. Rep. 89.]

Appeal—Exclusion of Evidence—Harmless Error.—Where, in an action for the negligent killing of a dog, the court found that defendant was not negligent, the error in excluding evidence of the value of the dog was harmless.

Evidence—Declarations of Employee—Admissibility.*—In an action against a street railway company for the negligent killing of a dog, the declaration of the motorman in charge of the car, made after the occurrence, was not binding on defendant, and was inadmissible.

Same—Statement of Fact.—Where there was an obstruction, shutting a car out of view while at a certain point, an answer that a person could not see the car was not objectionable as involving a conclusion, but was a statement of a fact.

Same—Res Gestæ.†—In an action against a street railway company for killing a dog, evidence that the car, while approaching the place where the dog was run over, was making a great deal of noise, was admissible as a part of the *res gestæ*.

& Eng. R. Cas., N. S., 199; *Birmingham Ry., Light & Power Co. v. Hinton* (Ala.), 17 R. R. R. 173, 40 Am. & Eng. R. Cas., N. S., 173; *Peerless Mfg. Co. v. New York, etc.*, R. R. (N. H.), 17 R. R. R. 13, 40 Am. & Eng. R. Cas., N. S., 13; foot-notes appended to *Shamblin v. New Orleans & N. W. R. Co.* (La.), 16 R. R. R. 528, 39 Am. & Eng. R. Cas., N. S., 528; *Fishburn v. Burlington & N. W. Ry. Co.* (Iowa), 16 R. R. R. 444, 39 Am. & Eng. R. Cas., N. S., 444; *Pharr v. Morgan's L. & T. R. & S. S. Co.* (La.), 16 R. R. R. 434, 39 Am. & Eng. R. Cas., N. S., 434; *Southern Ry. Co. v. Williams* (Ala.), 16 R. R. R. 429, 39 Am. & Eng. R. Cas., N. S., 429; *Smith v. Fordyce* (Mo.), 16 R. R. R. 378, 39 Am. & Eng. R. Cas., N. S., 378; *Dean v. Oregon R. & Nav. Co.* (Wash.), 16 R. R. R. 237, 39 Am. & Eng. R. Cas., N. S., 237.

*For the authorities in this series on the question whether or not the declarations of railroad employees are *res gestæ*, see foot-note appended to *South Covington & C. St. Ry. Co. v. Riegler's Adm'r* (Ky.), 15 R. R. R. 256, 38 Am. & Eng. R. Cas., N. S., 256; foot-notes appended to *Havens v. Rhode Island Suburban Ry. Co.* (R. I.), 13 R. R. R. 549, 36 Am. & Eng. R. Cas., N. S., 549.

†For the authorities in this series, where the term is used *eo nomine*, on the question whether or not circumstances attending an accident are *res gestæ*, see *Southern Ry. Co. v. Crowder* (Ala.), 1 R. R. R. 70, 24 Am. & Eng. R. Cas., N. S., 70 (evidence as to construc-

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Appeal—Admission of Evidence—Harmless Error.—Where, in an action against a street railway company for killing a dog, the evidence of a witness having no personal knowledge of the facts showed that the car running over the dog could have been stopped in time to have prevented the injury, the error, if any, in refusing to exclude the evidence, was not prejudicial to plaintiff.

Evidence—Opinion Evidence—Competency of Experts.†—A motor-man of several months' experience is competent to give his opinion that it was impossible to have stopped the car by the application of all the appliances at his demand in time to have prevented the injury complained of.

Appeal—Exceptions—Necessity.—Where no exception was reserved to the judgment, nor taken to the denial of the motion for a new trial, neither the finding of the judge nor the denial of the motion will be reviewed.

Same—Discretion of Court—Attachment of Witness.—The matter of issuing an attachment for a witness is within the exercise of the court's discretion, and the action of the court in refusing to issue an attachment will not be disturbed, in the absence of the abuse of discretion.

Appeal from Circuit Court, Morgan County; D. W. Speake, Judge.

"Not officially reported."

Action by B. P. Wallace against the North Alabama Traction Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Rehearing denied January 9, 1906.

tion of car as part of the *res gestæ*, in action for injury to passenger); Illinois Cent. R. Co. v. Henon (Ky.), 3 R. R. R. 145, 26 Am. & Eng. R. Cas., N. S., 145 (the circumstances under which the injury was committed were properly admitted as a part of the *res gestæ*, in an action for injuries to a minor employee); Louisville & N. R. Co. v. Carothers (Ky.), 3 R. R. R. 750, 26 Am. & Eng. R. Cas., N. S., 750 (outries of other injured passengers); Louisville & N. R. Co. v. Stewart (Ala.), 21 Am. & Eng. R. Cas., N. S., 34 (evidence of movements of other trains, in action for injury to bicycle rider at crossing); Louisville & N. R. Co. v. Bell (Ky.), 8 Am. & Eng. R. Cas., N. S., 413 (quarrel between stockmen and trainmen); Bradley v. Ohio River & C. Ry. Co. (N. Car.), 18 Am. & Eng. R. Cas., N. S., 340 (in an action for the death of a passenger, after she had alighted, and was crossing the track in its rear in a hack, evidence tending to show that the hack and the body of deceased's daughter, who was injured at the same time, were pushed back by the train, was admissible as part of the *res gestæ*, as tending to show what stopped the train; defendant claiming that the train could not have been stopped so soon if it had been detached from the engine, and "kicked" back, as plaintiff contended); Chicago, B. & Q. R. Co. v. Oyster (Neb.), 12 Am. & Eng. R. Cas., N. S., 655 (position of decedent and the engine shortly after the accident).

†For the authorities in this series on the question of the admissibility of expert testimony and opinion evidence, see foot-note appended to Denver & R. G. R. Co. v. Scott (Colo.), 17 R. R. R. 309, 40 Am. & Eng. R. Cas., N. S., 309; Macon Ry. & L. Co. v. Mason (Ga.), 17 R. R. R. 201, 40 Am. & Eng. R. Cas., N. S., 201; Birmingham Ry., L. & P. Co. v. Enslen (Ala.), 17 R. R. R. 127, 40 Am. & Eng. R. Cas., N. S., 127; foot-notes appended to German Ins. Co. v. Chicago, etc., Ry. Co. (Iowa), 16 R. R. R. 494, 39 Am. & Eng. R. Cas., N. S., 494.

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Wert & Wert, for appellant.*John C. Eyster*, for appellee.

TYSON, J. This action is to recover damages for the negligent killing of plaintiff's dog. The case was tried below by the judge without a jury, and a judgment rendered for defendant, from which the plaintiff prosecutes this appeal. Quite a number of exceptions were reserved to the rulings of the court upon the admission and exclusion of evidence. Many of these relate to the question of the value of the dog. These rulings must be regarded as innocuous, if erroneous, unless there is merit in those exceptions taken to the rulings upon the admission and exclusion of evidence pertinent to the contested issue of fact of negligence vel non. For clearly, if the court found that defendant was not negligent upon relevant and legal testimony, the rulings affecting the question of value become utterly immaterial.

The action of the court in excluding the declarations of Smith to witness Wallace was proper. Smith's declarations after the occurrence could not bind the defendant. The objection urged against the correctness of the court's ruling in permitting the witness on cross-examination to state in answer to a question that Moore, who was with him at the time the dog was killed by the car, sitting where he was, could not see the car at Canal street, is that the answer is a conclusion of the witness. The answer does not necessarily involve a conclusion, but may have been the statement of a fact. For aught appearing from the record, there may have been an obstruction between Moore and Canal street that would have completely shut out his view of the car at that point. If such was the situation, the answer was nothing more than a shorthand rendering of the fact. A. G. S. Ry. v. Linn, 103 Ala. 134, 159, 15 South. 508.

Nor was there error in permitting defendant on cross-examination of plaintiff's witnesses to show by them that the car, while approaching the place where the dog was run over, was making a great deal of noise. This was a part of the *res gestæ* of the occurrence, and was properly admitted.

If it be conceded the court erred in not excluding the testimony of the witness Edwards relative to the various distances testified to by him, because of a want of personal knowledge of the facts, yet we think it appears that the plaintiff was not and could not have been prejudiced by allowing the evidence to remain in. Indeed, if it had any bearing upon the determination of the issue of negligence vel non, it was more favorable to him than to defendant. It tended to show, if any thing, that the car could have been stopped in time to have prevented the killing of the dog after it went upon the track. There is no merit in any of the exceptions reserved to the refusal of the court to exclude certain parts of the showing made for the witness Smith. He had had several months' experience as a motorman, and as an expert could give his opinion that it was impossible to have stopped the car by the application of all the appliances at his command in

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time to have prevented striking the dog. *A. G. S. Ry. v. Linn*, supra; *Choate v. So. Ry. Co.*, 119 Ala. 611, 24 South. 373. The other matters objected to were facts and not conclusions.

No exception appears to have been reserved to the judgment rendered. Nor does the record show that an exception was taken to the ruling of the court in denying the motion for a new trial. Neither the finding of the judge nor the denial of the motion will be reviewed.

The refusal to issue an attachment for the witness Norwood was a matter within the exercise of the court's discretion, which is not shown to have been abused.

There is no reversible error in the record of which the plaintiff can complain.

Affirmed.

McCLELLAN, C. J., and SIMPSON and ANDERSON, JJ., concur.

KELLEY v. OHIO RIVER R. CO.

(Supreme Court of Appeals of West Virginia, Oct. 31, 1905. On Rehearing, Jan. 9, 1906.)

[52 S. E. Rep. 520.]

Trial—Demurrer to Evidence.—Upon demurrer to evidence by defendant, if the plaintiff's evidence is sufficient to sustain his case, oral evidence of the demurrant conflicting with that of the demurree is ignored, and the demurrer overruled, unless the oral evidence of the demurrant be so clearly preponderant over that of the demurree that a verdict for the demurree would be set aside.

Death—Wrongful Act—Damages.*—In an action in behalf of a father for killing his son by wrongful act or negligence, the jury is not confined to compensative damages for mere pecuniary injury, but may consider the sorrow, the mental distress, and bereavement of the father.

Railroads—Injury to Person on Track—Signals.†—When the trainmen see a person walking on a railroad track, they must give him an alarm signal at such distance before reaching him as will enable him to hear it and get off the track. Until such alarm is given, they cannot act on the assumption that he will get off the track.

(Syllabus by the Court.)

*For the authorities in this series on the question whether or not there be a recovery on account of mental suffering, in negligence cases, see foot-notes appended to *Southern Pac. Co. v. Hetzer* (C. C. A.), 17 R. R. R. 724, 40 Am. & Eng. R. Cas., N. S., 724.

†For the authorities in this series on the question of the right of those in charge of trains or cars to assume that persons on or near tracks will avoid danger, see foot-notes appended to *Seaboard R. R. Co. v. Vaughan's Adm'x* (Va.), 17 R. R. R. 600, 40 Am. & Eng. R. Cas., N. S., 600; *Woelf v. Washington Ry. & Nav. Co.* (Wash.), 16 R. R. R. 846, 39 Am. & Eng. R. Cas., N. S., 846; *Markowitz v. Metropolitan St. Ry. Co.* (Mo.), 16 R. R. R. 838, 39 Am. & Eng. R. Cas., N. S., 838; *St. Louis S. W. Ry. Co. v. Purcell* (C. C. A.), 16 R. R. R. 779, 39 Am. & Eng. R. Cas., N. S., 779; foot-notes appended to *Montgomery St. Ry. v. Rice* (Ala.), 16 R. R. R. 499, 39 Am. & Eng. R. Cas., N. S., 499.

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Error to Circuit Court, Wayne County.

Action by John Kelley against the Ohio River Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Vinson & Thompson, for plaintiff in error.

Marcum, Marcum & Shepherd and *W. W. Marcum*, for defendant in error.

BRANNON, P. This is an action by John Kelley, as administrator of James Kelley, against the Ohio River Railroad Company to recover damages for killing James Kelley by running a passenger train against him. The defendant entered a demurrer to the evidence, and upon it the court rendered judgment against the defendant for \$5,000, the damages assessed by a jury. James Kelley and one O'Conner were walking along the railroad track, using it for a footway, and were struck by a passenger train running at the speed of 35 or 40 miles an hour, and both were killed. The case does not involve the question of the liability of a railroad company for failure to keep a lookout for persons on its tracks; for it is without question that the trainmen could see Kelley and O'Conner on the July day of a straight track for more than half a mile, and did see them for a long distance before they were struck. The single question is a question of fact; that is, whether the trainmen, after discovering Kelley and O'Conner on the track, were guilty of negligence in failing to sound an alarm at the proper distance before striking them.

It is undeniable law that one walking upon a railroad track, using it as a footway, is a trespasser, and in that very act is guilty of great negligence. *Spicer v. Railroad Co.*, 34 W. Va. 514, 12 S. E. 553, 11 L. R. A. 385. But whilst such is the law, it is also settled law that after the trainmen have discovered one so walking upon the track they owe to him a duty under the law. They cannot injure him by willful or gross or wanton negligence. *Spicer v. Railroad Co.*, 34 W. Va. 514, 12 S. E. 553, 11 L. R. A. 385. Whatever be the duty of a railroad company's agent to keep a lookout to discover persons on the track, certain it is that when the trainmen have discovered a human being on the track, and in danger, they must give him warning of the train's approach, such a warning, by whistle or bell, at such a distance, before reaching the trespasser, that he will be able to hear, take a thought for his safety, and get off the track. Common humanity demands this. True he is a trespasser and in the wrong; but, though every man who uses the railroad track as a foot-way is committing a trespass has placed himself within the precinct of danger where he has no right to be, and is guilty of gross negligence, yet people do walk upon railroad tracks, and the law, from sheer necessity, has established the rule, applicable not only to railroads, but generally applicable, that it is the duty of one from whom the injury comes that he shall, when he sees a man in danger, use reasonable care, take reasonable steps, rea-

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sonable under the circumstances of the particular case, to save the man in danger. He cannot punish the trespasser for his wrong. It is a condition, not a theory. He cannot thus himself be guilty of a great wrong. He must help his perishing brother by doing what he reasonably can to warn and save him. These men were absent-minded in conversation. Some become listless and abstracted in mind. They are entitled to warning. At any rate, so the law is. Under this principle it is the duty of a railroad company, it was the duty of the defendant in this case, to blow an alarm with its locomotive at a point far enough from Kelley to reach his ears, allowing him to realize his danger, and take steps to save himself from the rushing deadly locomotive. *Raines v. Railroad*, 39 W. Va. 50, 19 S. E. 565, 24 L. R. A. 226; *Teel v. Railroad*, 49 W. Va. 85, 38 S. E. 518; 3 Elliott on Railroad, §§ 1253-1257. In that late great work, Thompson's Commentaries on Negligence (volume 1, § 238), we find this: "The courts are almost universally agreed that, notwithstanding the fact that the plaintiff or the person injured has been guilty of some negligence in exposing his person or property to an injury at the hands of the defendant, yet, if the defendant discovered the exposed situation of the person or the property in time, by the exercise of ordinary or reasonable care after so discovering it, to have avoided injuring it, and nevertheless failed to do so, the contributory negligence of the plaintiff or of the person injured does not bar a recovery of damages from the defendant. The rule is aptly illustrated by taking the case where a person negligently walks upon a railroad track, and fails to keep out of the way of a passing train. If the engineer, after noticing his exposed situation, fails to stop his engine, or give the proper signals, or otherwise act willfully and recklessly, in consequence of which the person is killed or injured, the company shall be liable to pay damages."

These unfortunate men were on the railroad track, seen by the engineer and fireman, as they themselves say, for a very considerable distance before they were struck, in open daylight. They say that, when the train struck the straight track, they saw the men. They saw them before blowing a crossing signal, at least 1,000 feet before the men were struck. Furthermore, the engineer swore that, after blowing the whistle, he saw that the men were making no effort to get off the track. The facts fully establish beyond dispute that the trainmen saw these men, and saw, and had occasion to realize, plain reason to realize, that they were in imminent danger, and did realize it. Everybody must know that an engineer who sees two men walking in front of his engine, flying at the rate of 40 miles an hour, only a few feet away, sees that they are in imminent danger. True the engineer may assume that the trespasser will get off the track; but, when he sees for several hundred feet that he makes no effort to get off the track, it must inevitably arouse a reasonable apprehension that the man does not realize his danger, and that the case calls for prompt alarm signals. If it be true, as the

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engineer says, that he blew a crossing signal 1,000 feet away from the men, the very fact and the fact that the men still kept walking the track were enough to tell the engineer that the men were listless, and to watch them closely, and to alarm them at the proper point. But the engineer and fireman let these men walk on, according to the plaintiff's evidence, without any sound of alarm until the moment before the engine struck them and hurled them into eternity. Three witnesses swear pointedly that they heard no whistle at the crossing even. Three witnesses swear that the locomotive gave two toots for alarm, but did not do so until just as the engine struck the men. One of the witnesses says it struck them just as the second toot was sounded. If this be so, if this is a fact, then the liability of the company is infallibly fixed under the law of the land, and really here the case ends. Remember that we are upon a demurrer to the evidence, and under principles applicable to a demurrer to the evidence we cannot get away from accepting as a fact that no kind of alarm signal was given until just as the locomotive struck Kelley and O'Conner. There is conflicting evidence, or conflicting in tendency and effect, disputing the theory that no alarm was given until just as the engine struck the men. Two witnesses say that the train was nearly opposite the residence of Bowe, that the engine had passed the house, but that some of its cars were opposite it, when the alarm was sounded, and Bowe measured from the point where the train was when it gave the alarm to the point where it struck Kelley and O'Conner, and found it to be 345 feet. Now, can Bowe be certain as to the point at which the train was? The train was flying. Is this evidence as certain as that of the three men who saw the men struck and heard the whistle at the same time? One of these three witnesses, when cross-examined, was asked if he had an idea how far the engine was from the man when it blew the first whistle, and answered that he did not know. When asked if it was as much as 100 yards, he said he did not know. This somewhat weakens his evidence; but the fact remains that he said: "She whistled twice about the time she hit them." Besides, two other men swear the same thing. He was a boy 13 years of age, and we all know that under cross-examination children are not always consistent in all their statements. It is said that Bowe's measurement of the distance was with a tape line, whereas the three witnesses who said that the whistles were just as the men were struck merely guessed distance with the eye. There was no distance for them to measure, because they say pointedly that the train struck the men just as it whistled two short toots, one after another. The engineer and fireman say that they discovered that the men were making no effort to get off the track about the train's length before the men were struck, and that the alarms were given that distance before the men were struck; that is, 320 feet. Now, these versions conflict upon the most material controlling point; that is, as to where the train was, with reference to Kelley and O'Conner, when the alarm was blown? What must the court do under a demurrer

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to evidence? Can it reject as mistaken or untrue the definite statements of three witnesses that no alarm was given until just as the men were struck, and accept as correct and true the adverse evidence? That adverse evidence may be the truth. It may be that injustice is done in this case.

After patient examination by the court of this case, we feel some reluctance in rendering the judgment which we render. It may do injustice, but we feel that we cannot, under principles governing demurrers to evidence, throw away the case plainly made by the plaintiff's evidence, and take that made by the defendant's. The law forbids this. We cannot say that there is a decided, plain preponderance of evidence in behalf of the defendant. Neither in number nor weight is there preponderance for the defendant. Two witnesses swear that the train was 320 feet from the men when the whistle was blown. Three witnesses flatly deny this. We have no reason to say that those three are false. The evidence of the two witnesses who say that the engine had just passed Bowe's house has not that degree of certainty as to just where it was to enable us to say that it was distant from Kelly and O'Conner. They might be mistaken as to the exact place of the engine. Our cases relative to the treatment of demurrers to evidence say that when the evidence of the two sides directly or in effect conflicts the oral evidence of the demurrant conflicting with that of the demurree is disregarded, and the evidence of the demurree is held to prove all that it can fairly be regarded as proving, and the demurrer is decided against the demurrant, unless the evidence of the demurrant clearly and decidedly preponderates against the demurree's case, or his case is without sufficient evidence to sustain it. Still, if the preponderance in favor of the demurrant is so clear and decided that the court ought to set aside a verdict against him, his demurrer ought to be sustained. But the demurrant by his demurrer takes the case from the jury, and, if the evidence is such that a verdict for the demurree would stand, the demurrer to the evidence must be overruled. To sustain the demurrer the evidence must plainly preponderate, decidedly preponderate, not be merely doubtful, so that different persons might come to different conclusions. *Barrett v. Coal Co.*, 55 W. Va. 395, 47 S. E. 154; *Mannon v. Railroad*, 56 W. Va. 554, 49 S. E. 450; *Shaver v. Edgell*, 48 W. Va. 502, 37 S. E. 664; *Gunn v. Railroad*, 42 W. Va. 681, 26 S. E. 546, 36 L. R. A. 575. Now, suppose there had been no demurrer to evidence, and the jury had found for the plaintiff; could we set it aside, if we followed old and well-settled principles governing motions for new trial under conflicting evidence? We could not do so. That is the test. As the party takes from his adversary the right to lay his evidence before a jury, should his adversary not have right to have it weighed as it would be after verdict? We are bound to sustain the circuit court in its judgment on demurrer to evidence. We cannot escape from it. The engineer and fireman say that crossing signals were blown for a road 1,000 feet away. This is claimed to be a compliance with

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all the duty of the defendant. There are several answers why it was not. It was not that short, sharp, distress whistle for alarm. Again, after that whistle, the engineer says he noticed that the men were not going to get off the track. This called for an alarm whistle. Anyhow, the fact that the men still kept on the track called for the alarm whistle.

The defendant complains of the refusal of instructions. One was that if the plaintiff failed to show that he had suffered any pecuniary or actual loss by the death of his son, and that he received nothing for his labor, and was not dependent upon him, only nominal damages should be found. Code 1899, c. 103, §§ 5, 6, gives an action for death in case of wrong to the administrator of the decedent for the benefit of his kin, wherever he would himself be entitled to recover damages, if death had not ensued. Can it be thought that the statute contemplates only one cent damages? The deceased was 37 years of age, in good health, unmarried. His father, his sole distributee, to whom the damages go under the statute, was 75 years of age, and might the next week after his son's death be stricken with infirmity and disability to labor. Also, he was bereaved of his son, and cast into sorrow, gloom, and disconsolation of soul. Can it be supposed for a moment that, although the old father was still able to labor for self-support, he would continue so, and that the Legislature intended to give him only one cent damages? We cannot realize that the statute designed only nominal damages in such a case. Moreover, the statute expressly says that "in every such action the jury may give such damages as they shall deem fair and just, not exceeding \$10,000, and the amount so recovered shall not be subject to any debts or liabilities of the deceased." This does not make the recovery dependent on the fact that the person should be dependent on the deceased. No such exception is incorporated in the statute, and the very fact that the recovery is not liable to the debts of the dead man shows that it was designed for the comfort and support of the next of kin, not merely in his condition to-day but for his future need. *Searle v. Railway*, 32 W. Va. 370, 9 S. E. 248; 8 Am. & Eng. Ency. L. (2d Ed.) 923.

Another instruction refused told the jury that they could not consider sorrow, grief, and sentimental feelings that the father may have felt, occasioned by the death of his son, unaccompanied by any pecuniary loss, actual or prospective. The statute makes no such limitation. We think the jury had the right to consider these matters, because they enter into the loss, and because the statute gives unlimited discretion as to the amount of the damages to the jury within the limit of \$10,000. The statute gives to those closely related to the person killed by tort a recovery, and we do not see why the jury may not consider the father's grief, bereavement, and anguish of soul under the loss of his son in his old age. Much law will be found in the books saying that the jury cannot consider mental suffering and sorrow in fixing damages; but the most of the decisions propounding this doctrine

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are based on statutes which limit the damages with reference to "pecuniary injury." The Virginia statute does not contain those words, but says that "the jury may award such damages as to it may seem fair and just." Three times has the Supreme Court of Virginia decided that the recovery is not limited to pecuniary or merely compensatory damages, but that they may be punitive or exemplary, expressly holding that mental anguish and sorrow of the bereaved father may be taken into consideration by the jury in fixing the amount of their verdict, and the damages may be given for solatium, solace, consolation. *Matthews v. Warner's Adm'r*, 29 Grat. 570, 26 Am. Rep. 396; *B. & O. Railroad Co. v. Noell's Adm'r*, 32 Grat. 394; *Anderson v. Hygeia Hotel*, 92 Va. 692, 24 S. E. 269. This court has explicitly approved the construction of that act as given by the Virginia court holding that the damages are not limited to pecuniary or compensatory damages, but may be punitive or exemplary. *Turner v. Railroad*, 40 W. Va. 676, 22 S. E. 83; *Thomas v. Electrical Co.*, 54 W. Va. 395, 46 S. E. 217. Now, if damages may be exemplary under these decisions, why cannot the mental distress of the bereaved father be considered? It enters into punitive damages. The Virginia court departs from many other decisions in other states because their statutes, either expressly or by construction, were limited to "pecuniary injury," whereas the Virginia statute was not. But this is not all. The case is clearer in West Virginia still. And why? Because our first act giving action for death caused by wrongful act expressly limited the jury to damages "with reference to the pecuniary injury resulting from such death." So it reads in Acts 1863, p. 113, c. 98. But when the Legislature made Code 1868, c. 103, § 6, it left out those words and broadly declared that "in every such action the jury shall give such damages as they shall deem fair and just, not exceeding five thousand dollars," and in re-enacting section 6, by chapter 105, p. 309, Acts 1882, it reads, "In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars," still leaving out the provision that the damages should be limited to "pecuniary injury." Now, this change from the acts of 1863, in this material feature, clearly means something. We are bound to take the act as it reads. We are bound to strike out the words "with reference to the pecuniary injury," because the Legislature has twice approved the change from the act of 1863 by leaving those words out. This ought to be the construction of the act, or else the willful murderer will pay only uncertain compensatory damages, which will not atone for the grief and anguish of the bereaved mother and father. His money ought to pay for their consolation, as far as money can give consolation. Why shall he not do so when he has brought the gray hairs of a father or mother in sorrow to the grave? He has caused the grievous loss from which heart or soul suffers more than from pecuniary loss.

A third instruction was refused. It says that in fixing damages the jury should not fix punitive or exemplary damages, but

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must be limited to such as would compensate the father for actual loss sustained by reason of the death of his son. We think this instruction was properly rejected under principles stated in *Turner v. Railroad*, 40 W. Va. 675, 22 S. E. 83, and *Thomas v. Electrical Co.*, 54 W. Va. 395, 46 S. E. 217. It is useless to re-discuss the subject of the discretion of the jury under said act.

For these reasons we affirm the judgment.

On Rehearing.

BRANNON, J. A petition for rehearing asserts that in the decision announced in the above opinion we have run counter to the cases of *Raines v. Railroad*, 39 W. Va. 50, 19 S. E. 565, 24 L. R. A. 226, and *Teel v. Railroad*, 49 W. Va. 85, 38 S. E. 518. We do not so see it. Plainly the *Raines* Case says that, "if those running a train discover a trespasser in immediate danger, they must use all reasonable exertions to avoid inflicting injury; otherwise, the company will be liable." The argument for the company in this case is that the engineer had the right to assume that the trespasser would get off the track. So he may, so far as not to require him, after alarm signal, to stop the train or lessen speed; but he cannot so assume as to dispense with such warning. After discovery he must give the track walker the benefit or chance of a warning. The *Raines* Case says that the trainmen, "having given such signals as are required, have a right to act on the presumption that such person will step aside in time to remove himself from danger." This pointedly demands the signal before the right to act on that presumption begins. The law cited in the two opinions in the *Raines* Case shows this. *Thompson, Com. on Negligence*, vol. 2, § 1736, says that "after having given sufficient warning by whistle or bell he [the engineer] has a right to act on the assumption that the trespasser will quit the track." Who can dispute that the decisions demand that warning after discovery? The very fact that the law demands such warning denies that it can be dispensed with on the theory that the engineer may assume that the track walker will get off the track. Why call for warning, if this is not so? The *Teel* Case supports our decision. It says that the engineer who discovers a person on the track is not bound to stop the train, unless he sees that the person is helpless; "but the engineer's only duty toward such obstructor is to give the alarm signals necessary to warn a person of sound mind and good hearing in time to allow such person to vacate the right of way." Now, what do we say in the above opinion contrary to these cases?

Complaint is made against the above opinion that it calls for a warning "at such a distance before reaching the trespasser that he will be able to hear, take a thought for his safety, and get off the track." Of what use would the warning be unless it gives time to "take a thought" for safety? It must be in time to reach the mind. "If the engineer sees the trespasser and waits until the warning by whistle will do no good, when by whistling sooner he could have enabled him to escape, the company is liable."

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Lake Shore v. Bodemer (Ill.) 29 N. E. 692, 23 Am. St. Rep. 218. It is said that the Raines Case accepted station and crossing signals 500 feet away from the person as sufficient signal. The fact was only mentioned. There were alarm whistles. Even if we say that the station whistle was held enough, it does not follow that a whistle 1,000 feet away would be the same as one 500 feet away. It is said that the Raines Case held an alarm 20 feet off sufficient. It must be admitted that was close; but the court said it was 20 to 30 feet. In that case the train was going 15 miles an hour; in this 40 miles. That would call for a distance of 50 feet in this case. But why so measure, when three witnesses say that there was no alarm until just as the engine struck Kelley?

SOUTHERN RY. CO. IN KENTUCKY v. STEELE.

(Court of Appeals of Kentucky, Jan. 23, 1906.)

[90 S. W. Rep. 548.]

Appeal—Error Cured by Instruction.*—The admission of evidence in a personal injury case that plaintiff had a family dependent on him is cured by an instruction that the jury are not to consider such evidence.

Trial—Right to Close Argument.—Defendant, in a personal injury case in which the petition alleges gross negligence, does not acquire the burden of proof, and the right to close the argument, by admitting ordinary negligence and damages in an insignificant sum.

Appeal from Circuit Court, Mercer County.

"Not to be officially reported."

Action by Clarence Steele against the Southern Railway Company in Kentucky. Judgment for plaintiff, and defendant appeals. Affirmed.

E. H. Gaither and Humphrey, Hines & Humphrey, for appellant.

Robt. Harding, E. M. Hardin, and Greene & Van Winkle, for appellee.

CANTRILL, J. In 1904 the appellant was engaged in building a side track on its line of road between Harrodsburg and Burgin. The work of the side track was being performed by a work crew and a work train. On the day of the collision the work train was under the directions of a conductor. The work crew were ordered to get on the work train, which was composed of an engine, tender, three flat cars, and a caboose. The work crew got upon the flat cars at the direction of the conductor, who also took a position on the forward flat car (the same car on which

*For the authorities in this series as to effect, or admissibility, of evidence of the financial circumstances, size of family, etc., of a party in negligence cases, see foot-note appended to *St. Louis, etc., Ry. Co. v. Adams* (Ark.), 16 R. R. R. 843, 39 Am. & Eng. R. Cas., N. S., 843.

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the appellee was), and took a position on the front end of said car at or near the brake rod. About the time that this work train left the yards in Harrodsburg to go down to work on the side track, a freight train left the yards at Burgin going in the direction of Harrodsburg. When said freight train was about one mile and a quarter from Harrodsburg, it collided with the work train, killing two or three men and injuring others—among the injured being appellee. At the time of the accident the work train seemed to be run by somebody who was not connected with the regular train crew. The engineer for said work train was not at his post in the engine, and none of the crew seem to know where he was, except that they supposed that he was in the caboose. Thus equipped, the work train left the yards at Harrodsburg, going in the direction of Burgin. According to the testimony of those on the work train, the rate of speed of this work train was said to be from 40 to 45 miles an hour. There is no indication or testimony to show that this speed was slackened at the time the collision occurred. In the meantime the freight train which started out from Burgin was approaching the town of Harrodsburg. This train seemed to be under the control of a conductor and an engineer and fireman. It appears from the proof that the engineer on this freight train was twice warned of the proximity of the work train—first, by a sectionman who flagged the train with a danger signal and told him that he would meet the work train down there in the cut; and further along a section foreman flagged the train, and it slowed up sufficiently for him to tell him to be on the lookout for the work train down there in the cut. It does not appear that the engineer of the freight train stopped his train to ascertain where the work train was, but proceeded on his way. Now, between Burgin and Harrodsburg there was no side track which the work train could pull out on and let the freight train pass; and the only way for the freight train to pass the work train was for the work train to back back to Harrodsburg and let it be passed there, or for the freight train to back back to Burgin and give the work train an opportunity to pass at that place. In any event, there was no effort made to find out the position of the work train on the track, nor was there any made on the part of the crew of the work train to find out where the freight train was as it approached. Thus were the two trains—one approaching from the west at a rate of speed described from 40 to 45 miles an hour, whilst the freight train was coming from the east towards the west at a rate that is not even approximated by any of the witnesses. These two trains were in these conditions when the collision occurred. It is perfectly apparent from the statement of this case that those in charge of said trains were guilty of criminal negligence, and from our standpoint it is the duty of the court when a case is presented which shows criminal negligence, to so designate it, and in this particular case the crews on both trains were guilty of criminal negligence. The crew on the work train especially so. The conductor was on the front of the front flat car, and it

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was apparent to him that the engineer was not at his post of duty, but that there were some volunteers—two negroes—in charge of the train, one acting as engineer and one acting as fireman. There is nothing in the record to show that either of them knew anything pertaining to the duties of either place—either that of engineer or fireman. It further appears that the negro who was acting as fireman loaded up the engine with coal, and it appears also that the engine was then put in motion and continued on its way down the track, in the direction from which the freight train was coming, at a rate of speed as designated by some witnesses at from 40 to 45 miles an hour. There is nothing in the record to show that this rate was ever checked or stopped until the collision occurred. It was in this collision that appellee was injured. He was placed upon a flat car and taken back to Harrodsburg. Whether this flat car was backed by an engine, or whether it just ran back of its own momentum, does not appear. When he arrived at Harrodsburg, he was still unconscious, and was taken to his home in that condition, and so remained the greater part of that day, which was the 4th of June. When his injuries were examined by the doctors who had been summoned to attend him, it was found that his collar bone was broken, his right hand was terribly mangled, the end of one of his fingers being cut off so as to hang by a thread, there was a cut on the right side of his head, and he was suffering from the shock of the collision with the two engines, to an extent even the doctors could not tell. He was put upon the bed, his wounds dressed, and he was kept upon a hard bed for three weeks and three days before he was able to get up. He then brought this suit in the Mercer circuit court, alleging that he was injured from the gross negligence of those in the operation of said trains. Upon the trial of said cause, the jury so found, and fixed his damages in the sum of \$5,000, upon which verdict a judgment was rendered, and from this judgment the appellant appeals.

The appellant in its answer denied that the appellee was injured from the gross negligence of those in the operation of said train, or either of them. They denied that his collar bone was broken, or he otherwise suffered mental and physical pain by reason of said accident. The appellant further pleaded in another paragraph in its answer that the appellee was injured by the ordinary negligence of the defendant company, but denied any gross negligence, and admitted that the appellee was injured to the extent of \$100 and no more. Upon the trial of the cause the appellant moved the trial court that it had the burden, and that it be allowed to introduce its testimony and to conclude the argument of said cause. Its contention is that, by reason of the fact that appellant admitted ordinary negligence, this admission of itself changes the rule of practice, and gives him the burden so far as the introduction of testimony and the argument is concerned. This contention the trial court overruled, and gave the burden to the appellee, where it properly belongs, to which action

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of the trial court the appellant objected and excepted at the time. At the trial of this cause, the circuit court permitted the appellee to testify that his family consisted of himself, wife, and two children, and that they were dependent upon him for their daily support, which testimony was objected to and excepted to by appellant at the time. This action of the court is one of the main grounds upon which a reversal of this case is sought. When the court came to give the instructions to the jury, it by an instruction withdrew all of this testimony given by appellee (plaintiff below), and notified the jury that this was not to be considered by them in making their verdict. The other instruction given by the court is neither objected to nor excepted to, as far as the record shows; the grounds for reversal relied upon being that appellant was refused the burden, and refused the right to conclude the argument, and that the trial court permitted the appellee to testify of whom his family was composed and that they were dependent upon his daily labor for their support.

If it be true that the appellant in this class of cases can evade the common rule of practice by admitting ordinary negligence and denying gross negligence, but admitting that appellee was damaged in the insignificant sum of \$100, then it would seem that the rules of the Code of Practice should be abrogated and of no effect, and that the Legislature should be called upon to make a new section of the Code defining when and how the appellant railroad company could by such a device change the universal and accepted practice in all the courts. The issue in this case was not whether the appellant was guilty of ordinary negligence, and his admission of that fact cuts no figure in the case. The issue was for the jury to try as to whether appellant was guilty of gross negligence, and it was to try this issue (which had been denied) that the jury was impaneled and sworn; and such having been done, and the jury, having had appellee before them and heard and saw the extent of his injuries, had the right to determine to what extent the appellant had been guilty of gross negligence, and, if necessary, to award punitive damages befitting the case that they were then trying. The authority relied upon by the appellant in this case, that the appellant was entitled to the burden of proof and to have the concluding argument, does not bear out their contention, and is not borne out by the text of the authority cited. A cursory reading of the opinion in the case of *Louisville & N. R. R. Co. v. Champion*, 68 S. W. 143, 24 Ky. Law Rep. 87, decides one question, and but one question alone; and that was that the appellee *Champion*, who was the plaintiff below, was not entitled to have the court give an instruction to the jury awarding punitive damages; and for that reason the court below, having given an instruction authorizing the recovery of punitive damages, was clearly in error from a statement of the case, and that is the whole case. The court does not come within a mile of deciding that, where the appellant admits ordinary negligence, he is entitled to the burden of proof and is entitled to the closing argument.

For those reasons, the judgment of the court below is affirmed.

HANNA v. PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania, Jan. 2, 1906.)

[62 Atl. Rep. 643.]

Railroads—Injury at Crossing—Evidence.*—The presumption that one about to cross a railroad track stopped to look and listen can only be overcome by evidence that he failed so to do.

Same—Nonsuit.—In action to recover for the death of plaintiff's husband at a grade crossing, held error to enter a compulsory nonsuit.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Sarah Hanna against the Philadelphia & Reading Railway Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

At the trial the court in awarding a nonsuit said: "The deceased was driving on the river road, which runs in a generally northerly direction and parallel with the tracks of the defendant company. Upon reaching an ice-house at the side of the road, a distance of 739 feet from the railroad crossing, he was seen to stop and rest his horses. He then drove on until he reached a place known as the "battery wall," 363 feet from the crossing, and on a level with the tracks. At this point he was seen to look out south along the railroad tracks. He then drove on, and was next seen with the hind wheels of his wagon resting upon a bridge over a small stream 109 feet from the railroad crossing and 12 feet below the level of the tracks. At this point the road curved, and the grade sloped upward to the crossing. Immediately to the south, on the first and second tracks, there were stationary coal cars extending some distance below the crossing. The plaintiff's horses were struck by a north-bound express train as they got upon the third track. The deceased was thrown from his wagon and killed. There was evidence by the witnesses who saw the accident that they heard no whistle blown or gong sounded. The question to be considered is whether or not his death was due to contributory negligence. He was shown to stop, look, and listen at a point 363 feet from the crossing, which is too remote to comply with the rule of law. He was next seen to stop at a point 109 feet from the crossing and 12 feet below the grade. There is no testimony to show that he had a view of the tracks from this place. On the contrary, Harry Nippes and Thomas E. Murry testified that it was necessary to walk up to the tracks in order to see an approaching train. In the opinion of the court, if the deceased had looked at a proper place before driving upon the track, he

*For the authorities in this series on the subject of the presumption of the exercise of due care by a person killed by a train, see foot-notes appended to *Miller v. Boston & Maine R. R.* (N. H.), 17 R. R. R. 564, 40 Am. & Eng. R. Cas., N. S., 564; *Rollins v. Chicago, etc., Ry. Co.* (C. C. A.), 17 R. R. R. 291, 40 Am. & Eng. R. Cas., N. S., 291; foot-notes appended to *Woolf v. Washington Ry. & Nav. Co.* (Wash.), 16 R. R. R. 846, 39 Am. & Eng. R. Cas., N. S., 846.

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would have seen the train approaching. As his view of the tracks was obstructed by the coal cars, it was his duty to alight from the wagon and lead his horses to a point where he could see. If he had done this, he would have seen the train. He must, therefore, either have seen the train and driven directly in front of it, or he must have tried to cross the tracks without looking. In either case he was negligent. The nonsuit is granted."

Argued before MITCHELL, C. J., and DEAN, FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Frank M. Grady, for appellant.

Gavin W. Hart, for appellee.

ELKIN, J. This is an action of trespass to recover damages for the death of the plaintiff's husband, who was struck and killed by a train of the defendant company at a grade crossing. At the place of the accident the railroad tracks run approximately north and south, a short distance west of, and parallel with, the Schuylkill river. Between the river and railroad is a public road, also running north and south, on which the deceased was driving. An icehouse 739 feet, and a battery wall 363 feet, both south of the crossing, are located between the public road and railroad. From the battery wall there is a downgrade until the road reaches the bridge which crosses a small stream 109 feet south of the crossing. The road at the bridge is 12 feet below the level of the railroad tracks. There are five tracks at the crossing. The deceased was driving a team north on this road. At the icehouse he stopped his team and looked for trains. He again stopped at the battery wall, got off his wagon, walked around his horses, then stood on the wheel of his wagon, and once more looked for trains. He then proceeded on his way until he reached the bridge, where he stopped and looked another time. He was not seen by any one, so far as the testimony discloses, from the time he stopped at the bridge until he was struck and killed by a train running north on the third track. In the court below a nonsuit was granted; the learned trial judge holding that, "if the deceased had looked at a proper place before driving upon the tracks, he would have seen the train approaching. As his view of the tracks was obstructed by the coal cars, it was his duty to alight from the wagon and lead his horses to a point where he could see. If he had done this, he would have seen the train. He must, therefore, either have seen the train and driven directly in front of it, or he must have tried to cross the tracks without looking. In either case he was negligent."

The question therefore arises whether, under the testimony offered by the plaintiff, it was the duty of the court to hold as a matter of law that the deceased was guilty of such contributory negligence as to preclude a recovery in this action. The evidence does not disclose what the deceased did immediately before starting over the crossing. It does show that he had stopped and looked at the icehouse, again at the battery wall, and still again at

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the bridge. These facts conclusively show that he had exercised the greatest care possible under the circumstances until he reached the bridge. What he did after leaving the bridge is only a matter of conjecture or inference. Under these circumstances he is entitled by the settled rule of law to the presumption that he did his duty, and this presumption can only be overcome by testimony showing that he failed to observe the precautions required by law. *Penna. Railroad Co. v. Weber*, 76 Pa. 157, 18 Am. Rep. 407; *Weiss v. Penna. Railroad Co.*, 79 Pa. 387; *Longenecker v. Penna. Railroad Co.*, 105 Pa. 328; *Schum v. Penna. Railroad Co.*, 107 Pa. 8, 52 Am. Rep. 468; *Cromley v. Penna. Railroad Co.*, 208 Pa. 445, 57 Atl. 832.

The learned counsel for appellee admits the force and effect of this rule as applied to the present case, but contends that the presumption of the deceased having done his duty is rebutted by the testimony offered by the plaintiff. The answer to this position is that there is no evidence in the case showing what the deceased did immediately before going on the crossing. The learned counsel argues that under the circumstances it was the duty of the deceased to lead his horses to a place where he could see the approaching train, and, if he had been leading his horses, he could and would have been seen by Mrs. Nippes. This does not necessarily follow. In the first place, it is doubtful whether under the facts proven and circumstances established the court was justified in holding as a matter of law that it was the duty of the deceased "to alight from the wagon and lead his horses to a place where he could see." The testimony did not clearly show that the view of the deceased was so obstructed as to require him to alight, nor does it show just what position of danger the deceased was in as the train approached, and whether he exercised such care as was required of him under the circumstances. But, even if it be conceded that it was his duty to alight and lead his horses, in the absence of evidence showing that he did not do so, the presumption is that he did perform whatever duty the law required of him. The testimony of Mrs. Nippes is not sufficient to overcome this presumption. In answer to questions by counsel and court, she testified: "I didn't see the man." At another time this witness said she did not see the man either before or after the accident. It requires a degree of ingenuity, not convincing to the court, to support the contention that the negative testimony of this witness is to be construed into affirmative testimony showing that the deceased had failed in the performance of a legal duty. The witness does not say whether deceased was leading his horses, or walking beside, or sitting upon, his wagon. She does not know where he was, nor has any other witness testified to the whereabouts of the deceased at the time of the accident. Certainly such negative, uncertain, and unconvincing testimony as this cannot be held to overcome the legal presumption in his favor. On the other hand, the presumption that the deceased did his duty before going on the tracks is strengthened by his course of action on his way to the crossing. He stopped

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three times to look for approaching trains, and may or may not have stopped a fourth time. These facts, added to the legal presumption that he exercised due care, make a particularly strong case in favor of the plaintiff.

It is earnestly contended that this case is ruled by *Kinter v. Penna. Railroad Co.*, 204 Pa. 497, 54 Atl. 276, 93 Am. St. Rep. 795. We think not. In that case it was held to be the duty of Kinter to stop, look, and listen at a place where he could see the approaching train. The evidence showed that he did not stop at such a point; and, it being conceded that he could not see where he did stop, it was for the court to say that he had not observed the rule requiring him to look. In the present case there is no evidence to show that the deceased did not stop at a place where he could see the approaching train, or that there was a better place of view where he should have stopped, or that he failed in the performance of any duty required of him by law. On these vital questions the evidence discloses nothing. The legal presumption, in the absence of evidence, is that he did stop at a place where he could see, that it was the proper place to stop, and that he performed his duty. It is clear, therefore, that the rule in that case is not applicable to the one at bar.

The question of defendant's negligence has not been raised here, nor was it considered by the court below. When, however, the case is again tried, it should not be overlooked that the first and primary question to be determined is the negligence of the defendant. The contributory negligence of the deceased is predicated upon and presupposes the negligence of the defendant. If the testimony does not show negligence by the defendant, there can be no recovery, no matter how free from negligence the facts show the deceased to be. The defendant is entitled to the benefit of the presumption that through its agents and employees it did its duty in approaching the crossing. There must be affirmative evidence to rebut this presumption, else there can be no recovery. If the case stands on presumptions alone, no evidence having been offered either as to the defendant's negligence or the contributory negligence of the deceased, the presumptions would be equal, and the action to recover damages could not prevail. The burden of showing negligence by the defendant rests on the plaintiff, and must affirmatively appear from the evidence. It is true there is some evidence, negative in character, of the failure to blow the whistle and ring the bell as the train approached the crossing. Whether this evidence is sufficient to rebut the presumption that these duties were performed is a question not raised by this appeal, and it is therefore unnecessary to review this branch of the case.

Judgment reversed, and a procedendo awarded.

ILLINOIS CENT. R. CO. *v.* CANE'S ADM'X.

(Court of Appeals of Kentucky, Feb. 21, 1906.)

[90 S. W. Rep. 1061.]

Master and Servant—Injuries to Servant—Contributory Negligence—Reliance on Care of Fellow Servant.*—Where it was the duty of an engineer not to move a train except in response to signals of the brakeman, the latter had a right, in performing his duties about the train, to rely upon the faithful discharge of his duty by the engineer.

Same—Negligence—Question for Jury.—In an action for the death of a brakeman, alleged to have been caused by negligence of the engineer, evidence considered, and held sufficient to justify submission to the jury of the question of the engineer's negligence.

Same—Contributory Negligence.—In an action for the death of a brakeman, alleged to have been caused by negligence of the engineer, evidence considered, and held sufficient to justify submission to the jury of the question of decedent's contributory negligence.

Evidence—Mortality Tables.†—In an action for death by wrongful act, life insurance tables are admissible in evidence.

Removal of Causes—Diverse Citizenship.—Where, in an action against a foreign railroad company for the death of a brakeman, the engineer, who was a resident of Kentucky, was made a defendant, and the petition stated a cause of action against him, the action was not removable to the federal courts.

Appeal from Circuit Court, Muhlenberg County.

"Not to be officially reported."

Action by Nelson Crane's administratrix against the Illinois Central Railroad Company and others. From a judgment for plaintiff, defendant railroad company appeals. Affirmed.

Trabue, Doolan & Cox, J. M. Dickinson, and Johnson & Wickliffe, for appellant.

R. Y. Thomas, for appellee.

BARKER, J. Nelson Crane was a brakeman on a freight train belonging to and operated by the appellant company. On the 2d day of January, 1904, he was instantly killed at Luzerne Mines, in Muhlenberg county, Ky., by being crushed between the drawheads of two cars which came together with great violence, catching him about the middle of the body. To recover damages for this accident, his wife, Ellen Crane, administratrix of his estate, instituted this action in the Muhlenberg circuit court. The petition alleges that the injury was caused by the gross negligence of the corporation's employees in the management of the train. The answer denies all of the material allegations of the petition, and pleads contributory negligence, which, being denied by reply, completed the issues. A trial resulted in a judgment for

*See foot-notes appended to *McCabe v. Montana Cent. Ry. Co.* (Mont.), 13 R. R. R. 564, 36 Am. & Eng. R. Cas., N. S., 564.

†See foot-notes appended to *Virginia & S. W. Ry. Co. v. Bailey* (Va.), 15 R. R. R. 795, 38 Am. & Eng. R. Cas., N. S., 795; *Atlanta, etc., Ry. Co. v. Gardner* (Ga.), 14 R. R. R. 603, 37 Am. & Eng. R. Cas., N. S., 603.

\$5,000 in damages against the railroad, of which it is now complaining.

The facts are, substantially, these: On the day of the accident there were some 20 cars standing on a switch leading to the Luzerne mines. Some of these were loaded with coal ready for shipment; others were empty. The train on which appellee's decedent was a brakeman was to transport the loaded cars to their destination. In order to separate the latter, which were at the far end of the line as they stood on the siding, from the empty cars, it was necessary to haul them all out from the switch onto the main track, then cut off the loaded cars, leave them on the main track, and push the empties back on the siding where they were to remain. This was carried out successfully to the point where the loaded cars were left on the main track. Here the conductor directed the decedent, Cane, to "shove back" the empties on to the siding, cut them off, and come out with the engine and the box car loaded with coal which was next to the engine. When this was done, and the engine attached to the loaded cars on the main track, the train for shipment would be made up. In pursuance of these instructions the engineer pushed the empties back on the siding, and, at a signal from the decedent, Cane, stopped his engine, the empties being uncoupled were carried forward by the acquired momentum some distance from the engine and box car, which were stopped. At this point the evidence and theories of the respective parties to the action become variant. It is undisputed that the siding was on a comparatively slight grade, and, as the empties were backed in, they were necessarily backed up-grade. It is the theory of the defendant that, when Cane stopped the engine by signal, he uncoupled the empties from the loaded coal car next to the engine without having set the hand brakes on the empties so as to hold them in their position on the siding, and then, for some purpose unknown to the company, or its employees, went into the gap between the stationary part of the train and the empties, and that the latter, as soon as the momentum which they received from the engine was exhausted, rolled down against the engine and car, caught the unfortunate man between the drawheads, and crushed him to death. The theory of the appellee is that the empties were stationary, and that the decedent, in pursuance of his duty as a brakeman, went in the gap between them and the engine and coal car to adjust something about the coupler of the first empty, and that, while he was engaged in this duty, without any signal or warning, the engineer backed the loaded coal car and engine against the empty car, catching the decedent between the drawheads, crushing him.

There is something in the case to support each of these theories. In favor of the defendant it may be said that the duty which called the engineer and engine on to the switch was simply to take in the empties, have them cut loose from the coal car, and leave them. It was not contemplated that the loaded car should be recoupled to the empties after the severance was made; therefore, it is manifest that there was no reason that the engine,

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after it stopped, should be again moved in the direction of the empty cars. The next duty would be to go in the opposite direction towards the main track. And, moreover, it would seem that, if the empty cars were left with nothing to hold them on the upgrade, they would of necessity roll back of their own force, and this was to be expected if the hand brakes were not set after the engine was uncoupled. The appellee, however, urges with great force that, when the decedent was found crushed between the drawheads, he was standing erect with his face towards the empty cars. This would indicate that he could not have been run down by them, as their approach would be plainly visible; whereas, if the engine was backed on him while he was adjusting the knuckles of the automatic coupler of the first empty, it would come from behind, silently, and catch him unawares. In support of this theory, Sam Vincent, a disinterested witness, testified to having seen the whole tragedy. He saw the engine stop in obedience to the signal of the brakeman, saw the latter go in between the cars and busy himself about some duty—he did not know exactly what; and while he was thus engaged the witness saw the engineer, without any signal being given, or any warning to the unfortunate man, back his engine and crush the decedent to death. Mrs. Anna Hall, another disinterested witness, says she saw practically the same thing. It may be admitted that it was difficult to understand how Mrs. Hall could have seen all that she testified to, as she was at her residence on the opposite side of the train, and some distance away, but we do not feel at liberty to entirely discredit her testimony, as it is not impossible, if she was at the right angle, for her to see between the cars, and especially through the gap that was made in the train when the empties were uncoupled and separated from the loaded coal car. We appreciate the force of the argument that both Vincent and Mrs. Hall were liable to mistake the effect of the running down of the empty cars for the backing of the engine; at their distance, when they saw the gap between the engine and coal car and the empty cars closing up, it would be difficult to tell whether the engine was backing, or the empties running down; and, as the engine was the usual source of the moving of the cars, their minds, under the influence of this generality, would naturally attribute the closing up of the gap to the moving of the engine. But which of these two divergent theories was true, was one of the facts which, with the other facts, go to make up the problem in the case.

The first question, then, is whether or not the appellant company was entitled, at the close of the testimony, to a peremptory instruction to the jury to find in its favor. The evidence showed, without contradiction, that, after the engineer stopped in obedience to the signal of the brakeman, it was his duty to remain standing until he received a signal to move. With this duty of the engineer, the brakeman, who was to give the moving signal, was well acquainted, and it seems to us he had a right to expect that it would be faithfully discharged, and was warranted in gov-

erning his own actions upon its performance. The record does not show what duty called the brakeman in between the cars, nor are we informed exactly what he was doing, or where he was standing at the time the great danger with which he was about to be overwhelmed became apparent to him; but we perceive no reason why we should presume that he was unnecessarily between the cars, or that he did not find something to be done which he considered it his duty to do. Having a right to rely upon the fidelity of the engineer, he could act with less caution than would otherwise be incumbent upon him. If, as the testimony of Vincent and Mrs. Hall tended to establish, he was adjusting the knuckles of the automatic coupler on the first empty, in order to make it easier to couple it when it was desired to put it again in operation, he would have to do this with his hands, as is shown by the uncontradicted testimony in the case. If he considered this to be his duty, we are not willing to say that it was per se negligence for him to go in front of the drawhead to perform it; and if, while he was so occupied, the engine and loaded coal car were backed up against him, as is the theory of appellee, then it seems to us the latter's case was made out. Both the engineer and fireman testified that, after the engine and loaded coal car stopped in obedience to the signal of the decedent, they did not move until they were informed that the brakeman had been crushed between the drawheads, as before detailed, and they then moved the engine for the first time in order that the body might be taken out. It seems to be admitted that none of the railroad employees knew of the tragedy that had taken place until they were informed of it by the appellee's witnesses, who, as said before, viewed the occurrence from some distance away. It is difficult to understand how the engineer and fireman could have failed to know (even upon appellant's theory) of the collision that took place between the empties and the coal car. This collision was with such force as to cut the decedent's body in two, and the drawheads, under the force of the impact, passed each other through his body; and yet these two men knew nothing of this collision, so far as their testimony shows. Of course, they did not know the decedent was caught between the drawheads, because they could not see through the loaded coal car; but they were bound to know that a collision had taken place, whether it was caused by the running down of the empties, or the backing of the engine. Their ignorance of this fact is surprising, to say the least of it. On the whole, we are of opinion that the question of the negligence of the employees in charge of the engine, and the contributory negligence of the decedent, under all the facts in this case, was properly left to the decision of the jury, and that the court did not err in overruling the motion for a peremptory instruction. *C. N. O. & T. P. R. Co. v. Cook's Adm'r*, 113 Ky. 161, 67 S. W. 383; *I. C. R. Co. v. Jones' Adm'r*, 80 S. W. 484, 26 Ky. Law Rep. 31.

The question as to the admission of the life insurance tables by appellee was decided adversely to appellant's theory in the case

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of I. C. R. R. Co. v. Houchins, 89 S. W. 530, 28 Ky. Law Rep. 499.

The court properly overruled the petition to transfer the case to the United States court. The engineer was made a party defendant, and the petition states a good cause of action against both him and the appellant company. He was a resident of Kentucky, and therefore, under the principle laid down in *Illinois Central Railroad Co. v. Coley*, 89 S. W. 234, 28 Ky. Law Rep. 336, and *I. C. R. R. Co. v. Houchins*, supra, the motion to transfer was properly overruled.

The instructions given by the court were as follows: "(1) The court instructs the jury that, if they should believe from the evidence that the defendant Illinois Central Railroad Company, by its engineer, Peter Wiltz, with gross negligence, so operated or managed the freight train under his control that the cars of said train were forced, run, or driven against the plaintiff's intestate, and that he was by the gross negligence of the defendant Illinois Central Railroad Company's engineer crushed between two of the cars of said train by that part of said train which was hitched to the engine being backed upon said Cane, and catching between same and the other part of said train which was cut off from the engine, and that the decedent was, at that time, in the performance of his duty, and at a place where his duty as brakeman on said train required him to be, then and in that event the jury should find for plaintiff against the defendant Illinois Central Railroad Company and against the said Wiltz for such compensatory damages as they may believe from the evidence were thereby caused to the said decedent, and which they may believe from the evidence were the direct and natural result of said gross negligence of defendant's engineer, if there was any gross negligence—not exceeding \$15,000,000, the amount claimed. Unless the jury should further believe from the evidence that the said decedent in receiving his said injuries was himself guilty of negligence, and that his said negligence, if any, contributed to his said injuries to such an extent that the said injuries would not have been received but for his said negligence, if any, in which event they should find for the defendants. (2) 'Compensatory damage,' if any, as used in the instructions, means such a sum of money as will fairly and reasonably compensate the estate of said decedent for the destruction of his power to earn money, which was the direct and natural result of the gross negligence, if any, of defendant Illinois Central Railroad Company and said engineer, Peter Wiltz. (3) 'Gross negligence,' as used in the instructions, means the failure to use such care as careless and inattentive persons usually exercise under circumstances similar to those under investigation. (4) 'Negligence,' as used in the instructions, when applied to plaintiff's intestate, means the failure to use ordinary care; and 'ordinary care' is such care as an ordinarily prudent man would use in matters involving his own interest under circumstances similar to those under investigation. (5) Nine or more of the jury may find a

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verdict, but, if less than all the jury find the verdict, those of the jury who agree to it should sign it. (6) The jury should find for the defendant Ferrington. (7) If the jury should decide that the plaintiff ought to recover damages against defendants, Wiltz and Illinois Central Railroad Company, they may find a joint verdict against the Illinois Central Railroad Company and the defendant Peter Wiltz, or they may find a separate verdict against each of said defendants." These instructions were certainly as favorable to the appellant company as it was entitled, and fairly presented the law as to the rights of both parties to the jury.

Perceiving no error in the record, the judgment is affirmed.

SOUTHERN RY. CO. v. PATTERSON.

(Supreme Court of Appeals of Virginia, Feb. 2, 1906.)

[52 S. E. Rep. 694.]

Railroads—Operation—Fires—Negligence—Questions for Jury.—In an action against a railroad for the destruction of property situated along the right of way by fire communicated from an engine, evidence authorizing an inference that the fire was caused by a red-hot clinker of unusually large size being thrown from the tender by the fireman of the engine, or suffered to fall from the footboard and to roll down the right of way, was sufficient, as against a demurrer to the evidence and in the absence of any explanation or denial by the fireman, to establish defendant's negligence.

Same—Contributory Negligence—Burden of Proof.*—In an action against a railroad for destruction of property by fire communicated from a locomotive, the burden of proving contributory negligence rests upon defendant, unless such negligence appears by plaintiff's own evidence or may be fairly inferred from the circumstances.

Same—Location of Property Destroyed—Contributory Negligence—Questions for Jury.†—It is not negligence per se for one to build a warehouse used for storing barrels of kerosene oil within a few inches of a railroad's right of way, and the construction of the warehouse in such position does not as a matter of law preclude a recovery for the destruction of the warehouse by a fire resulting, not from accident, but from the negligence of the operatives of a passing train.

Error to Circuit Court, Pittsylvania County.

Action by T. J. Patterson against the Southern Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Harrison & Leigh, for plaintiff in error.

George T. Rison, for defendant in error.

WHITTLE, J. The object of this action is to recover damages from the plaintiff in error, the defendant in the court below, for the destruction by fire of a wooden warehouse and adjacent

*See foot-notes appended to *Coalbroth v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 419, 36 Am. & Eng. R. Cas., N. S., 419.

†See foot-notes appended to *St. Louis, etc., R. Co. v. League* (Kan.), 17 R. R. R. 772, 40 Am. & Eng. R. Cas., N. S., 772.

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buildings, and other property of the plaintiff; the origin of the fire being ascribed to the negligence of the defendant.

The company demurred to the evidence, and the case is before us upon a writ of error to the judgment of the trial court overruling the demurrer and awarding to the plaintiff the damages conditionally assessed by the jury.

The warehouse in question was located upon the land of the plaintiff in the vicinity of one of the defendant's stations, and within a few inches of the right of way, and had been used for years as a depository for storing kerosene oil in barrels. The source of the fire was a red-hot clinker of unusually large size, which the jury would have been justly warranted by the evidence in inferring was withdrawn by the fireman from the fire box of the engine, and either negligently thrown off the tender by him or suffered to fall from the footboard and roll down the embankment to a point from which it communicated fire to the building.

We therefore quite agree with the conclusion reached by the learned judge of the circuit court that from the standpoint of a demurrer to the evidence, and in the absence of any explanation or denial by the fireman, the initial negligence of the defendant was clearly established.

But the company denies liability upon the further ground that, even if it be conceded that the fire was primarily caused by the negligence of its employee, the plaintiff was, nevertheless, guilty of such contributory negligence in locating his warehouse immediately along the company's right of way as to bar a recovery.

The burden of proving contributory negligence rests upon the defendant, unless it be disclosed by the plaintiff's own evidence, or may be fairly inferred from all the circumstances, and (inasmuch as this case does not come within the exception, and there is no evidence to sustain the allegation) the question having been withdrawn from the consideration of the jury by the demurrer to the evidence, it must be resolved in favor of the plaintiff, unless this court shall declare as matter of law that the bare location of the warehouse, in such proximity to the right of way, or the manner of its use, constituted negligence per se.

Such contention would seem to be opposed both by experience and observation, for the warehouse had for years escaped the ordinary dangers incident to passing trains, and it is matter of common knowledge that similar structures, devoted to like purposes, are erected along the route of railroads throughout the country.

It is true that the owner of land who elects to establish buildings, or place combustible material, near the track of a railroad, assumes the increased risk from accidental fires, and cannot thereby abridge the right of the company in the lawful use of its property. *Pierce on Railroads*, 436. But that principle is not to be so interpreted or applied as to exonerate a railroad company from liability for an injury proximately caused by its own negligence.

The case of *Chicago & N. W. R. Co. v. Simonson* (Ill.) 5 Am.

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Rep. 155, was cited to maintain the rule that the owner who suffers combustible material to accumulate upon his land contiguous to the railroad is guilty of contributory negligence, and cannot recover damages for a fire negligently ignited on the right of way.

That decision is opposed to the great weight of authority on the subject in this country, and contravenes the settled doctrine in this jurisdiction. *Railway Co. v. Medley*, 75 Va. 507, 40 Am. Rep. 738; *Kimball v. Borden*, 97 Va. 477, 34 S. E. 45; *White v. Railway Co.*, 99 Va. 357, 38 S. E. 180.

In a note to the principal case numerous authorities are cited to the contrary, and with respect to it the reporter observes: "The latest decision on the subject is that in *Kellogg v. Chicago & N. W. Ry. Co.*, 26 Wis. 223, 7 Am. Rep. 69, wherein, after a most elaborate and powerful argument, the doctrine of contributory negligence by the adjacent landowner was repudiated."

The ultimate limit to which the doctrine seems to have been carried, in connection with the erection and use of buildings, is that the question of the contributory negligence of the owner ought to be submitted to the jury, upon the facts and circumstances of the particular case, a course which was not followed in this instance. 2 Thompson's Com. on Neg. § 2326; *Murphy v. Chicago, etc., R. Co.*, 45 Wis. 222, 30 Am. Rep. 721; *Kesee v. Railway Co.*, 30 Iowa, 78, 6 Am. Rep. 643.

Upon the whole case we are of opinion that the judgment is without error, and it must be affirmed.

STATE, to Use of *MANFUSO et al., v. WESTERN MARYLAND R. CO.*

(Court of Appeals of Maryland, Dec. 6, 1905.)

[62 Atl. Rep. 754.]

Railroads—Crossing Accident—Contributory Negligence.*—One who, without stopping, looking, and listening, drove upon railroad tracks at a point where his view of the tracks was obstructed, was guilty of contributory negligence as a matter of law.

Appeal from Superior Court of Baltimore City; Daniel Girard Wright, Judge.

Action by the state, to the use of Jelsomina Manfuso and others, against the Western Maryland Railroad Company. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

*For the authorities in this series on the question of the care required of a highway traveler before attempting to cross railroad tracks at a point where his view of approaching trains is obstructed, see foot-notes appended to *Colorado & S. Ry. Co. v. Thomas* (Colo.), 17 R. R. R. 167, 40 Am. & Eng. R. Cas., N. S., 167; *Coffee v. Pere Marquette R. Co.* (Mich.), 16 R. R. R. 772, 39 Am. & Eng. R. Cas., N. S., 772.

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William Colton, for appellants.

Leon E. Greenbaum, for appellee.

BURKE, J. John Manfuso was struck and killed by a locomotive of the defendant company on the 18th day of November, 1903, at Mt. Hope Station in Baltimore county. This suit was brought by his widow and infant children to recover damages for his death, which is alleged to have been caused by the negligence of the company. Manfuso was in the act of crossing the tracks of the railroad company at Mt. Hope, and was struck by an engine of the company and killed. The tracks at the point where the accident occurred were crossed by a private road, much traveled, leading from the Reistertown Road into the grounds of Mt. Hope Retreat.

The record contains two bills of exceptions, one to the ruling of the court on a question of evidence, and another to the action of the court in granting the prayers submitted by the counsel of the defendant at the conclusion of the plaintiff's case. In the argument before this court, counsel for the appellant abandoned the exceptions to the testimony, and, consequently, the only question to be determined is: Was the court right in withdrawing the case from the consideration of the jury? This involves an examination of the facts and circumstances under which the injury which caused the death of John Manfuso was received.

Manfuso was a fruit dealer, and on the morning of the accident had borrowed a horse and wagon from Dominick Saio for the purpose of delivering some fruit at Mt. Hope Retreat. Saio accompanied him on the journey, and was with him in the wagon when the accident occurred. In traveling to the institution they went out the Reisterstown Road, and went down the private road or lane above mentioned, crossed the tracks of the railroad, and entered the grounds of the institution. As they approached the crossing, a train passed, and Manfuso told Saio the crossing was a dangerous place. He delivered the fruit, and began the return trip to the city, and while in the act of crossing the tracks at Mt. Hope Station the wagon was struck by an express train of the defendant company—the York Limited—and Manfuso was killed, and Saio injured. The accident occurred between 9 and 10 o'clock in the morning. The day was clear and cold, and the sun was shining. The road over which they were traveling was smooth, and the wagon in which they rode was new and made little noise. It appears from the evidence that after passing the station at Mt. Hope the tracks of the company curve, and at a distance of about 600 feet from the station there is an abrupt curve, which obscures the view of an approaching train, and renders its presence at that curve invisible to one standing at the distance of 10 feet from the west-bound track; and that a fast train would cover the distance from this curve to the crossing in about 10 or 11 seconds. In approaching the crossing in the direction in which the deceased was traveling, there were trees and shrubbery which cut off the view of the tracks to

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the northwest, and at the entrance to the grounds of Mt. Hope there was a gate house and station house which obscured the view of the tracks as one approached more closely the crossing, and when the gate house was reached only about 25 or 30 feet of the track was visible. Near the railroad crossing there was a danger signal, warning travelers to stop, look, and listen, which notice Manfuso saw and read. The train which struck the deceased was coming from the west.

The witness Saio gives the following account of the accident: "Q. And you were looking for trains coming towards Baltimore? A. Yes, sir. Q. And he was looking for trains coming from Baltimore? A. Yes, sir. Q. And it was agreed between you that you would watch out? A. Yes, sir. Q. How fast were you going? A. Very slow. We ran fast when we first started but when we got near there he said he would go quite easy, so we see if any train was coming, because he said this is a dangerous place. Q. What did you do with the way of keeping on easy, how slow did you go? A. We went right slow, and we passed a little house. Q. That is the gate house? A. Yes, sir. Q. And you came out the gate? A. Yes, sir. Q. Then what? A. We went real slow, almost stopped. Q. Which way were you looking? A. On the left side way. Q. That way [indicating]? A. I could not look all the way though, because the house was against me. Q. But when you got outside the gate, and got near the track, you could see up the track could you? A. Yes, sir; I stuck my head through the wagon to see if any train was coming. Q. Could you see up as far as the curve? A. I could not see all the way through, because I didn't have a chance. Q. How far was your horse from the track here [indicating] when you got sufficiently open view to see up the track? A. We were near the track, and all at once, crack! and I see black smoke coming fast, and I don't know where we went to." On cross-examination Saio testified as they approached the crossing he and Manfuso "were talking about that dangerous place, because he knew it was a dangerous place there, and that is the reason we were talking. He told me to look up, and he was looking down, to pay attention to a dangerous place."

It is thus apparent from the testimony that the crossing was a peculiarly dangerous one, and that Manfuso was acquainted with its surroundings and was aware of its danger. The danger attending the crossing is made more evident by the testimony of Saio to which we have alluded. Notwithstanding the danger which confronted him, and of which he was well aware, Manfuso, without stopping, drove upon the tracks of the railroad, and was killed by a passing train. Was Manfuso guilty, as a matter of law, of contributory negligence in attempting to cross the track of the defendant company under the circumstances we have stated? If so, the court was clearly right in withdrawing the case from the consideration of the jury, and in directing a verdict for the defendant. By the settled law of this state certain well-defined and imperative duties are imposed upon persons

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before they make the attempt to cross the tracks of a railroad company. They are bound under all circumstances to look and listen for approaching trains, and if the crossing is one of more than ordinary danger and the view of the tracks is obstructed at or near the place of crossing, it is the duty of the traveler to stop, look, and listen before he attempts to cross; and if a person neglects these necessary precautions, and in consequence of such neglect is injured by the collision with a passing train, he will be held to have contributed by his own negligence to the occurrence of the accident, and will not be allowed to recover for any injury he may have sustained.

The circumstances under which a person is bound to stop before attempting to cross have been indicated in a number of cases in this state. In the case of *Maryland Central Railroad Company v. Neubeur*, 62 Md. 399, this obligation upon the part of the traveler to stop, look, and listen before making the attempt to cross was considered by the court. Referring, in that case, to this obligation, Alvey, C. J., said: "A large number of the decisions go to the extent of holding that it is incumbent upon the traveler, at ordinary street crossings, to stop, look, and listen before attempting to cross the rails; and, if he fails to observe this precaution, he forfeits all right to recover for injuries received. This precaution is not only reasonable and proper to be observed on the part of the traveler on a public road, crossing railroad tracks, for his own safety, but it is equally necessary for the safety of the multitude of the people riding in the railroad train, liable to be killed by collision of the train with obstacles on the track." While referring to the rule with approval, the court, however, declined to follow the authority of cases in many other states, and declare it to be the duty of the traveler in all cases to stop before attempting to cross. In the case of *Philadelphia & Baltimore Railroad Company v. Hogeland*, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159, the question was again presented for consideration, and Alvey, C. J., speaking for the court, said: "The rule is now firmly established in this state, as it is elsewhere, that it is negligence per se for any person to attempt to cross tracks of a railroad company without first looking and listening for approaching trains, and, if the track in both directions is not fully in view in the immediate approach to the point of intersection of the roads, due care would require that the party wishing to cross the railroad track should stop, look, and listen before attempting to cross." And it was said in *State, Use of Price, v. C. & P. Railroad Co.*, 87 Md. 188, 39 Atl. 610, that, "If the traveler's view of the railroad is obstructed so as to prevent him from seeing whether a train is approaching, it is his duty to stop, look, and listen before attempting to cross." And in *Watson's Case*, 91 Md. 355, 46 Atl. 996, it is said that the obligation to stop "should be applied to all crossings where the view is obstructed, or when, for any reason, it is evident that the traveler can hear better and avoid danger by stopping to listen in a place of safety."

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In *Holden's Case*, 93 Md. 417, 49 Atl. 625, where the view of the track was obstructed in one direction only, the defendant's sixth prayer, which had been refused by the trial court, was under consideration. By this prayer the court was asked to instruct the jury that, if they found that the plaintiff's view on his near approach to the track was in any manner obstructed, then it was the duty of the plaintiff before going on the track to stop, look, and listen for the train, and, if he violated this rule by failing to stop, he was guilty of contributory negligence, and could not recover. In delivering the opinion in that case, Fowler, J., speaking in reference to that prayer, said: "The plaintiff's first contention is that the language of the prayer is too broad, but we cannot agree with him. We think it clearly announces the established rule, which we said, in *Hogeland's Case*, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159, 'is one which the courts ought not to relax,' as its enforcement is necessary as well for the safety of those who travel on railroad trains as for those who travel on the common highways." In the case just cited the rule is thus expressed: "If the track in both directions is not fully in view in the immediate approach to the point of intersection of the road, due care would require that the party wishing to cross the railroad track should stop, look, and listen before attempting to cross."

The prayer we are considering declares that, if the view was in any manner obstructed, it was the duty of the plaintiff to stop, etc. This is equivalent to saying that, if the track was not "fully in view"—that is to say, if there was an obstruction of the view by a hill, a bank, trees, or in any manner—due care requires the traveler on the common highway to stop and listen before attempting to cross. The prayer in the opinion of the court announced the correct principle of law applicable to the case, and was in itself free from objection, but its refusal by the court below was not pronounced to be error, because the concession of the plaintiff's first prayer estopped the defendant from complaining of the rejection of its sixth prayer. It may be declared to be the fixed and inflexible rule of law in this state that it is the duty of the traveler to stop, look, and listen before attempting to cross the tracks of a railroad, where the crossing is one of more than ordinary danger, because of obstructions at, or near, the immediate approach to the point of intersection of the roads, by reason of which the track is not fully in view; and, if he attempts to cross in disregard of this duty, and in consequence thereof is injured, he will be held to be guilty in law of contributory negligence. The undisputed evidence in this case shows that the crossing in question was of more than ordinary danger; that the view of the tracks, in the immediate approach to the crossing, on the northwest, from which direction the train which struck and killed *Manfuso* came, was obstructed by shrubbery, trees, a gate house, and a station house; that, without stopping, he attempted to cross and was struck by a passing train and was killed; and that his failure to stop, look, and listen was the

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direct and proximate cause of his injury. Therefore he was guilty of contributory negligence as a matter of law.

It was the clear duty of the court, under the facts, to have granted the defendant's second prayer, by which the jury was instructed to find their verdict for the defendant.

Judgment affirmed.

WESTERN RY. OF ALABAMA v. STONE.

(Supreme Court of Alabama, Dec. 19, 1905.)

[39 So. Rep. 723.]

Railroads—Injuries to Cattle—Pleading—Sufficiency.*—In an action against a railroad for killing cattle, a complaint alleging that on the 14th day of March, 1903, defendant was engaged in the operation of a railroad between certain cities, and that one of its employees so negligently operated a locomotive on said road, at or near a certain place in a certain county, that by reason thereof it ran against plaintiff's cows, was sufficiently definite in its allegations of the time and place of the injury.

Same.*—In an action against a railroad for killing cattle, a complaint alleging that one of defendant's servants, in charge of a locomotive, so negligently operated such locomotive that it struck plaintiff's cows, was sufficient in its allegations of negligence.

Same.*—In an action against a railroad for the killing of cattle on the track, it is not necessary for the complaint to allege the name of the employee who was in control of the locomotive which struck the cattle.

Appeal—Harmless Error—Rulings on Pleading.—Sustaining a demurrer to a plea setting up matters available under an accompanying plea of the general issue is harmless.

Damages—Injuries to Animals—Evidence.—In an action against a railroad for killing cows used only as milk and butter producers in the prosecution of a dairy business, evidence of the yield of milk and butter by the cows killed is admissible on the issue of the market value of the animals.

Evidence—Conclusions of Witness.—In an action against a railroad for the killing of cattle on the track, testimony of the engineer, in charge of the locomotive which killed the animals, that he did not have time to make any effort to prevent the killing, was but the conclusion of the witness on a question of fact, and was properly excluded.

Railroads—Injuries to Cattle—Pleading—Variance.—In an action against a railroad for the killing of cattle on the track, where the negligence alleged was in the operation of the train, testimony as to the equipment of the train was properly excluded.

Same—Negligence of Railroad.—It is negligence for a railroad to operate a locomotive and train of cars at night at so great a rate of speed that it is impossible to stop the train within the distance that the locomotive headlight illuminates the track.

Damages—Killing of Cattle—Instructions.—In an action against a railroad for the killing of cattle, a charge that the measure of damages is not necessarily the value of the animals when alive, but the difference in value between the living animals and the dead carcasses, and the jury should deduct the amount which plaintiff might have

*See foot-note appended to *Pierce v. Seaboard Air Line Ry. (Ga.)*, 17 R. R. R. 575, 40 Am. & Eng. R. Cas., N. S., 575.

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realized from the dead carcasses by the exercise of reasonable diligence, was properly refused as abstract, where there was no evidence of the value of the carcasses of the cattle in their mangled condition, and was also bad in failing to take into account the cost of transporting the carcasses from the place where the cattle were killed to market.

Same.—In an action against a railroad for the killing of cattle, a charge to find for defendant, if plaintiff has failed to reasonably satisfy the jury as to the amount of damage sustained, was erroneous, in that plaintiff, although he failed to establish the amount of damages, was entitled at least to nominal damages on proof of the wrongful killing.

Railroads—Injuries to Cattle—Actions—Instructions.—In an action against a railroad for killing cattle on the track, a charge to find for defendant if the engineer was keeping a proper lookout for obstructions, and the animals came on the track suddenly and so close to the train that the injury could not be avoided, was properly refused, in that it failed to take into consideration the question of negligence in the operation of the train with respect to speed and illuminative power of the locomotive's headlight.

Damages—Assessment—Instructions.—In an action against a railroad for the killing of cattle, a charge that the value of the animals killed was not to be determined by the purpose for which they were used, but by the reasonable market value of the animals, was properly refused as misleading, in view of evidence that the cows were milk and butter producers and were used for that purpose alone.

Trial—Instructions—Improper Phraseology.—The improper use of the word "defendant" for "plaintiff" in a requested instruction need not be corrected by the trial court, but the instruction may be refused.

Railroads—Injuries to Cattle—Actions—Instructions.†—In an action against a railroad for killing cattle on the track, a charge that the engineer was not bound "to keep a lookout for animals beyond the light thrown from his engine; that is, on the outsides of the track"—was properly refused as obscure and misleading.

Same—Duty to Keep Lookout.†—Where a locomotive engineer is negligent in keeping a lookout, but afterwards, when it is too late to prevent a collision, discovers an animal upon the track, the railroad is liable for the consequent injury to the animal.

Appeal from City Court of Montgomery; A. D. Sayre, Judge.
"Not officially reported."

Action by H. L. Stone against the Western Railway of Alabama. From a judgment for plaintiff, defendant appeals. Affirmed.

Action for injuring or killing three cows. The complaint was in the following words: "Plaintiff claims of the defendant the sum of \$250 as damages, for that, to wit, on the 14th day of March, 1903, the defendant was engaged in the operation of a

†For the authorities in this series on the subject of the duty of railroad companies to maintain lookouts upon trains in order to avoid injuring live stock, see foot-notes appended to *Southern Ry. Co. v. Hoge* (Ala.), 17 R. R. R. 792, 40 Am. & Eng. R. Cas., N. S., 792; *Southern Ry. Co. v. Henry* (Ga.), 17 R. R. R. 198, 40 Am. & Eng. R. Cas., N. S., 198; *St. Louis, I. M. & S. Ry. Co. v. Kimberlain* (Ark.), 16 R. R. R. 479, 39 Am. & Eng. R. Cas., N. S., 479; *St. Louis & S. F. Ry. Co. v. Carlisle* (Ark.), 16 R. R. R. 462, 39 Am. & Eng. R. Cas., N. S., 462; *Prescott & N. W. Ry. Co. v. Brown* (Ark.), 16 R. R. R. 132, 39 Am. & Eng. R. Cas., N. S., 132.

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railroad and locomotive and cars thereon, between the cities of Montgomery and Selma, Ala.; that one of defendant's agents, servants, or officers, then and there in charge of one and such locomotive, and whose name is to plaintiff unknown, so negligently operated such locomotive on said road at or near Stone's Tank, in the county of Montgomery, Ala., that by reason thereof it then and there ran against, struck, and greatly injured or killed three cows, the property of plaintiff, to the damage of plaintiff," etc.

There was demurrer to this complaint, assigning as grounds that, first, he failed to aver with sufficient certainty and particularity where the injury occurred; second, failed to show with sufficient certainty who the officers or agents were who are charged with negligence in operating its engines; third, that it fails to show that said agents or officers were acting within the scope of their employment at the time of the injury; fourth, that it does not aver with certainty that the injury was negligently done; and, fifth, because it assumes negligence in striking said cows and does not affirmatively aver any act of negligence on the part of the defendant.

These demurrers being overruled, the defendant filed the general issue, and a special plea, setting up that the animals killed ran suddenly and unexpectedly on the track immediately in front of the train; that the engine was equipped with a first-class headlight, which enabled the engineer to see sufficiently far ahead of him to have discovered the animals on the track or within the rays of said headlight in time to have stopped the train to prevent injury; that the engineer was keeping a proper lookout, but that the cows got on the track unexpectedly and so near the engine that by the use of all means known to skillful engineers the engineer could not have stopped the train in time to prevent the injury. There were demurrers to this plea, which were sustained.

The defendant requested the following charges, which were refused: "(2) The measure of damages in this case is not necessarily the value of animals when alive, but the difference in value between the living animal and the dead carcass; and if the jury believe from the evidence that the plaintiff might have realized the appreciable value of the dead carcass by the exercise of reasonable diligence, the amount of such value must be deducted. (3) The burden of proof is upon the plaintiff to show that the animals were killed by the engine of the defendant, and also to show the amount of damages sustained; and if the plaintiff has failed to reasonably satisfy the jury what such damages were, they must find for the defendant. (4) Railroad employees are not required to attempt the impossible; and if the jury believe from the evidence that the engineer was keeping a proper lookout for obstructions on the track, and that the animals came on the track suddenly, and so close to the train that the use of preventive efforts could not have avoided the injury, they must find for the defendant. (5) The value of the animals alleged to have been

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killed is not to be determined by the purpose for which they were used by plaintiff for dairy purposes, but by the reasonable market value of said animals at the time of the injury shown. * * * (8) Notwithstanding the fact, if it be a fact, that the engine did not have a headlight sufficiently strong to see an animal on the track in time to stop the train before striking it, yet if the animals were not on the track, but came suddenly on it so near the approaching train that it was impossible for the engineer to have stopped or slackened its speed in time to prevent the injury, the fact of not having a strong headlight, if it be a fact, can have no influence in this case, and cannot authorize the verdict for defendant. (9) Under the facts of this case offered in evidence no duty rested on the engineer to keep a lookout for animals beyond the light thrown from his engine; that is, on the outsides of the track."

The court in its oral charge used the following language: "But if the engineer is negligent in keeping a lookout, and after a while, after such negligence, does discover an animal upon the track, and it is then so close upon the track that it is impossible to prevent killing or hurting it, that engineer is guilty of negligence; whereas, in the other case I have supposed to you, he would not be. Now the contention here is that the engineer was guilty of negligence in not keeping a lookout of this sort; that if he had kept a lookout for animals in dangerous proximity, he would have seen the animals in time to have prevented injury to them. The contention of the defendant, on the contrary, is that he did keep such a lookout as a reasonably prudent and competent man ought to have kept, and, keeping it, did not see the animals until they were so close that he could not help hurting them. If this is true, of course, he cannot recover; if the first contention is true, of course, the plaintiff must recover." The court, further charging the jury, said: "There is another proposition in that connection, involved in this case, which is insisted on by the plaintiff, and that is this: that if this engine was equipped with such light as only allowed the engineer to discover obstacles on the track or in dangerous proximity to it—we will say, for example, 100 yards away, meaning 100 yards away from the engine—then it was negligence to operate its train at such a rate of speed as rendered it impossible for him to stop within 100 yards."

George P. Harrison, for appellant.

Steiner, Crum & Weil, for appellee.

DOWDELL, J. The complaint contained but a single count, to which a demurrer was interposed by the defendant. The averments in the complaint were sufficiently definite as to time and place of the alleged injury to put the defendant on notice. The complaint was also sufficient in its averment as to negligence. In actions of this character it is not necessary to aver the name of the agent or employee of the defendant who had the control

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and operation of the locomotive and cars. The court properly overruled the demurrer to the complaint.

All matters of defense set up in defendant's plea No. 2, to which it was entitled, was available to it under the plea of the general issue, and it appears from the record that in the trial of the case under the plea of the general issue the defendant did have the benefit of the facts averred in said plea. So, if there was any error in sustaining the demurrer of the plaintiff to the plea, it was error without injury.

The third, fourth, fifth, and sixth assignments of error relate to rulings of the court on objections made by appellant to questions asked by appellee concerning the yield of milk and butter by the cows killed by defendant's locomotive and train of cars. The evidence is uncontradicted that the cows killed were only used as milk and butter producers, and that appellee so used them in carrying on the business of selling milk and butter in the prosecution of a dairy business. This evidence was relevant and pertinent as tending to show elements of value of the injured animals. While it is true that the market value is the proper criterion of value in such actions, still the facts testified to might very properly become an element in making up market value.

There was no error in excluding, on the motion of the plaintiff, the statement by defendant's witness Tinsley that "he did not have time to make any effort to prevent the killing of the cows." This was but a conclusion of the witness. The witness was permitted to testify to all the facts attending the killing of the cows. It was for the jury to determine from all these facts whether he had time to make any effort to control his train so as to avoid collision with the animals. The evidence was not an expert opinion based upon a given statement of facts, but a mere conclusion of fact. Moreover the appellant had the benefit of everything contained in this statement on the theory of its being expert evidence. Later on he was permitted to testify, and did testify, as follows: "In my opinion, as an expert engineer, that train, running as it was, on the track where it was, could not have been stopped after I discovered these animals by the use of all means known to skillful engineers, such as applying brakes and reversing the engine, in time to have prevented the injury. * * * I was helpless. I could not do anything, and did not do anything."

There was no error in sustaining the objection of the plaintiff to the question, asked this witness Tinsley by the defendant, "whether or not the equipment on that train was such as is in use on the best regulated railroads in the country." This question called for evidence wholly immaterial and irrelevant. The equipment of the train was not an issue in the case. The negligence counted on was in the operation of the train, and not on any defects in the machinery. The defendant was permitted to prove the kind of headlight it had on its engine and the distance it shed light. The plaintiff upon cross-examination of this witness was permitted, against the objection of the defendant, to ask the

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witness, "How far did that headlight throw a light on a straight track?" The evidence called for by this question was pertinent to the issue of the negligent operation of the train. It was shown by the undisputed evidence that the track at the place of the alleged injury was straight half a mile or more in the direction the train was going before it struck the cows. The witness Tinsley, the engineer, testified that at the time he was running at a speed of 30 miles an hour, and that, at the speed at which he was going, he could not have stopped the train in a shorter distance than 200 yards. In answer to the question, the witness said: "You can see an object, a cow, about 100 yards, maybe a little better than that, but not to tell whether it was a horse or cow. I could not have stopped after discovering an object as big as a cow within 100 yards." It is a want of due care to operate a locomotive and train of cars at night at so great a rate of speed that it is impossible to stop the train within the distance that the headlight of the locomotive lights up the track. In *Anniston Electric & Gas Co. v. Hewitt*, 139 Ala. 442, 36 South. 39, 107 Am. St. Rep. 42, it was said: "The law is well settled that railroad companies that knowingly run their trains under conditions rendering it impracticable for those in charge to prevent injuring stock straying on their tracks are accountable for the loss when injury results"—citing authorities. The tendency of the evidence was to show that at the time and place the train was being run under conditions that rendered it impracticable to prevent injury to the stock in question.

The defendant requested the court to give several written charges, which were refused, and for the refusal of which errors are here assigned. The first of these charges was the general affirmative charge to find for the defendant. That it was open to the jury, under the evidence, to find that the injury to the cows was the proximate result of a negligent operation of the train by the defendant's servant, and the amount of damage thereby sustained by the plaintiff, is, we think, hardly open to serious controversy, and therefore no error was committed in the refusal of the general charge as requested.

Charge 2 was properly refused as being abstract. There was no evidence of the value of the carcasses and hides of the cows in their mangled condition—and there was evidence of mangled condition—at the time and place of injury. Evidence of the value of beef cattle and of hides in the city of Montgomery was not evidence of value at Stone's Tank, where they were killed. The cost of transporting the carcasses and hides from Stone's Tank to Montgomery, however small the amount might be, would still be an element in determining the net value at the place of the injury, and the burden of showing this was upon the defendant. In *Georgia Pacific Railway Co. v. Fullerton*, 79 Ala. 298, it was said, among other things: "If stock or cattle be killed, it does not follow that in every case the necessary measure of the plaintiff's recovery must be the value of the stock. Such value is undoubtedly the prima facie measure of damages, and the burden

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of proof may be thrown on the defendant to overcome this presumption, when once it is made to arise upon proved facts. * * * The carcass, it may be, is most frequently worth nothing to the owner, and the facts must be peculiar which would overcome this presumption. It is often bruised, mangled, and unfit for use. Its small value and distance from any available point may render its utilization profitless."

That the cows were killed by the defendant's engine was an undisputed fact in the case. Written charge 3, requested by the defendant, after stating that the rule as to the burden of proof with respect to the killing of the cows by defendant's engine, proceeds as follows: "And also to show the amount of the damage sustained; and, if the plaintiff has failed to reasonably satisfy the jury what such damage is, they must find for the defendant." This charge requires the jury to return a verdict in favor of the defendant. If the amount of the damage was not reasonably and satisfactorily shown to the jury by the evidence, still, if the wrongful killing was shown, the plaintiff would, at least, be entitled to a verdict for nominal damages.

Written charge 4 pretermits any consideration of the question of the negligent operation of the locomotive and cars, at the time and place of the injury of the animals, with respect to the speed and headlight conditions. Non constat, if the locomotive and cars had at the time and place been operated in a manner and at a speed whereby the engineer would have been enabled to stop the train within the distance, namely, 100 yards, that being the distance at which he could discover an object, such as a cow, on the track, the exercise of preventive effort might have avoided the injury.

Written charge 5, requested by the defendant, was misleading, in that it had the tendency to withdraw from the consideration of the jury evidence that the cows were milk and butter producers, etc.

Charge 8 was properly refused. This charge used the word "defendant" where, doubtless, "plaintiff" was intended. The trial court, however, was under no duty to make the correction.

There was no error in refusing charge 9, requested by the defendant. This charge was obscure and misleading.

There was no error committed in the parts of the court's oral charge excepted to by the defendant.

We find no reversible error in the record, and the judgment will be affirmed.

Affirmed.

HARALSON, SIMPSON, and DENSON, JJ., concur.

GROGAN *et al.* v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, Jan. 2, 1906.)

[62 Atl. Rep. 924.]

Negligence—Fences—Trespassers.—A railroad company owning real estate abutting on a street is not required to construct a fence sufficiently strong to provide against the contingency of a crowd of trespassers coming on the inclosed property and pushing the fence over on a person walking on the street, though some of the trespassers were the servants of the company.

Appeal from Court of Common Pleas, Allegheny County.

Action by Patrick and Mary Grogan against the Pennsylvania Railroad Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

M. W. Acheson, Jr., for appellant.

F. C. McGirr and *John Marron*, for appellees.

ELKIN, J. There can be no recovery of damages in this case without announcing the rule that it is the duty of the owner of real estate abutting on a street or highway to construct and maintain a fence sufficiently strong and adequately safe to provide against a contingency arising by reason of a crowd of trespassers coming upon the property inclosed and pushing the fence over on a person walking on the street. The defendant is the owner of a tract of land abutting on Carson street, in the city of Pittsburgh, around which it caused a fence to be erected, one part of which is near the property line which divides the lot inclosed from the street named. The fence was built for the use and protection of the defendant. In the building of the fence it owed no particular duty to any one. Whether it was six feet high or three; whether it was built of stone, boards, or iron, were matters entirely within the discretion of the defendant, and about which the plaintiff and the public had no concern. The defendant was ordinarily under no duty to build a fence of any particular degree of strength, or, indeed, to build a fence at all. On the principle, however, that no one can use or maintain his property in such a dangerous or unsafe condition as to endanger the life, limb, or property of others, the defendant was under the duty of maintaining its fence strong and safe enough to resist such forces or conditions as should have been foreseen by ordinary forecast. In *McGrew v. Stone*, 53 Pa. 436, Mr. Justice Agnew stated the rule in the following language: "The general rule is that a man is answerable for the consequences of a fault which are natural and probable and might therefore be foreseen by ordinary forecast, while it is true that if his fault happened to concur with something extraordinary, and therefore not likely to be foreseen, he will not be answerable for the unexpected results." Again,

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Mr. Justice Strong in *Phila. & Reading Railroad Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457, said: "It is true that what amounts to ordinary care under the circumstances of a case is generally to be determined by the jury, yet the jury cannot hold parties to a higher standard of care than the law requires, and they cannot find anything negligence which is less than a failure to discharge a legal duty."

We concede that under ordinary circumstances it would be for the jury to determine whether the defendant used proper care in the construction and maintenance of the fence. But the defendant company did not owe a legal duty to the plaintiff or any one else to construct and maintain the fence so strong that a crowd of trespassers, wrongfully coming upon its land, could not push it over and thus cause the injury complained of. There can be no negligence in a legal sense, unless there is a violation of the legal duty to exercise care. In the present case the inquiry is, were the consequences such as should have been foreseen by ordinary forecast and provided against? It was not the duty of the defendant company to foresee and provide against the contingency of 40 or 50 trespassers coming upon its land for the purpose of witnessing an arrest by a police officer in the public street, and, while thus gratifying their idle curiosity, climb upon, lean against, and push over the fence, causing the injury for which damages are sought to be recovered. This is a higher standard of care than the law requires, and it is the duty of the court to say so. In this case the defendant stands in the same position as every other owner of real estate. Its rights, duties, and liabilities are no greater and no less. The rule established in this case will apply, not to common carriers as such, but to the real estate owners of the commonwealth. It is conceded that the accident would not have occurred, except for the fact that a crowd of 40 or 50 persons, without authority, came upon the land of the defendant, climbed upon or leaned against the fence, so that it gave way and injured one of the appellees, who was walking on the street below. The direct cause of the accident was the negligent act of these trespassers, which, under the law, it was not the duty of the defendant to provide against.

The contention that some of these trespassers were employees of the defendant, and that their negligent acts can be visited upon the company, is without merit. Their duties as employees did not call them to climb upon or to lean against the fence, or to be at that place in the performance of their work. In these respects they acted entirely outside of their duties as employees, and were trespassers as much as the other persons assembled in that crowd. Our attention has been called to a number of cases relating to questions of concurrent negligence and proximate cause, cited by the learned court below and relied upon by counsel for appellees here. We do not deny the doctrine of these cases, but they apply only where negligence by the defendant is established. If no negligence by the defendant is shown, questions of concurrent negligence and proximate cause do not arise.

Dulin v. Metropolitan St. Ry. Co

Assignments of error sustained, and judgment reversed; and it is now ordered that judgment be entered in the court below for defendant.

DULIN v. METROPOLITAN ST. RY. CO.

(Supreme Court of Kansas, Dec. 9, 1905.)

[83 Pac. Rep. 821.]

Street Railroads—Frightening Horses—Negligence—Question for Jury.*—Where, in an action against a street railway company for injuries to a traveler in consequence of his horse being frightened by a car, the testimony showed that that car when approaching the traveler was running more rapidly than he was driving, that the motorman was sounding his gong loudly, that the horse became frightened, that though the danger to the traveler was apparent the motorman continued to run his car toward the horse and to loudly ring the gong, the question whether the motorman was negligent in failing to do what he could to avert the threatened danger to the traveler so as to render the company liable was for the jury.

Error from Court of Common Pleas, Wyandotte County; Wm. G. Holt, Judge.

Action by John Dulin against the Metropolitan Street Railway Company. There was a judgment for defendant, and plaintiff brings error. Reversed.

T. P. Anderson, for plaintiff in error.

Miller, Buchan & Miller, for defendant in error.

PER CURIAM. In driving along a street of Argentine, John Dulin's horse was frightened, ran away, throwing him out of his cart, injuring him, and damaging his property. He sued the Metropolitan Street Railway Company, claiming that the injury and loss was caused by the negligent operation of a street car. There was testimony that the street car approached Dulin, running more rapidly than he was driving; that the motorman sounded the gong very loudly and the horses became frightened at the car and pranced and jumped about; that, although the danger to Dulin was apparent, the motorman continued to run his car toward the frightened horse and to loudly ring the gong; and that then the horse became unmanageable, running away, throwing Dulin out, and causing the injury and loss for which recovery is sought. The trial court sustained a demurrer to the plaintiff's evidence.

*For the authorities in this series relating to the duties and liabilities of railroad companies with respect to frightening teams, see foot-note appended to *Butler v. Easton & A. R. Co.* (N. J.), 17 R. R. 803, 40 Am. & Eng. R. Cas., N. S., 803; foot-note appended to *Powell v. Nevada, C. & O. Ry.* (Nev.), 17 R. R. 295, 40 Am. & Eng. R. Cas., N. S., 295; foot-notes appended to *Western Ry. of Alabama v. Cleghorn* (Ala.), 17 R. R. 216, 40 Am. & Eng. R. Cas., N. S., 216.

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If the danger to Dulin was apparent, and was or should have been known to the motorman, and he persisted in running the car toward the frightened horse, and in unnecessarily and loudly sounding the gong, it cannot be said that he was free from culpable negligence. Under such circumstances he should have done what he reasonable could do to avert the threatened danger to Dulin. There is testimony fairly tending to show that this was not done, and whether he was guilty of such negligence as would make the company liable for the loss was a question for the jury.

The taking of the case from the jury was therefore an error, for which the judgment will be reversed, and the cause remanded for a new trial.

LATSON v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Division No. 1, Dec. 21, 1905.)

[91 S. W. Rep. 109.]

Street Railroads—Collision—Negligence.*—Where the driver of a vehicle, owing to the fact that another vehicle was approaching her between the curb and a street car track, drove upon the track about 40 feet ahead of a car approaching at the rate of 6 or 7 miles an hour, and while the vehicle was preceding the car a collision occurred, the motorman was guilty of negligence, under an ordinance requiring a motorman to stop on the first appearance of danger.

Same—Contributory Negligence.†—The driver of the vehicle was not guilty of contributory negligence either in going upon the track or in driving along ahead of the car.

Same—Instructions—Contributory Negligence.—In an action for injuries sustained in a collision between plaintiff's vehicle and a street car, an instruction for plaintiff was not erroneous for failing to take into consideration the contributory negligence of plaintiff; it having

*For the authorities in this series on the subject of the violation of ordinances regulating the running of street cars as negligence, see foot-notes appended to *Lincoln Traction Co. v. Heller* (Neb.), 17 R. R. R. 368, 40 Am. & Eng. R. Cas., N. S., 368.

For the authorities in this series on the question of the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-notes appended to *Marden v. Portsmouth, etc., St. Ry. (Me.)*, 17 R. R. R. 821, 40 Am. & Eng. R. Cas., N. S., 821; *Sharpton v. Augusta & A. Ry. Co. (S. Car.)*, 17 R. R. R. 190, 40 Am. & Eng. R. Cas., N. S., 190; *Hollingshead v. Camden & Suburban Ry. Co. (N. J.)*, 16 R. R. R. 797, 39 Am. & Eng. R. Cas., N. S., 797; foot-note appended to *Miller v. St. Charles St. R. Co. (La.)*, 16 R. R. R. 460, 39 Am. & Eng. R. Cas., N. S., 460; *Laronde v. Boston & M. R. R. 223 (N. H.)*, 16 R. R. R. 223, 39 Am. & Eng. R. Cas., N. S., 223.

†For the authorities in this series on the subject of the care required of those driving other vehicles on streets upon which street cars are operated, see foot-notes appended to *McCarthy v. Boston Elevated Ry. Co. (Mass.)*, 17 R. R. R. 856, 40 Am. & Eng. R. Cas., N. S., 856; foot-notes appended to *Marden v. Portsmouth, etc., St. Ry. (Me.)*, 17 R. R. R. 821, 40 Am. & Eng. R. Cas., N. S., 821; foot-note appended to *Riley v. Shreveport Traction Co. (La.)*, 16 R. R. R. 785, 39 Am. & Eng. R. Cas., N. S., 785; *Wood v. Boston Elevated Ry. Co. (Mass.)*, 16 R. R. R. 475, 39 Am. & Eng. R. Cas., N. S., 475.

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authorized a verdict for plaintiff only in case she was exercising ordinary care at and before the time of the injury.

Appeal—Harmless Error—Instructions.—Defendant could not complain of an instruction because it merely required the motorman to use common-law care, while the petition charged a violation of an ordinance requiring a motorman to stop on the first appearance of danger.

Same—Evidence to Authorize Instructions.—Where, in an action for injuries sustained by plaintiff in a collision between her vehicle and a street car, plaintiff's evidence showed that the car was running 15 miles an hour and that the motorman could have seen the vehicle when he was more than 500 feet away, and defendant's evidence showed that the car was going at the rate of 6 or 7 miles an hour when the motorman saw the vehicle on the track 40 feet ahead, an instruction authorizing a recovery for plaintiff if by reason of excessive speed the motorman was unable to avert a collision was not objectionable on the ground that there was no evidence showing within what space the car could have been stopped.

Same—Modification of Instructions.—Defendant requested an instruction that if the motorman, on seeing the vehicle, reversed his power and applied the brakes, and thus would have averted the accident but for the fact that the driver of the vehicle was prevented from getting off the track by reason of another vehicle in front of it, and that the collision was due to such failure, plaintiff was not entitled to recover unless the motorman knew or could have known that the plaintiff's vehicle was so obstructed in time to have stopped the car, which instruction was modified by adding, "unless excessive speed prevented stopping the car." Held, that the modification was proper; it appearing that if the motorman had applied his brakes as soon as he saw the danger the accident would have been averted, and the special defense pleaded being that the accident was caused by plaintiff, who was driving so close in front of the car as to render a collision unavoidable.

Same—Refusal of Instructions.—Where, in an action for injuries sustained in a collision between plaintiff's vehicle and a street car, there was nothing to show that the motorman saw that plaintiff, driving ahead of the car, was attempting to get off the track, it was proper to refuse an instruction that the motorman had a right to assume that the driver of the vehicle would use reasonable diligence and get off the track and out of the way, unless the motorman knew, or by the exercise of reasonable care might have seen or known, that the vehicle was hindered or impaired in its progress by a vehicle in front of it.

Same—Contributory Negligence—Reliance on Care of Motorman.†—The driver of a vehicle has a right to presume that a motorman will so run his car that a collision will not occur with a vehicle, even though the driver of the vehicle does not do his duty.

Same—Collision—Action—Instructions.—In an action for injuries

†For the authorities in this series on the subject of the mutual rights and duties of street railways and other users of streets, see foot-notes appended to *Marden v. Portsmouth, K. & Y. St. Ry.* (Me.), 17 R. R. R. 821, 40 Am. & Eng. R. Cas., N. S., 821; foot-notes appended to *O'Brien v. Blue Hill St. Ry. Co.* (Mass.), 14 R. R. R. 806, 37 Am. & Eng. R. Cas., N. S., 806; *Dungan v. Wilmington City Ry. Co.* (Del.), 14 R. R. R. 746, 37 Am. & Eng. R. Cas., N. S., 746; foot-notes appended to *Greene v. Louisville Ry. Co.* (Ky.), 14 R. R. R. 589, 37 Am. & Eng. R. Cas., N. S., 589; foot-note appended to *Birmingham Ry., L. & P. Co. v. Oldham* (Ala.), 14 R. R. R. 165, 37 Am. & Eng. R. Cas., N. S., 165; *Rhymes v. Jackson Elec. Ry., L. & P. Co.* (Miss.), 14 R. R. R. 7, 37 Am. & Eng. R. Cas., N. S., 7; *Lightfoot v. Winnebago Traction Co.* (Wis.), 14 R. R. R. 1, 37 Am. & Eng. R. Cas., N. S., 1.

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sustained in a collision between plaintiff's vehicle and a street car, the motorman having testified that the car was running at the rate of six or seven miles an hour when he saw the vehicle preceding the car, and that he then applied the brakes and reversed the current, it was proper to refuse an instruction that, if the motorman was unable to stop the car, plaintiff could not recover.

Trial—Instructions—Refusal—Other Instructions.—There is no error in refusing instructions substantially covered by others.

Appeal—Harmless Error—Admission of Evidence.—In an action for injuries, there was no error prejudicial to defendant in admitting testimony that plaintiff had visited certain places in an attempt to regain her health; it appearing that in consequence of such visits her health had improved.

Same.—In an action for injuries, defendant having sought to have plaintiff identify written statements said to have been made by her, there was no prejudice to defendant in her testimony that she did not sign one of them; the statements not being offered in evidence.

Damages—Injuries to Person—Excessive Damages.—Where, in an action for injuries, it appeared that plaintiff was in good health prior to the accident, and that she received injuries to her side, uterus, ankle, spine, and nerves; that she was suffering from traumatic neurosis, her condition being one of nervous debility and exhaustion; and that she probably would not fully recover—a verdict for \$9,000 was not excessive.

Marshall, J., dissenting.

Appeal from St. Louis Circuit Court; H. D. Wood, Judge.

Action by Alice Z. Latson against the St. Louis Transit Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Boyle, Priest & Lehmann, Geo. W. Easley, and Edw. T. Miller, for appellant.

Chester H. Krum and William Zachritz, for respondent.

MARSHALL, J. This is an action to recover \$20,000 damages for personal injuries received by the plaintiff on the 25th of May, 1901, in consequence of one of defendant's cars colliding with the rear of a stanhope, in which the plaintiff was riding, on Olive street, between Tenth and Eleventh streets, in the city of St. Louis; the accident occurring about 9:25 a. m. The plaintiff recovered a judgment for \$9,000, and the defendant, after proper steps, appealed.

The Issues.

The negligence charged in the petition is a violation by the defendant of the vigilant watch ordinance and of the speed ordinance of the city of St. Louis. The answer is a general denial, with a special plea that whatever injuries the plaintiff received were caused by the vehicle in which she was riding being driven in front of the car "so close thereto as to render a collision therewith unavoidable." The reply is a general denial.

The plaintiff introduced evidence tending to show: That on the morning of the day on which the accident occurred she was riding in a stanhope with Mrs. Ramm. That they stopped on the east side of Eleventh street, just south of Olive street, for a few moments, where plaintiff left the vehicle to transact some

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business in a store at that point. That Mrs. Ramm then turned, and by reason of vehicles being on the east side of Eleventh street, she had to go to the west side of that street, and thence to Olive street, where she turned east. That there was a vehicle coming west on the south side of Olive street between the car track and the curbstone, in consequence of which she drove onto the east-bound track. That before so doing she looked westwardly and saw a car coming, which was, at that time, west of the west line of Twelfth street. The width of Twelfth street is not given in the record, but the block from Twelfth to Eleventh is shown to be 469 feet. That the reason she turned onto the street car track was to avoid collision with the vehicle that was coming west on the south side of Olive street. That, in the language of Mrs. Ramm: "I had the right of way, but this rig had possession of the driveway. It was necessary for me to drive in the car track." That after getting onto the car track she again looked back, and saw the car on the east side of Twelfth street. That afterwards she left the plaintiff to watch the car, while she directed her attention to the front. That the plaintiff then looked a third time, and the car was at the east side of Eleventh street. That the plaintiff then looked a fourth time, and the car was about to strike them, and she told Mrs. Ramm, to get off of the track as quickly as possible. That Mrs. Ramm did not leave the track immediately after encountering the first vehicle coming west, because there was a second vehicle also coming west, on the car track, and so close to the first that it was impossible for her to leave the track, until the second vehicle had pulled off of the track onto the driveway, and, in doing it, the wheels of that vehicle caught or slid on the track, which made it necessary for her to check her horse momentarily. That they were driving at a walk. That as soon as the second vehicle got out of the way, Mrs. Ramm immediately commenced to turn off of the track on to the driveway south thereof, but before she had succeeded in clearing the track, the car struck the hind wheel of the stanhope, lifted it about two or more feet above the ground, and the occupants were thrown out, and the plaintiff injured. The vehicle in which the plaintiff was riding went eastwardly 82 feet on the track on Olive street before the car collided with it. Mrs. Ramm testified that the reason she did not turn to the left was because there was a west-bound track on that side of the street and also because there were other vehicles on that side of the street, and that to turn to the left would have been an illegal act. The evidence for the plaintiff further showed that the car was traveling at a speed of 15 miles an hour. Prior to the accident the plaintiff was in good health and weighed about 180 pounds. In consequence of the accident, she received injuries to her side, ankle, uterus, spine, and nerves, and, as one of the medical experts said, is now suffering from traumatic neurosis, and as the other medical expert said: "Her condition is one, now, of nervous debility and exhaustion, irritability of the spinal cord, pain, and that kind of disturbance which comes to the mind from the brain being

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disordered by a shock, the brain and spinal cord. She had a displacement of the uterine organs." Her physician advised leisure and rest as the best means of effecting a cure, in consequence of which, she visited New Mexico, Alabama, and Cape Girardeau, Mo., but at the time of the trial was still suffering, and the medical experts said the probabilities were she would not fully recover. The plaintiff read, in evidence, the vigilant watch ordinance of the city, which required the motorman to keep a vigilant watch for vehicles and persons either on the track or moving toward it, and on the first appearance of danger to such persons to stop the car in the shortest time and space possible. The plaintiff also read in evidence the speed ordinance of the city, which prohibited the running of street cars, at the point of the accident, at a greater rate of speed than 8 miles an hour.

The defendant's testimony tended to prove that the motorman saw the plaintiff and Mrs. Ramm when the car was not more than 40 feet from them; that the car was then running at about $6\frac{1}{2}$ or, may be, 7 miles an hour; that at the time the motorman first saw them, they were driving on the driveway, on the south side of Olive street, between the track and the curb; that when the car was right upon them, they turned and drove suddenly onto the track immediately in front of the car, and so close thereto that the motorman could not stop the car in time to avoid the accident, although he applied the brakes and reversed the power; that the car struck the rear wheel of the stanhope, and the fender raised the wheel three or four feet from the ground; that the car then stopped, and some persons held the stanhope to keep it from turning over, and the car backed away back from it; that the stanhope was not seriously injured; that the car was running not more than 6 or 8 miles an hour, and that the gong on the car was sounded; that just before the collision, the driver of the stanhope, Mrs. Ramm, checked the vehicle momentarily, which she says was caused by the fact that the wheels of the vehicle ahead of her, which was turning out of the car track, clung to or slid on the rails.

At the close of the plaintiff's case, and again at the close of the whole case, the defendant demurred to the evidence; the court overruled the demurrers, and the defendant excepted. The instructions given and refused, concerning which error is assigned, will be noted in the course of the opinion.

1. This action is predicated upon a violation of the vigilant watch ordinance and the speed ordinance of the city of St. Louis, and therefore falls within the rule laid down in *Sluder v. Transit Company*, 189 Mo. 107, 88 S. W. 648. The writer hereof dissented from the opinion of the court in that case, and has not changed his views in regard thereto, but so long as that opinion stands, it is the rule of law in this state, and what is hereinafter said in this case rests upon the rule announced in that case, and is in no sense the views of the writer, so far as the right to

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maintain the action is concerned. In the judgment of the writer the same conclusion would necessarily be reached if this had been an action for common-law negligence, and for this reason, as well as because the orderly administration of justice requires that the will of the majority shall rule, the writer has no difficulty in reaching the conclusion hereinafter announced. The principle of law relating to the running of street cars, and of the respective rights of such cars and of pedestrians, and of persons traveling in other vehicles, on the street of a city, have recently undergone adjudication by this court, in the cases of *Oates v. Street Railway Company*, 168 Mo. 533, 68 S. W. 906, 58 L. R. A. 447, and *Schafstette v. Street Railway Company*, 175 Mo. 142, 74 S. W. 826.

In the first case cited, it was said (*loc. cit.* 544, 168 Mo., page 908, 68 S. W. [58 L. R. A. 447]): "The sum of the adjudicated cases bearing upon the relative rights and duties of street cars and citizens traveling in vehicles drawn by horses, or other animals, is that both have a right to use the street, but that neither has an exclusive right. The operator of a street car is not necessarily obliged to stop the car every time a horse shies or scares at the approaching car, but when the operator of the car sees that a horse is frightened at the car, it is his duty to manage his car in such a manner as a man of ordinary prudence would do under the same circumstances, and it is always a question of fact for the jury whether such care in the running of the car has been observed. The duty may or may not lead to the necessity for bringing a car to a full stop. The duty of the company in this regard is just the same as the duty of one individual or citizen to another when they meet on the highway, and the horse of the one becomes frightened at the vehicle of the other, or at anything upon the vehicle of another. Because a street car carries more people than any other kind of a conveyance, or because it is authorized to run more rapidly than a vehicle can ordinarily be legally driven, or because the rush and restlessness of the age makes unreasonable demands for more and more rapid transit along the crowded thoroughfares of popular cities, it does not follow that a street car can be run in disregard of the rights of persons traveling by other means, nor that a street car company is exempt from the common-law duty of every one to exercise ordinary care, nor that it is only liable where the agents act wantonly, maliciously and heedlessly." That was a case of a head-on collision. The second case cited was a case of a rear end collision, between a street car and a vehicle. It was said: "It is argued, however, that if street cars are required to check up every time a person approaches the track, no time can be made, and that the traveling public demands rapid transit. It is true that street cars are not compelled to check up every time a person approaches a track, but it is equally true, that if a person is on or so near a track that a car cannot pass without a collision, and the operator of the car sees, or by the exercise of ordinary care can see, the condition of danger of such person, it is his duty to

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check the speed of the car, or even stop the car entirely, to prevent injury to the person. This duty is just the same between street cars and a citizen as it is between any two citizens when using a street. The traveling public has no right to demand such rapid transit on streets of a city as to amount to negligence in the running of the car. The citizen who is not in such a hurry, but is exercising ordinary care while upon the street, has rights that are just as sacred in the eye of the law as those of the hurrying crowds, who demand such rapid transit; and if a street car company heeds the demands of the latter class, and thereby negligently injures the former, it must stand the consequences."

The application of these principles to the facts in judgment renders the conclusion very easy. The plaintiff and her friend entered upon the track of the defendant at Eleventh and Olive streets, because another vehicle occupied the space between the track and the curbstone on the south side of the street. The plaintiff and her friend had a perfect right to so drive on the portion of the street on which the car track was laid, for at that time there was no car coming eastwardly nearer than the distance of the length of the block between Eleventh and Twelfth streets, which is shown by the evidence to be 469 feet, and also the distance of the width of Twelfth street, which is not disclosed by the evidence. The vehicle in which the plaintiff was riding progressed on the track eastwardly for a distance of only 82 feet before the collision. The plaintiff's vehicle was not sooner turned off of the track onto the driveway south thereof, because, first, sufficient time had to elapse to permit the vehicle going westwardly on the driveway to pass; and, second, because another vehicle was coming westwardly on the same track on which the plaintiff's vehicle was going eastwardly, and so close to the first vehicle that the plaintiff's vehicle could not turn off from the track. The second vehicle turned off from the track onto the south side of the street, but, in so doing, the wheel caught or slipped on the car rails, and necessitated the driver of the plaintiff's rig momentarily checking the horse. Immediately upon the second vehicle moving out of the way, the driver of the plaintiff's rig commenced to pull off from the track, and had succeeded in getting entirely off of the track except the hind wheel, when the car struck the rear wheel of the rig, the fender thereof raised the wheel three or four feet, and threw the occupants out on to the street, and injured the plaintiff. The accident occurred shortly after 9 o'clock in the morning. The street was straight. There was nothing to obstruct the view of the motorman on the car. He could have seen the plaintiff's rig on the track more than 500 feet before the collision occurred. Yet, he says he did not see it until he was within 40 feet of it. If so, he was negligent in not sooner discovering it. But conceding that he did not see it until he was within 40 feet of it, and conceding that the car was running at the rate of $6\frac{1}{2}$ or 7 miles an hour, there is nothing in the record to show that it was even then too late for him to have stopped the car in time to have avoided the injury; for it

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needs no expert testimony to show that a car traveling at that rate of speed could have been stopped in a distance of 40 feet. This is true whether the plaintiff's rig was on the track at the time the motorman first discovered it, or whether it turned suddenly onto the track when the car was 40 feet distant from it, as the motorman says was the case. In either event, it admits of no question that if the motorman had exercised ordinary care he could have stopped the car in time to have avoided the injury. If, however, the facts were shown by the plaintiff's testimony, the motorman saw, or could have seen, the plaintiff's rig on the track for a distance of over 500 feet before he permitted his car to collide with the rear thereof. And in this view of the case there is no possible room for doubt that the negligence of the motorman was the direct and proximate cause of the injury, and that neither the plaintiff nor the driver of the stanhope were guilty of contributory negligence. The only room for the application of the doctrine of contributory negligence in this case, if indeed there is such room, rests upon the testimony of the motorman, that when the car was within 40 feet of the stanhope, the driver thereof suddenly turned it off from the driveway on the south-side of the street onto the street car track, and that there was not then sufficient time to have avoided the accident. But as hereinbefore pointed out, even if the driver of the stanhope did as charged, there was still abundant time to have stopped the car in a space of 40 feet, and have avoided the accident, by exercising the most ordinary degree of ordinary care. The fact that the driver of the stanhope saw the car coming when she drove onto the track, and the fact that she continued on the track until the collision occurred, did not authorize or justify the motorman colliding with the rear of the vehicle. No amount of amplification or illustration could make the case plainer than the simple facts, whether they be the facts as detailed by the plaintiff and her witnesses, or as detailed by the defendant's motorman and the defendant's other witnesses. The collision was absolutely without excuse, and the judgment must be affirmed, unless some error of procedure be found in the record.

1. The first instruction given for the plaintiff proceeds strictly according to the rules of law heretofore announced, and upon the facts as developed by the plaintiff's case, but it is criticised, because it is said it fails to take into account the contributory negligence of the plaintiff. This objection is untenable for two reasons: First, because there was no contributory negligence of the plaintiff or the driver of the vehicle, shown; and, second, because the instruction given for the plaintiff only authorized a verdict for the plaintiff, "if the plaintiff and the driver of said vehicle were exercising ordinary care at the time of and before said injury, in averting injury from a collision with said car," and the fifth instruction given for the plaintiff, likewise required the jury to find that the plaintiff and the driver of the vehicle "were exercising ordinary care at the time of and before said injury, to avoid a collision." The first instruction is further criticised, be-

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cause it is said it limits the care of the plaintiff and the driver of the stanhope to the period just prior to driving onto the track; and further because the negligence complained of in the petition is a violation of the vigilant watch and speed ordinances, and that the instruction authorized a recovery if the motorman saw the vehicle on the track, and in danger of injury, and did not use ordinary care to avoid the collision. The second criticism is answerable in the same manner above indicated as to the first criticism.

The second and fifth instructions given for the plaintiff required the jury to find that the plaintiff and driver of the vehicle were exercising ordinary care at the time of and before the collision. The third criticism of the instruction is without merit, for the instruction complained of simply required the motorman and operatives of the car to use common-law care, and the defendant was not injured because the plaintiff did not ask that the defendant be held to that degree of care, which is required by the vigilant watch and speed ordinances.

3. Instruction No. 5 is assigned as error. That instruction authorized a recovery by the plaintiff if the defendant's car was operated at a speed in excess of that permitted by the ordinance, and if, by reason of the excess of speed, the motorman was unable, by the exercise of ordinary care, to avert the collision, and if the plaintiff and the driver of the vehicle were exercising ordinary care at the time of, and before the collision. The objection to this instruction is that there is no evidence showing within what space a car, running at 8 miles an hour, could have been stopped. Nor anything to show that, even conceding that the car was running in excess of eight miles an hour, the excessive rate of speed caused the accident. The plaintiff's evidence tends to show that the car was running at the rate of 15 miles an hour, whereas the defendant's evidence tended to show that it was running only $6\frac{1}{2}$ or 7 miles an hour. The plaintiff's evidence tends to show that the motorman could have seen the vehicle on the track when he was more than 500 feet away from it, and during all the time he was traveling that distance; and the defendant's testimony tends to show that the motorman actually did see the vehicle on the track 40 feet before the collision occurred. If the plaintiff's testimony is true, there can be no question that the car could have been stopped within 500 feet, or its speed have been reduced while it was covering that distance, in time to have averted the injury. On the other hand, if the car was traveling only six or seven miles an hour, as the defendant's motorman says was the case, and he saw the vehicle on the track, 40 feet ahead of him, there can be no doubt that the car could have been stopped in time to have averted the injury. It needed no expert testimony for the jury to draw a proper conclusion from either phase of the case.

4. The modification of defendant's instruction No. 8, is assigned as error. That instruction told the jury that if the motorman saw the stanhope on the track, and immediately reversed

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his power and applied the brakes, and thus would have averted the accident, but for the fact that the driver of the vehicle was prevented from getting off of the track by reason of another vehicle in front of it, and that the collision was due to such failure, then the plaintiff was not entitled to recover, unless the motorman knew, or by the exercise of ordinary care, could have known, that the plaintiff's vehicle was so obstructed, in time to have stopped the car. The court modified this instruction by adding, "unless you find the facts to be as stated in instruction No. 5," which were that the car was being run at an excessive rate of speed, and that the excess of speed prevented the stopping of the car in time to avoid the collision. The instruction, as asked, was broader than the defendant was entitled to, for there is no foundation in fact for the instruction to rest upon. There is no room for doubt upon the facts disclosed by the record that if the motorman had applied his brakes as soon as he saw the danger to the plaintiff had become imminent, the accident could have been avoided. The modification of the instruction, therefore, did not prejudice the defendant. But the modification was proper, because the instruction, as asked, did not cover the phase of the case presented by the fifth instruction asked by the plaintiff, to wit, that the car was being run at such an excessive rate of speed, that it could not have been stopped, by the exercise of ordinary care, in time to have averted the injury. Moreover, the instruction was predicated upon a condition that was not pleaded and which was wholly inconsistent with the special defense interposed by the defendant.

5. The refusal to give defendant's instructions 1, 2, 5, 6, and 7, is assigned as error. The first instruction asked by the defendant, and refused by the court told the jury that the motorman had a right to assume that the driver of the vehicle, in which the plaintiff was riding, would use reasonable diligence, and get off of the track, and out of the way of the car, unless the motorman knew, or by the exercise of reasonable care and prudence, in looking and listening, might have seen or known that said vehicle was hindered or impaired in its progress by a vehicle in front of it. Such an instruction under the facts in this case would have been misleading. For it would have been calculated to make the jury believe that a motorman seeing a vehicle on the track ahead of him, may proceed without checking the speed of the car, on the assumption that the driver of the vehicle would get off of the track in time to avoid the injury, even though he might see that the driver was not attempting so to do, and in addition the instruction was based upon matters which were wholly outside of and inconsistent with the issues joined. The presumption of law obtains in ordinary cases, but there is also another presumption of law, which is left out of account by the instruction, to wit, that the motorman will do his duty, and will so run the car so that a collision will not occur, even though the driver of the vehicle does not do his duty. As was said in *Schafstette v. Railroad*, *supra*: "It is true that street cars are not compelled to check up every time a person ap-

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proaches a track, but it is equally true that if the person is on, or so close to the track that a car cannot pass without a collision, and the operator of the car sees, or by the exercise of ordinary care can see, the condition of danger of such person, it is his duty to check the speed of the car, or even stop the car entirely to prevent injury to the person." The instruction, as asked, overlooked entirely that duty of the motorman.

The second instruction asked by the defendant, and refused by the court, told the jury that if the collision was caused by the joint and concurring negligence of defendant's agents in charge of its car, and the driver of the vehicle, in which the plaintiff was riding at the time of such collision, and that the negligence of either without the concurring negligence of the other, would not have caused said collision, the plaintiff could not recover. It has been pointed out that there was no negligence on the part of the driver of the vehicle, in which the plaintiff was riding, and therefore there was no basis of fact upon which to predicate the instruction.

Instruction No. 5 asked by the defendant and refused by the court told the jury that if the vehicle, in which the plaintiff was riding, was turned suddenly across the defendant's tracks, in front of its car, and immediately upon discovering that the plaintiff was coming upon the track, upon which the car was moving, the motorman began setting his brakes and reversing the power of the car, and was unable thereby to stop the car and avoid the collision, then the plaintiff could not recover. The motorman testified that the car was running at the rate of $6\frac{1}{2}$ or 7 miles an hour; that he did not see the vehicle in which the plaintiff was riding, until the car was within 40 feet of it; that the vehicle was then turned onto the track, and he gave a very loud ring, and also applied the brakes, and reversed the current. When asked, on cross-examination, if, after he applied the brakes and reversed the car, the car ran 40 feet, he said: "Well, it takes some time to wind up the brake and check it in 40 feet if you are going at $6\frac{1}{2}$ or 7 miles an hour." When interrogated by the court, as to how far the vehicle was ahead of him when he first discovered it, he answered: "Well, my car did not quite get to Eleventh street, as I remember." The undisputed evidence in the case is that the collision occurred 82 feet east of the line east of Eleventh street. Giving, therefore, all the weight to the testimony of the motorman, to which, under the physical facts, it is entitled, he had 40 feet in which to stop the car, after he applied the brakes and reversed the power, according to his own testimony, but in fact he had more than 80 feet in which to do so. Under such evidence, the court cannot be adjudged guilty of error in refusing to put to the jury a theory of the case, which cut off the plaintiff's recovery, which rests upon only testimony which is contrary to the physics of the case, and to the common knowledge of all men. A car traveling at the rate of 6 or 7 miles an hour moves only ten and a fraction feet a second, and it is manifestly absurd to say that a car traveling at that rate on a level street could in 40 or 82 feet overtake a vehicle

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traveling in the same direction, even at a walk, and cause a collision therewith, after the brakes had been applied and the power reversed. The testimony of the motorman, taken in its entirety, does not amount to substantial evidence, and therefore affords no basis for the instruction asked.

The sixth and seventh instructions asked by the defendant and refused by the court, were substantially covered by the eighth instruction asked by the defendant, and given by the court, and therefore there was no error in refusing them.

6. Over the objection of the defendant, the plaintiff was permitted to testify that she visited New Mexico, Alabama, and Cape Girardeau, Mo. The abstract of the evidence shows that the court admitted this testimony, as bearing upon the question of the plaintiff's condition, and of her attempts to regain her health, by following the instructions of her physician as to rest, leisure and change of climate. The record further shows, that in consequence of the trips made by the plaintiff, her condition was improved. It is difficult, therefore, to see how the defendant could have been prejudiced by the testimony.

7. The defendant sought to have the plaintiff identify two written statements said to have been signed by her. She testified over defendant's objection that she did not sign one of them, and, further, that it was not true. This is assigned as error. The statements themselves were not offered in evidence, therefore her characterization of them that they were false did not injure the defendant, nor did it convey to the jury, as the defendant claims, any impression that the defendant's agents were seeking by trick and artifice to deceive the plaintiff into making a statement, which was unfavorable to her, and not in accordance with the facts. The defendant produced this condition by interrogating the plaintiff concerning the statements.

8. The last contention of the defendant is that the verdict is grossly excessive. The defendant disposes of this contention by simply stating it, and citing *Stolze v. Transit Co.* (Mo. Sup.) 87 S. W. 517, and *Chitty v. Railroad*, 106 Mo. loc. cit. 442, 65 S. W. 959. In the *Stolze Case* the verdict was for \$15,000, and this court affirmed it on condition that the plaintiff remit \$7,000, thus leaving a verdict of \$8,000. The verdict in the *Chitty Case* was likewise \$15,000. This court ordered a remitter of \$5,000, and thus permitted the verdict to stand at \$10,000. The verdict in the case at bar was for \$9,000, which is the average between the verdicts in the *Stolze* and *Chitty Cases*, and therefore those cases are not authority for the contention that the verdict is grossly excessive.

For the foregoing reasons the judgment of the circuit court is affirmed. All concur, except BRACE, P. J., absent.

COOPER v. NORTH CAROLINA R. CO.

(Supreme Court of North Carolina, Dec. 12, 1905.)

[52 S. E. Rep. 932.]

Railroads—Crossings—Care Required.*—While a railroad is bound to give adequate warning of the approach of a train over a public crossing, both the railroad company and a person about to cross are charged with the mutual duty of keeping a careful lookout for danger; the degree of diligence on either side being such as a prudent man would exercise under the circumstances of the case in endeavoring to perform his duty.

Same—Action—Instructions—Contributory Negligence—"Look and Listen."†—In an action for death of plaintiff's intestate, who was struck by a train at a railroad crossing, the court charged that, if the train did not give timely warning of its approach, it was not contributory negligence in the traveler to go on the track without looking and listening for the approach of a train, if he exercised that prudence and care which a prudent man would exercise under the circumstances, and, if the injury was attributable to the railroad's negligence in failing to give the signals, such failure would be deemed the proximate cause of the injury, if the jury should find that with proper warning the traveler would not have attempted to cross. Held, that the instruction was erroneous as relieving a traveler of all obligation to look and listen when there was a failure on the part of the railroad company to give the usual and ordinary signals.

Same—Curing Error.—The court having followed such instruction by a statement that if the railroad failed to give timely warning of the approach of a train over the crossing by sounding the whistle or ringing the bell, and plaintiff's intestate went on the crossing without looking and listening, his failure so to do would not be the proximate cause of his death, if with proper warning he would not have gone on the track, and he would not, therefore, be guilty of contributory negligence, the error was not cured by the fact that the court qualified the words exempting the plaintiff from the obligation to "look and listen" by the words "if he exercised that prudence and care which a prudent man would use under the circumstances," and by the fact that the instruction required the jury to find that

*For the authorities in this series on the subject of the duty to maintain lookout upon trains approaching crossings, see foot-notes appended to *St. Louis, etc., Ry. Co. v. Johnson* (Ark.), 16 R. R. R. 775, 39 Am. & Eng. R. Cas., N. S., 775; foot-notes appended to *Hughes v. Chicago, etc., Ry. Co.* (Wis.), 14 R. R. R. 787, 37 Am. & Eng. R. Cas., N. S., 787.

For the authorities in this series on the question of the care required of a highway traveler to discover approaching trains before attempting to cross railroad tracks, see foot-notes appended to *Greenawaldt v. Lake Shore, etc., Ry. Co.* (Ind.), 17 R. R. R. 816, 40 Am. & Eng. R. Cas., N. S., 816; *Rollins v. Chicago, M. & St. P. Ry. Co.* (C. C. A.), 17 R. R. R. 291, 40 Am. & Eng. R. Cas., N. S., 291; foot-notes appended to *St. Louis, etc., Ry. Co. v. Johnson* (Ark.), 16 R. R. R. 775, 39 Am. & Eng. R. Cas., N. S., 775; foot-note appended to *Louisville & N. R. Co. v. Bryant* (Ala.), 14 R. R. R. 734, 37 Am. & Eng. R. Cas., N. S., 734.

†For the authorities in this series on the question of the combined effect of contributory negligence and failure to give crossing signals, see foot-notes appended to *Southern Ry. Co. v. Carroll* (C. C. A.), 16 R. R. R. 488, 39 Am. & Eng. R. Cas., N. S., 488; foot-notes appended to *Giardina v. St. Louis & M. R. Ry. Co.* (Mo.), 14 R. R. R. 579, 37 Am. & Eng. R. Cas., N. S., 579.

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deceased's failure to look was not the proximate cause of the injury.

Death—Damages—Evidence.—In an action for wrongful death, the inventory of decedent's personal property filed by plaintiff as his administratrix, and plaintiff's annual account as administratrix, were incompetent for the purpose of showing intestate's capacity to earn and accumulate money.

Clark, C. J., and Connor, J., dissenting.

Appeal from Superior Court, Caswell County; E. B. Jones, Judge.

Action by Mary W. Cooper, as administratrix, etc., against the North Carolina Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Action to recover damages for alleged negligent killing of plaintiff's intestate. The ordinary issues in such actions were submitted. There was evidence of plaintiff tending to show that intestate was killed in attempting to drive his wagon over defendant's road at a public crossing, and by reason of the negligent failure on the part of defendant in giving the ordinary and usual signals at crossings, and that such negligence was the proximate cause of the injury. There was evidence of defendant tending to show that the ordinary and usual signals were given, and that the intestate was guilty of contributory negligence in driving on the crossing without having looked and listened for an approaching train, and when, if he had looked, the approach of the train might have been seen in time to have avoided the collision and prevented the death of the intestate. In response to prayer for instructions by plaintiff, the court on the issue as to contributory negligence charged the jury as follows: "Fourth. It is the duty of a railroad company to give the public due notice of the approach of its trains to a public crossing so that travelers may stop their teams, if necessary, and stay off the crossing until the train has passed. The train, if it gives the proper warning of its approach, and the railroad company is not otherwise at fault, is entitled to the right of way in preference to a traveler on the highway. The traveler has the right to expect such warning to be given to him, and he must look and listen when approaching a crossing, and his failure to look and listen when such warning is given is negligence, and, if such failure should cause his death, no recovery could be had for it. But, when the train does not give timely warning and reasonable warning of its coming, it is not contributory negligence in a traveler to go upon the track without looking and listening for the approach of a train, if he exercises that prudence and care which a prudent man would exercise under the circumstances, and, if the injury resulting is attributable to the negligence of the railroad company in failing to give the signals, for such failure would be deemed the proximate cause of the injury, if the jury should find from the evidence that with proper warning the traveler would not have attempted to cross. Therefore, if from the evidence you find that the railroad company failed to give timely warning of its approach to the crossing, by sounding the whistle or ringing the bell, and also find that the plaintiff's intestate went

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upon the crossing without looking and listening, his failure to look and listen under such circumstances would not be the proximate cause of his death, if, with the proper warning, he would not have gone upon the track, and if from the evidence you find such to be the facts, you will answer the second issue 'No'; that is, that the plaintiff's intestate was not guilty of contributory negligence." To this charge the defendant duly noted an exception. The court in substance repeated this statement in its direct charge to the jury. Verdict and judgment for the plaintiff. Defendant excepted and appealed.

Manly & Hendren, for appellant.

Kitchin & Carlton, for appellee.

HOKE, J. (after stating the case). The first portion of the instruction above quoted, which states the obligation on the railroad to give adequate warning when approaching a public crossing and the obligation on the traveler to look and listen in like case, is correct. As stated in *Improvement Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403: "Both parties are charged with the mutual duty of keeping a careful lookout for danger, and the degree of diligence to be used on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring to perform his duty." The remaining portion of the instruction, however, addressed more particularly to the feature of contributory negligence, by fair and reasonable intendment can only mean that, though a traveler in approaching a railroad track is required to look and listen, yet this obligation is not upon him, nor will the consequence be imputed to him, if he failed to look and listen when such failure was caused by the negligent failure of the railroad train to give the necessary signals; and this where there was evidence tending to show that, if he had looked, he could have seen the approaching train in time to have avoided the collision, or at least to have saved himself by the exercise of reasonable effort. In this we think there was error which entitles the defendant to a new trial. It relieves the traveler of all obligation to look and listen when there is a failure on the part of the defendant to give the usual and ordinary signals, and places the entire responsibility for such a collision on the railroad company. It would, in effect, practically eliminate the defense of contributory negligence when there had been a negligent failure to give the warning; for ordinarily it is only by looking and listening that a traveler can inform himself of dangerous conditions. This is not a just principle by which the rights of parties in cases like the present should be determined, nor is it supported by any well-considered authority. The general rule is well stated in *Breach on Contributory Negligence*, as follows: "In attempting to cross, the traveler must look and listen for signals, notice signs put up as warnings, and look attentively up and down the track, and a failure to do so is contributory negligence, which will bar a recovery. A multitude of decisions of all the courts enforce this reasonable rule. It is also consonant with right reason and the

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dictates of ordinary prudence, and so much in line with the ordinary care which the average of mankind display in the daily routine of life that it would seem to be scarcely dependent upon the authority of decided cases in the law courts. As a general rule, the omission of the traveler to look and listen is so clearly a want of ordinary care that it constitutes contributory negligence as a matter of law, but it cannot be said that such failure will always defeat a recovery, for circumstances may and sometimes do exist which excuse the omission." And the rule so stated is in accord with the decisions in this and other jurisdictions. *Randall v. Railroad*, 104 N. C. 410, 10 S. E. 691; *Mayes v. Railroad*, 119 N. C. 758, 26 S. E. 148; *Mesic v. Railroad*, 120 N. C. 490, 26 S. E. 633; *Laverenz v. Railroad*, 56 Iowa, 689, 10 N. W. 268; *Nixon v. Railroad*, 84 Iowa, 331, 51 N. W. 157; *Davis v. Railroad*, 47 N. Y. 400; *Rodrian v. Railroad*, 125 N. Y. 526, 26 N. E. 741; *Bonnell v. Railroad*, 39 N. J. Law, 189.

The rule is so just in itself, and so generally enforced as controlling, that citation of authority is hardly required. But, as the matter has been very earnestly debated, it is considered well to quote from some of the decisions illustrative of the obligation on the traveler to look and listen, and some of the exceptions where its violation was not held contributory negligence as a matter of law. In *Randall's Case*, *supra*, it is held to be the duty of a person approaching a railroad track to take every prudent precaution to avoid a collision, and it is the duty of the engineer to sound the whistle or ring the bell at a reasonable distance from the crossing in order to enable travelers to avoid danger. In *Mayes' Case* (*Clark, J.*, delivering the opinion) it is held to be the duty of one approaching a railroad crossing to use ordinary and reasonable care to avoid accident, and to exercise his senses of hearing and sight to keep a lookout for an approaching train; and, if he does not do so, but drives inattentively upon the track without keeping a lookout or listening for approaching trains, and injury results, he is ordinarily, but not in all cases, guilty of contributory negligence. In *Mesic's Case*, *Mr. Justice Montgomery*, speaking for the court, said: "The rule is general and usual that, whenever an approach to a public crossing over a railroad is made by any one in charge of a wagon and team, such person is bound to look and listen for approaching trains and take every proper precaution to avoid a collision; and this is so, even though the approach be made at a time when no regular train is expected to pass; and in case the driver fails to look and listen and to take proper precaution to avoid a collision, and one does occur, the plaintiff cannot recover, even though the defendant was negligent in the first instance." In *Laverenz's Case*, *supra*, it is held to be the rule that a person who voluntarily goes on a railroad track at a point where there is an unobstructed view of the track, and fails to look or listen for danger, cannot recover for an injury which might have been avoided by so looking and listening; but, when the view is obstructed or other facts exist which tend to complicate the question of contributory negligence, it becomes one for the

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jury. In *Nixon's Case*, supra, it is held that one who, in full possession of his senses and without having his attention diverted from any cause, passes over a railroad crossing without looking in both directions to see if there is an approaching train, is guilty of contributory negligence, and will not be entitled to recover for injuries received from a passing train, though no whistle was sounded nor bell rung from the engine, as required by law. Rothrock, J., delivering the opinion, said: "It is true there are exceptions to this rule. There may be such circumstances surrounding the traveler as that his failing to look and listen may exonerate him from the charge of contributory negligence. The traveler, for instance, may be placed without his fault in some dilemma, or some place of danger, where the exigencies of the situation and an emergency may excuse him from going on the track without looking and listening. These circumstances are so varied that they cannot be cited or commented upon in an opinion without unduly extending the subject. They involve obstructions on the track, which prevent an approaching train from being seen by the traveler, and where there are several tracks and trains running on them in different directions, and one train is obscured by another the fact that the railroad track is in a deep cut and trains cannot be seen by a traveler approaching the crossing, or trains following each other in close proximity which may serve to confuse the traveler, and numberless other circumstances from which the jury may be authorized in finding that the traveler exercised the precaution which an ordinarily prudent person would exercise under the same circumstances." In *Rodrian's Case*, supra, it is held that a pedestrian who crosses a railroad track must, in the absence of circumstances excusing it, look in each direction and ascertain whether a train is approaching. He may not omit this in reliance upon the performance by the railroad of its duty to give reasonable notice of the approach of the train; and, if he does omit it, the neglect of the company to discharge its duty will not relieve him from the imputation of negligence; Andrews, J., further saying: "If in case of an accident at a crossing it appears that the person injured did look for an approaching train, it would not necessarily follow as a rule of law that he was remediless because he did not look at the precise place and time when and where looking would have been of some aid. Many circumstances might be shown which could properly be considered by the jury in determining whether he exercised due and reasonable care in making his observation, the presence of other imminent dangers, the raising of gates erected by the company to guard the highway, giving assurance that the crossing was safe, these and similar circumstances appearing, they may be considered in determining whether the person injured, who did in fact look and listen before attempting to cross the track, fairly discharge the duty imposed upon him, although it should appear that if he had looked at another instant of time, or had looked last in the direction from which the train was approaching, he would have seen it."

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It will be observed that the circumstances which may at times excuse the failure of the traveler, who has entered on a railroad crossing, to note the approach of a train, usually arise where the view is obstructed, or in the presence of some imminent danger or emergency sufficient to divert the attention of a person of reasonable fortitude and self-possession, or where one has entered on the crossing under an express or implied invitation of the company's employees giving reasonable assurance of safety. The last instance more usually occurs at stations where a way has been left open by the company across other tracks for an approach to the station or train, or at much frequented crossings where there are gates raised, or an employee charged with the duty has satisfied the traveler that he may cross in safety, and has no application here. The general rule is that the traveler is required to look and listen for danger, and, where there is an unobstructed view, he is not relieved of the obligation by the fact that the train has failed to give the ordinary signals of its approach. The error in the above charge consists in relieving the plaintiff's intestate from all obligation to look and listen, if his not doing so was caused by the negligent failure of the defendant to give proper warnings, where there was evidence tending to show that there was an unobstructed view which would have enabled the intestate to see the train in time to have saved himself by the exercise of reasonable effort. It is submitted in support of this charge that the objectionable feature is qualified or eliminated by the use of the words "if he exercised that prudence and care which a prudent man would use under the circumstances;" and, further, "that the failure to look would not be the proximate cause of the injury, if the jury should find from the evidence that with the proper warning the traveler would not have attempted to cross," and it is argued that by reason of these qualifying words the charge may be referred to certain testimony to the effect that the view was obstructed. Unfortunately for this position, and for the intention here imputed to the judge below, he puts his own, and as we interpret it, an entirely different, construction upon these words, for in his conclusion, and just after using them, he says: "Therefore, if from the evidence you find that the railroad company failed to give timely warning of its approach to the crossing by sounding the whistle or ringing the bell, and also find that the intestate went upon the crossing without looking or listening, his failure to look and listen would not be the proximate cause of his death, if with the proper warning he would not have gone upon the track." It is true the court in several other portions of the charge imposes on the plaintiff the obligation to look and listen whenever the view was unobstructed, but this does not help the matter. Standing apart, the positions are in absolute conflict, and the only way to reconcile them and give each any significance would be to annex the erroneous proposition to the more correct one wherever the same occurs.

Again, it is contended that the burden was on the defendant to establish contributory negligence, and that there was no evidence

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tending to show contributory negligence sufficient for the consideration of a jury, and for this reason any error in the charge on that issue should be considered as harmless and immaterial. But this position cannot be sustained. Both the evidence on the conduct of the intestate and as to the physical conditions and placing of the occurrence are against it. There was evidence of the defendant tending to show that the intestate was in a covered wagon and that he drove on the crossing without any stop whatever, and with the wagon cover down on the side from which the train approached. Henry Flintop (on pages 38 and 39 of the record) testified that he "was in the wagon, going towards Scarlet crossing; while near a branch Cooper's wagon passed the witness and continued up the hill to the crossing; noticed the wagon of intestate nearing the railroad and wondered why they did not stop the team; Cooper was driving; the wagon sheet was down on the right side; the wagon did not slacken its speed or stop, but went right on the crossing; was looking at the wagon all the time." There was also evidence to the effect that at a point just on the edge of the wagon road and 13 feet from the center of the railroad track one could see down the railroad from 500 to 1,200 feet in the direction from which the train approached, and photographs were in evidence giving a picture of the view from that point. This was on the edge of the county road, and it may have been taken from that point in order to give the photographer an opportunity to present a picture of the county road where it approached the crossing, as well as the crossing itself. If the camera had been placed in the center or right of the county road, the view down the railroad would have been shortened some, but would still be sufficient to require that the question should be submitted to the jury as to whether the intestate could by looking have noted the train's approach in time to have saved himself by reasonable effort, and with the obligation to look upon him. There was both contradictory and impeaching testimony for the plaintiff on this question, but the defendant was entitled to have this view presented under a proper and correct charge.

We are referred, further, to several decisions in this state which it is argued are contrary to our present opinion, but none of them we think sustain the position for which they are cited. While the headnotes of the different cases may be at times too general, both these and the language of the judge delivering the opinion must be taken in connection with the facts admitted or established, or at least in evidence and assumed to be true, upon which they are predicated; and they are only to be regarded as authoritative decisions when so construed and applied. Thus, in *Hinkle's Case*, 109 N. C. 478, 13 S. E. 884, 26 Am. St. Rep. 581, the plaintiff testifies that the plaintiff and his father were on the county road in a covered wagon, and as they traveled along the road he looked out of the wagon two or three times to see if the train was coming; and when they had gone down the hill, within about 20 yards of the crossing, he stopped the wagon and listened. The plaintiff then got on the crosspieces of the shaft and held to

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the wagon with one hand while he rested the other on the horse's rump, and, as his father drove on, he looked and listened, but neither saw nor heard an approaching train. In *Alexander's Case*, 112 N. C. 720, 16 S. E. 896, the view of the track was shut off by cars, etc., and the ordinary noise of a moving train was deadened by the operation of an adjacent cotton factory, etc. The plaintiff testified that before attempting to cross the track he pulled up his horse and listened to hear if there was any approaching train, and, hearing no bell, he ventured on the track and was hurt; that he had heard the bell there, prior to that time, as a warning, etc. There was also an ordinance requiring trains to sound bells at crossings. In *Russell's Case*, 118 N. C. 1098, 24 S. E. 512, the evidence was not set out, but the writer has examined the record and finds that the plaintiff testified that he both looked and listened, and failed to see or hear any train, and drove on the track only after having done this. There was also testimony in this case to the effect that the plaintiff, who was in a buggy, had crossed one railroad track, and was between that and another which she was approaching, when the horse took fright, and her husband, who was driving, lost control over him; and, further, there were some cross-ties between the roads which may have partially obstructed the view. Here was testimony that the plaintiff both looked and listened, that the occupants of the buggy were in the presence of an emergency, and further there was evidence tending to show that the view was partially obstructed. In *Norton's Case*, 122 N. C. 910, 20 S. E. 886, the plaintiff stopped, looked, and listened at a distance of 60 feet from the track, the nearest point where the view was open to him, and not seeing or hearing any train, and relying on the signals he had a right to expect and which the defendant negligently failed to give, he drove on the track, and was injured by a train running at an unlawful rate of speed. Here the plaintiff had looked at the only place where looking would have availed him. In *Mesic's Case*, *supra*, the distinction here dwelt upon is adverted to by Mr. Justice Montgomery. After laying down the obligation on the traveler to look and listen, even though the railroad may have been negligent, he proceeds: "The rule, however, does not prevail where to look would be useless on account of obstructions, natural in themselves or such as had been placed by accident or design by the company's employees on their tracks, * * * and when at the same time the engineer had failed to sound the whistle or ring the bell for the crossing, and in consequence of which failure the plaintiff had been induced to go upon the track and take the risk."

In none of these cases cited and relied upon is the person injured or killed relieved of the obligation to look and listen when the proper and prudent exercise of sight or hearing would have enabled him to save himself by avoiding a collision, and a correct deduction from these and the other cases seems to be: (1) That a traveler on the highway, before crossing a railroad track, as

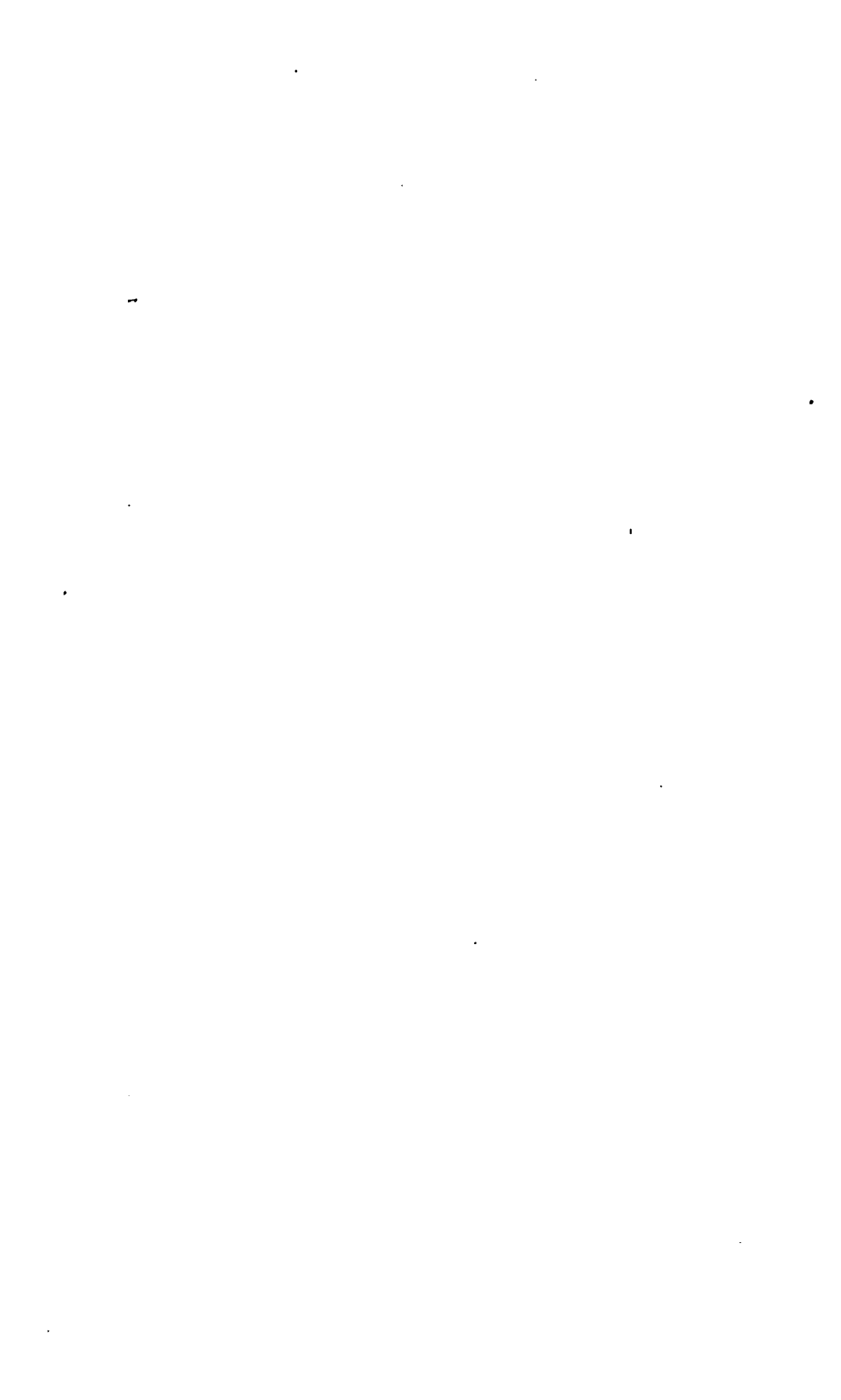
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a general rule, is required to look and listen to ascertain whether a train is approaching; and the mere omission of the trainmen to give the ordinary or statutory signals will not relieve him of this duty. (2) That, where the view is unobstructed, a traveler, who attempts to cross a railroad track under ordinary and usual conditions without first looking, when, by doing so, he could note the approach of a train in time to save himself by reasonable effort, is guilty of contributory negligence. (3) That, where the view is obstructed, a traveler may ordinarily rely upon his sense of hearing, and, if he does listen and is induced to enter on a public crossing because of the negligent failure of the company to give the ordinary signals, this will usually be attributed to the failure of the company to warn the traveler of the danger, and not imputed to him for contributory negligence. (4) There may be certain qualifying facts and conditions which so complicate the question of contributory negligence that it becomes one for the jury, even though there has been a failure to look or listen, and a traveler may, in exceptional instances, be relieved of these duties altogether as when gates are open or signals given by a watchman and the traveler enters on the crossing reasonably relying upon the assurance of safety. None of these positions, however, justify the charge given in the case, which, as stated, withdraws all obligation either to look or listen when there has been a negligent failure to give the ordinary warnings, even though there was evidence tending to show there was an unobstructed view.

There was also pressed upon our attention a ruling of the court on a question of evidence; and, as the cause goes back for a new trial, we deem it well to determine the matter. Defendant offered Exhibit A, being the plaintiff's inventory of the personal property of the deceased, and Exhibit B, being the annual account of plaintiff, as administratrix of the intestate, for the purpose of showing the intestate's capacity to earn and accumulate money. The proposed evidence was excluded by the court, and defendant excepted. If these papers should show a large estate, there are so many ways by which it could be explained otherwise than by the capacity of the deceased to accumulate money, and, if it is small, there are so many and various ways it could be accounted for, consistent with the highest capacity to earn and acquire, that these admissions, we think, would tend rather to confuse than aid the investigation and would open up a field of inquiry entirely too extensive and often foreign to the issue. We hold the papers to be irrelevant, and affirm the ruling of the trial judge on that question.

For the error in the charge above pointed out, there will be a new trial on all the issues, and it is so ordered.

New trial.



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Copp v. Maine Cent. R. Co. (Me.), 199.

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Contributory negligence no defense where railroad's employee wantonly ran railroad tricycle over person he knew to be in perilous situation. *Vicksburg S. & P. Ry. Co. v. Barmore (Miss.)*, 144.

Engineer was not guilty of negligence in not sooner apprehending that woman would not leave track in time. *Copp v. Maine Cent. R. Co. (Me.)*, 199.

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Insufficiency of evidence to show that those in charge of train might have averted injury by exercise of proper care after discovering presence of the railroad's employee on the track. *Louisville H. & St. L. Ry. Co. v. Jolly's Adm'x (Ky.)*, 154.

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Right of engineer to assume that person seen walking on track will avoid train. *Copp v. Maine Cent. R. Co. (Me.)*, 199.

Signals, until they have been given trainmen cannot assume that person seen walking on track will leave it. *Kelley v. Ohio River R. Co. (W. Va.)*, 807.

ACTIONS.

Complaint alleging that plaintiff's intestate was rightfully at work in defendant's mine, assisting defendant's contractor in work of mining, when he was struck by defendant's tram car, negligently allowed to run against plaintiff by defendant's servants, etc., stated cause of action in case, and not in trespass. *Lookout Mountain Iron Co. v. Lea (Ala.)*, 10.

ACT OF GOD.

See CARRIERS OF GOODS; CARRIERS OF LIVE STOCK.

ADVERSE POSSESSION.

See RIGHT OF WAY.

AGENCY.

See CARRIERS OF LIVE STOCK; CONNECTING CARRIERS; INDEPENDENT CONTRACTORS.

ANIMALS.

See CARRIERS; FRIGHTENING TEAMS.

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ARGUMENT OF COUNSEL.

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ASSAULTS.

Boy killed by railroad's detective while stealing ride, railroad not liable if detective acted maliciously or in pursuit of some purpose of his own, but if, while acting within general scope of his employment, he disregarded railroad's orders or exceeded his power in shooting the boy, railroad was responsible. *Sharp v. Erie R. Co.* (N. Y.), 683.

In action against railroad for death of boy shot by its detective, after testifying for plaintiff as to the circumstances resulting in the shooting, detective testified on cross-examination to matters excusing his conduct, which matters were undisputed. It was held not to authorize taking of case from jury; credibility of the witness being for jury. *Sharp v. Erie R. Co.* (N. Y.), 683.

Mining company not liable for an assault by its general superintendent on driver of one of its cars while superintendent was riding on it, in absence of evidence that the assault was committed in pursuance of his duties. *Palos Coal & Coke Co. v. Benson* (Ala.), 185.

Question for jury whether railroad's detective acted within scope of his employment in shooting boy, who had been stealing ride, or whether he acted as public officer only. *Sharp v. Erie R. Co.* (N. Y.), 683.

ASSUMPTION OF RISK.

See LICENSEES; MASTER AND SERVANT.

BAGGAGE.**Damages.**

Measure of damages was any reasonable loss and expense occasioned by the delay, together with the value of the goods at time and place they should have been delivered, less their value according to their condition when they were tendered, on the day of trial, and their acceptance was refused. *Wall v. Atlantic Coast Line R. R.* (S. Car.), 332.

BILLS OF LADING.

See CARRIERS.

Carrier not estopped, even as to innocent indorsee, by statements in bill of lading issued by its agents from showing that no goods were in fact received for transportation. *Swedish-American Nat. Bank v. Chicago, etc., Ry. Co.* (Minn.), 783.

Delivery of freight to carrier may be proved by oral testimony, notwithstanding existence of receipt or bill of lading, as such receipt or bill of lading does not fall within the best-evidence

BILLS OF LADING—Continued.

rule as proof of such fact of delivery. *Atlantic Coast Line R. Co. v. Dexter (Fla.)*, 787.

Evidence was not sufficient to sustain finding that defendant had authorized its agents to issue bills of lading for goods not received. *Swedish-American Nat. Bank v. Chicago, etc., Ry. Co. (Minn.)*, 783.

Limiting liability, effect of mere acceptance of receipt or bill of lading containing stipulation. *Atlantic Coast Line R. Co. v. Dexter (Fla.)*, 787.

BRIDGES.

See CONSTITUTIONAL LAW.

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See CARRIERS; CARRIERS OF PASSENGERS; DEATH BY WRONGFUL ACT; FIRES SET BY LOCOMOTIVES.

CARRIERS.

See BAGGAGE; BILLS OF LADING; CONNECTING CARRIERS; CONSTITUTIONAL LAW; EXPRESS COMPANIES; FIRES SET BY LOCOMOTIVES; LICENSEES; MAIL ROUTES; SLEEPING CAR COMPANIES; STATIONS AND DEPOTS; STATUTES; TRESPASSERS; WHARVES.

CARRIERS OF GOODS.

See CARRIERS OF LIVE STOCK.

After plaintiff's cotton was placed on the proper freight platform by the manager of the gin which had cleaned it, such manager requested railroad's agent at nearest station to have car sent for it, but a train conductor failed to follow his instructions, so that no car was sent, and the cotton was destroyed by fire while on the platform. It was held there was no relation of carrier and shipper between plaintiff and the railroad. *Anderson v. Mobile & O. R. Co. (Miss.)*, 382.

Carrier not liable for loss of goods by fire where it was not negligent with respect to the fire, in absence of evidence that its negligence in failing to forward goods promptly was proximate cause of loss. *General Fire Ext. Co. v. Carolina & N. W. Ry. Co. (N. Car.)*, 336.

Carrier was guilty of negligence in failing to transport cotton within reasonable time, and was therefore precluded from claiming that it was destroyed by an act of God (a cyclone). *Alabama Great Southern R. Co. v. Quarles & Couturie (Ala.)*, 69.

Damages.

Delay in transportation of theatrical properties, which carrier knew were intended for use in a widely advertised exhibition, shipper was entitled to recover his ordinary gross earnings, less such expenses, if any, as the deprivation of use of the property saved him from. *Weston v. Boston & M. R. R. (Mass.)*, 718.

In action for failure to deliver cars to a manufacturer in which to ship special orders, the item of damage must be shown, and plaintiff cannot estimate the amount in a lump sum. *Mauldin v. Seaboard Air Line Ry. (S. Car.)*, 76.

Instruction on subject of right to recover special damages for failure to promptly deliver cattle feed to consignee, after its arrival at destination, could not have mislead jury or injured defendant. *Bourland v. Choctaw O. & G. Ry. Co. (Tex.)*, 61.

Special damages for delay in delivering freight, complaint must allege that carrier knew of the use to which it was to be put, and that special injury would result from delay, and that car-

CARRIERS OF GOODS—Continued.

- rier contracted to transport with reference to such damages. *Wesner & White Mfg. Co. v. Atlantic Coast Line R. R.* (S. Car.), 342.
- Where carrier is unable to furnish cars because of an unprecedented amount of business, such failure is no ground for punitive damages. *Mauldin v. Seaboard Air Line Ry.* (S. Car.), 76.
- Where consignee, when applying for delivery of cattle feed, after its arrival, stated that failure to get it would cause him great loss, he was entitled to special damages for delay in delivering it, although notice of the peculiar facts was not given before or at time of the making of contract of carriage. *Bourland v. Choctaw O. & G. Ry. Co.* (Tex.), 61.
- Demurrage, carrier had no lien on freight on account of delay in unloading barges on which it was carried at their point of destination, and had no right to retain possession of the goods until the demurrage was paid. *Nicolette Lumber Co. v. People's Coal Co.* (Pa.), 733.

Evidence.

- In an action for failure to furnish cars on which to ship goods ordered, evidence of verbal orders for the goods is not objectionable, because they were subsequently followed by written orders to same effect. *Mauldin v. Seaboard Air Line Ry.* (S. Car.), 76.

Limiting Liability.

- By special contract, carrier may relieve itself, of its common-law liability as an insurer, and may contract against liability arising from certain losses which do not involve negligence of carrier or its servants. *Central of Georgia Ry. Co. v. Hall* (Ga.), 741.
- Carrier may exempt itself from liability for fire not attributable to its negligence. *Anderson v. Mobile & O. R. Co.* (Miss.), 382.
- Negligence of carrier or that of its servants. *Central of Georgia Ry. Co. v. Hall* (Ga.), 741.
- Notice given merely by publication, or by entry on receipts given or tickets sold. *Central of Georgia Ry. Co. v. Hall* (Ga.), 741.
- Under laws of Georgia, carrier cannot bind shipper by contract limiting liability unless it is signed by shipper at time of shipment. *Frasier v. Charleston & W. C. Ry. Co.* (S. Car.), 768.
- Verdict properly directed for defendant, where absence of evidence that loss of goods by fire was caused by negligence. *Michaels v. Adams Exp. Co.* (N. J.), 341.
- Scope of freight agent's authority, who is in charge of carrier's business at a station, to contract for shipment of freight. *Gulf, C. & S. F. Ry. Co. v. Jackson & Edwards* (Tex.), 125.
- Shipper in absence of special contract, is not entitled to damages for failure to carry his freight, caused by sudden press of business which could not have been reasonably anticipated. *Mauldin v. Seaboard Air Line Ry.* (S. Car.), 76.

CARRIERS OF LIVE STOCK.

See CARRIERS OF GOODS.

- Act of God, burden on carrier to establish not only that it occasioned loss, but that its own negligence did not contribute thereto. *Central of Georgia Ry. Co. v. Hall* (Ga.), 741.
- Act of God excusing carrier, definition. *Central of Georgia Ry. Co. v. Hall* (Ga.), 741.
- An authorized agent of a railroad, who receives cattle for shipment without objection, under a parol agreement made by an unau-

CARRIERS OF LIVE STOCK—Continued.

thorized agent, binds the company by his authority, notwithstanding the want of authority of the agent who made the contract. *Gulf C. & S. F. Ry. Co. v. Jackson & Edwards (Tex.)*, 125.

Are common carriers. *Central of Georgia Ry. Co. v. Hall (Ga.)*, 741.

Burden, of proof, under Florida statute, is on shipper assuming to take care of stock during transportation to show that injury to the stock was caused "by running of the locomotive, or cars, or other machinery of the defendant company," before the burden shifts to carrier to show that injury complained of was not the result of negligence on its part. *Atlantic Coast Line R. Co. v. Dexter (Fla.)*, 787.

Burden on carrier to excuse itself from negligence. *Louisville & N. R. Co. v. Smitha (Ala.)*, 775.

Contributory Negligence.

Shipper's failure to accompany stock, according to contract, no defense to carrier's liability for injuries to the stock, unless such failure contributed thereto. *Louisville & N. R. Co. v. Smitha (Ala.)*, 775.

Damages.

In absence of evidence of class and condition of the live stock, damages cannot be awarded for a claimed decline in the market price of stock of the general description of that which the carrier refused to accept and transport. *Chicago B. & Q. Ry. Co. v. Todd (Neb.)*, 113.

Market value, instruction on subject of was not misleading, because of evidence and oral charge, in failing to take into consideration the necessary deterioration in the animals during their journey. *Southern Ry. Co. in Kentucky v. Thomas (Ky.)* 759.

Refusal to receive and transport live stock, carrier liable for expense of keeping stock, caused by the delay, and consequent difference of in market price. *Chicago B. & Q. Ry. Co. v. Todd (Neb.)*, 113.

Shipper, injured by fall into ditch on carrier's premises, was entitled to recover only actual damages. *Southern Ry. Co. in Kentucky v. Goddard (Ky.)*, 116.

Duty of carrier to feed, water, and exercise stock, where it knew that no representative of shipper was accompanying stock, as required by the contract. *Louisville & N. R. Co. v. Smitha (Ala.)*, 775.

Evidence.

Evidence as to value of cattle in a certain vicinity, as ascertained by the witness from inquiry of cattle raisers in that vicinity, is hearsay. *Gulf C. & S. F. Ry. Co. v. Jackson & Edwards (Tex.)*, 125.

In action for breach of contract for shipment of cattle, plaintiff's testimony in chief entitled defendant to ask him on cross-examination what he paid for the cattle when he purchases them and the cost of shipping them to destination. *Gulf C. & S. F. Ry. Co. v. Jackson & Edwards (Tex.)*, 125.

Instruction that carrier owed no duty to guard the animals against fever was properly refused, as exempting carrier from liability, though the fever resulted from its negligence. *Louisville & N. R. Co. v. Smitha (Ala.)*, 775.

Instruction was erroneous in eliminating the question whether carrier was negligent in not furnishing a suitable place for unloading stock and in the use of the appliances at hand. *Illinois Cent. R. Co. v. Cane's Adm'x (Ky.)*, 823.

Limiting Liability.

Amount of liability limited, validity of stipulation. *Atlantic Coast Line R. Co. v. Dexter (Fla.)*, 787.

CARRIERS OF LIVE STOCK—Continued.

- Bona fide valuation, whether question for jury, or whether proper for court to construe contract. *Central of Georgia Ry. Co. v. Hall (Ga.)*, 741.
- Burden on carrier to prove that injury to live stock shown by plaintiff's evidence did not result from negligence on part of its employees, or that it was within one of the specified exceptions to the contract of affreightment. *Louisville & N. R. Co. v. Smitha (Ala.)*, 775.
- Burden on carrier to show that any injury to cattle resulted from an excepted cause for which it was not liable under the contract. *Kansas City M. & B. R. Co. v. Heard (Miss.)*, 755.
- Carrier of live stock may by special contract so limit its liability that it will be liable only in the event that it is guilty of gross negligence. *Central of Georgia Ry. Co. v. Hall (Ga.)*, 741.
- Common-law liability may be limited, but carrier cannot exempt itself by contract from liability for negligence of its servants. *Louisville & N. R. Co. v. Smitha (Ala.)*, 775.
- Consignee was entitled to show that contract was not binding on him because not signed by shipper until after injury to horse, and an agreement that it should not affect rights of consignee. *Frasier v. Charleston & W. C. Ry. Co. (S. Car.)*, 768.
- In action by consignee for injuries to freight shipped from foreign state, contract must be construed according to laws of state in which it was executed. *Frasier v. Charleston & W. C. Ry. Co. (S. Car.)*, 768.
- Under special contract making it the duty of shipper to unload horse, if agent of carrier is present and assisting in unloading the horse in unsafe way, and the animal is injured, the carrier is liable. *Illionis Cent. R. Co. v. Cane's Adm'x (Ky.)*, 823.
- Validity of agreement as to value of property to be transported. *Central of Georgia Ry. Co. v. Hall (Ga.)*, 741.
- Valuation of freight, evidence was not sufficient to show fraud by shipper. *Central of Georgia Ry. Co. v. Hall (Ga.)*, 741.
- Valuation of property to be transported, effect of mere general limitation as to value expressed in bill of lading. *Central of Georgia Ry. Co. v. Hall (Ga.)*, 741.
- Where contract exempted carrier from liability for injuries other than those caused by fraud or gross negligence, it was admissible for carrier to plead and prove that its engineer causing the wreck from which the loss resulted became suddenly insane, and consequently caused the accident. *Central of Georgia Ry. Co. v. Hall (Ga.)*, 741.
- Where, in action to recover for injury to freight shipped from foreign state, carrier sets up special contract, consignee may show that contract was void under laws of foreign state without pleading such laws. *Frasier v. Charleston & W. C. Ry. Co. (S. Car.)*, 768.
- Where special contract was denied, instruction that shipper satisfied special contract limiting carrier's liability by accepting reduced rates was properly refused. *Illinois Cent. R. Co. v. Cane's Adm'x (Ky.)*, 823.
- Proper to refuse to charge that the stock was not confined in the cars an unreasonable time; the question being a mixed one of law and fact. *Louisville & N. R. Co. v. Smitha (Ala.)*, 775.
- Request to charge that carrier was not bound to transport the stock on its fast train was properly refused as misleading. *Louisville & N. R. Co. v. Smitha (Ala.)*, 775.
- Request to charge that plaintiff could not recover for delay in delivery was properly refused as not warranted by the evidence. *Louisville & N. R. Co. v. Smitha (Ala.)*, 775.
- Responsibility assumed by carrier of live stock. *Louisville & N. R. Co. v. Smitha (Ala.)*, 775.
- Where there was evidence justifying finding of unreasonable delay

CARRIERS OF LIVE STOCK—Continued.

in transportation of stock, instruction that, if the stock was brought over defendant's line without any unnecessary jar or rough handling, defendant was not liable for injuries they received, was properly refused. *Louisville & N. R. Co. v. Smitha* (Ala.), 775.

Where wreck causing loss of freight resulted from conduct of engineer, and he was at the time in company of the conductor, who had authority to control him, even if the engineer was insane at the time, the loss could not be attributed to the act of God, within meaning of rule of law excusing carriers. *Central of Georgia Ry. Co. v. Hall* (Ga.), 741.

CARRIERS OF PASSENGERS.

See **CONNECTING CARRIERS; EVIDENCE; NEGLIGENCE; TICKETS AND FARES.**

Carrier was not liable under penal statute of Michigan, for failure to transport passenger by train which had been discontinued and proper notice given, provided the mistake in selling her ticket for use on such train was error of local ticket agent. *Geer v. Michigan Cent. R. Co.* (Mich.), 781.

Contributory Negligence.

Alighting from moving car. *Alabama & V. Ry. Co. v. Jones* (Miss.), 367.

Care required of passenger for his own safety. *Pendleton's Adm'r v. Richmond F. & P. R. Co.* (Va.), 73.

Evidence showed that passenger was injured while attempting to alight from train after it started again. *Newlin v. Iowa Cent. Ry. Co.* (Iowa), 360.

Excursionists' right to ride home on platforms of crowded train. *Jackson v. Natchez & W. Ry. Co.* (La.), 385.

Instruction on the subject of the care required of an alighting passenger was objectionable as argumentative. *O'Dea v. Michigan Cent. R. Co.* (Mich.), 53.

Instruction was not misleading as to burden of proof with reference to contributory negligence. *Hutcheis v. Cedar Rapids & M. C. Ry. Co.* (Iowa), 362.

Instructions were erroneous as in effect charging that plaintiff was guilty of contributory negligence as a matter of law if she attempted to alight from moving street car. *Paul v. Salt Lake City R. Co.* (Utah), 45.

Of person traveling on shipper's pass, and struck by train on other track while walking to a car, was question for jury. *Chicago B. & Q. R. Co. v. Troyee* (Neb.), 350.

Passenger killed by train while crossing tracks from station to take his train was guilty of contributory negligence. *Dieckmann v. Chicago & N. W. Ry. Co.* (Iowa), 736.

Passenger struck by pole while standing on running board with his back to front of car. *Mason v. Boston & N. St. Ry. Co.* (Mass.), 793.

Passenger struck by train while crossing track to opposite platform, sufficiency of evidence of. *Pendleton's Adm'r v. Richmond F. & P. R. Co.* (Va.), 73.

Passenger thrown from car, was not negligent in seating himself on rear seat of open car facing rear of car. *Spooner v. Old Colony St. Ry. Co.* (Mass.), 727.

Damages.

Additional suffering caused by failure to promptly rescue passenger from wreck. *Jackson v. Natchez & W. Ry. Co.* (La.), 385.

Exemplary damages for ejection of passenger for refusal to pay fare, when, and when not, recoverable. *Ammons v. Southern Ry. Co.* (N. Car.), 724.

Indignities to passenger, who presented valid order for ticket

CARRIERS OF PASSENGERS—Continued.

- on connecting line instead of the ticket, by conductor, \$1,497 was not held excessive. *Cincinnati, etc., Ry. Co. v. Harris* (Tenn.), 762.
- Plaintiff was not entitled, under the circumstances, to recover exemplary damages, where street car conductor improperly refused to accept plaintiff's transfer, and required him to pay another fare or leave car. *Little Rock Traction & Electric Co. v. Winn* (Ark.), 349.
- Punitive damages were recoverable for forcible expulsion of passenger from train by conductor or other employees, without excuse. *Seaboard Air Line Ry. v. O'Quin* (Ga.), 103.
- Where carrier sold ticket for drawing room on sleeper, when there was no drawing room in the car, possible injury to health by reason of breach of the contract might be presumed to have been within contemplation of the parties. *Ingraham v. Pullman Co.* (Mass.), 739.
- Wrongful ejection, elements of the damages which may be recovered. *Ammons v. Southern Ry. Co.* (N. Car.), 724.

Degree of Care.

- Care due passenger on platform of station. *Maxfield v. Maine Cent. R. Co.* (Me.), 344.
- Care due person traveling on shipper's pass to look after stock. *Chicago B. & Q. R. Co. v. Troyee* (Neb.), 350.
- Care required of street railway. *Hutcheis v. Cedar Rapids & M. C. Ry. Co.* (Iowa), 362; *Omaha St. Ry. Co. v. Boesen* (Neb.), 100; *Paul v. Salt Lake City R. Co.* (Utah), 45.
- Care required of street railway in constructing tracks in reference to persons who had been or might be its passengers. *Conroy v. Boston Elevated Ry. Co.* (Mass.), 384.
- Care required with respect to bridges. *Jackson v. Natchez & W. Ry. Co.* (La.), 385.
- Carrier absolutely liable for injuries to passenger caused by misconduct of its servants while engaged in performance of contract of carriage. *Hayne v. Union St. Ry. Co.* (Mass.), 66.
- Comprehensive statement as to degree of care due passengers. *Maxfield v. Maine Cent. R. Co.* (Me.), 344.
- Correct principle is that in all cases the amount of care bestowed for benefit of passengers must be equal to the emergency, however the standard may be denominated. *Maxfield v. Maine Cent. R. Co.* (Me.), 344.
- Duty of railroad to exercise all ordinary care to maintain its platforms in such a reasonably safe and suitable condition that the passengers who are themselves in the exercise of ordinary care can walk over them in safety. *Maxfield v. Maine Cent. R. Co.* (Me.), 344.
- Duty to provide, for benefit of street railway passenger, proper transportation facilities, including proper servants, and to carry him safely to destination. *Spooner v. Old Colony St. Ry. Co.* (Mass.), 727.
- Failure of carrier to exercise highest degree of care is only slight negligence, not gross negligence. *Dolphin v. Worcester Consol. St. Ry. Co.* (Mass.), 161.
- Instructions as to respective degree of care required of carrier and passengers were not inconsistent. *Hutcheis v. Cedar Rapids & M. C. Ry. Co.* (Iowa), 362.
- Street railway not an insurer of its passengers. *Omaha St. Ry. Co. v. Boesen* (Neb.), 100.
- Door of car left open by carrier's servants for ventilation, carrier not bound to keep it from closing at time when car was in motion and before next station was called. *Weinschenck v. New York, N. H. & H. R. R.* (Mass.), 722.

CARRIERS OF PASSENGERS—Continued.**Ejection.**

In action for wrongful ejection of passenger, carrier cannot plead or prove a conviction of the passenger, in a criminal prosecution brought against him on the charges of using profane and vulgar language in the presence of females, while upon its cars on the occasion when he was forcibly expelled from the train. *Seaboard Air Line Ry. v. O'Quin* (Ga.), 103.

Plaintiff had, under his contract with ticket agent, right to have the train stop at certain point; and his ejection at the preceding station was wrongful. *McDonald v. Central R. Co. of New Jersey* (N. J.), 58.

When a common carrier undertakes, through its servants, to exercise its right to eject from its cars passengers who have been guilty of disorderly conduct, it acts at its peril in determining their identity, and the good faith of such employees is only available in defeating recovery of punitive damages. *Seaboard Air Line Ry. v. O'Quin* (Ga.), 103.

Error to refuse to charge that the working time table in question was not for the information of the public, and that any information which plaintiff passenger may have obtained therefrom, either directly or by statements made from it by carrier's agent, were not binding on carrier, and could not be considered in determining its liability. *Geer v. Michigan Cent. R. Co.* (Mich.), 781.

Evidence.

Evidence showing that other accommodations in the sleeper were offered plaintiff was admissible to show that alleged consequences of breach of contract in failing to have drawing-room on sleeper could have been avoided by plaintiff. *Ingraham v. Pullman Co.* (Mass.), 739.

Evidence did not show that at time passenger was struck by train he was being escorted across tracks to his train by agent of defendant. *Dieckmann v. Chicago & N. W. Ry. Co.* (Iowa), 736.

Evidence in action for death of infirm passenger thrown from seat by jerking of car warranted finding that defendant's servants operated car in a reckless, willful, or wanton disregard of existing conditions, within Mass. Rev. Laws, c. 111, § 267, authorizing recovery for death of passenger caused by gross negligence of carrier's servants. *Spooner v. Old Colony St. Ry. Co.* (Mass.), 727.

Fact that one taking passage on street car was large and fleshy did not render its negligence to fail to keep car stationary until he had seated himself. *Bennett v. Louisville Ry. Co.* (Ky.), 730.

Fact that the conductor in question was a member of the crew of another car did not exempt carrier from liability for injury to passenger, struck by object thrown by such conductor at motorman of the passenger's car. *Hayne v. Union St. Ry. Co.* (Mass.), 66.

Facts did not show absence of negligence, as matter of law, where it appeared that passenger was injured by reason of train being started with a sudden jerk without its operatives ascertaining that persons were in the act of alighting. *O'Dea v. Michigan Cent. R. Co.* (Mich.), 53.

Failure to provide appliances for promptly rescuing passengers from wrecks as negligence. *Jackson v. Natchez & W. Ry. Co.* (La.), 385.

In action for death of passenger, thrown from open electric car, it appeared that street railway was not negligent in failing to adopt rule requiring the rail on the other side of car to be down when cars are rounding curves, the rails being only intended to prevent passengers from leaving car on inner side, where there are double tracks. *Dolphin v. Worcester Consol. St. Ry. Co.* (Mass.), 161.

In action for injuries to passenger, an instruction as to the duties of

CARRIERS OF PASSENGERS—Continued.

- a carrier of passengers for hire is not unwarranted, though that the relation exists is denied by the carrier, where the facts alleged in the declaration, if proved, would establish such a relation. *Chicago Union Traction Co. v. O'Brien* (Ill.), 95.
- Indignities offered passenger by conductors, evidence justified verdict for plaintiff. *Cincinnati, etc., Ry. Co. v. Harris* (Tenn.), 762.
- In order to render street railway company liable for injuries received by person traveling upon one of its cars, from negligence or wrongful act of third persons, such act or negligence must be the proximate cause of the injuries. *Bevard v. Lincoln Traction Co.* (Neb.), 79.
- Instruction against right to recover, in action by passenger to recover statutory penalty for failure to transport her by a particular train for which carrier had sold her a ticket, as modified, was erroneous as authorizing jury to determine whether the countermand of the time table in question was reasonable. *Geer v. Michigan Cent. R. Co.* (Mich.), 781.
- Jolts or lurches of street car are fairly incidental to that mode of travel. *Spooner v. Old Colony St. Ry. Co.* (Mass.), 727.
- Necessary open spaces in passageway between elevated railway cars, carrier was not negligent in permitting their existence, nor in failing to inform passengers, in words, of their existence. *Falkins v. Boston Elevated Ry. Co.* (Mass.), 395.
- Not negligence to fail to keep street car stationary until passenger has seated himself, unless it is reasonably apparent to those in charge of car that passenger needs unusual care. *Bennett v. Louisville Ry. Co.* (Ky.), 730.
- Passenger injured by sudden starting of car while she was attempting to alight was not guilty of contributory negligence, as matter of law. *O'Dea v. Michigan Cent. R. Co.* (Mich.), 53.
- Persons traveling on freight train on stock shipper's pass, risks and inconveniences assumed by him. *Chicago B. & Q. R. Co. v. Troyee* (Neb.), 350.
- Presumption of Negligence.**
- Burden of proof on question of negligence does not shift to defendant upon proof that injury to street railway passenger resulted from derailment of the car. *Omaha St. Ry. Co. v. Boesen* (Neb.), 100.
- Collision caused by attempt to couple two cars while in dangerous proximity to train. *Kansas City M. & B. R. Co. v. Nichols* (Miss.), 330.
- Derailement of car causing injury to street railway passenger. *Omaha St. Ry. Co. v. Boesen* (Neb.), 100.
- Injury to street car passenger resulting from blowing out of the controller. *Firebaugh v. Seattle Electric Co.* (Wash.), 107.
- Jolting causing car door to shut upon fingers of passenger standing in open doorway. *Graf v. West Jersey & S. R. Co.* (N. J.), 796.
- Passenger injured by reason of mere closing of door caused by unusual jolt. *Weinschenck v. New York N. H. & H. R. R.* (Mass.), 722.
- Raised by testimony of passenger on freight train, riding in car with his stock, that he was thrown from it while in motion by two persons unknown to him; and whether it was overcome by the testimony of the conductor and brakeman on the train that they had nothing to do with his being thrown off, and did not know of it until long after its occurrence, was question for jury. *Louisville & N. R. Co. v. Board* (Ky.), 51.
- Rebuttal of presumption of negligence, arising from fact that injury to street car passenger resulted from blowing out of controller, was question for jury. *Firebaugh v. Seattle Electric Co.* (Wash.), 107.
- Street car passenger injured by being thrown from car by sudden

CARRIERS OF PASSENGERS—Continued.

acceleration of speed, after its speed had been slackened in response to her notice that she desired to alight. *Paul v. Salt Lake City R. Co. (Utah)*, 45.

Street car passenger, who, on being placed in danger in consequence of blowing out of controller, jumped from car to save himself and was injured, was not deprived of right to insist that proof of the accident presumptively showed actionable negligence. *Firebaugh v. Seattle Electric Co. (Wash.)*, 107.

Where it is met by evidence which makes it equally probable that the derailment was not due to negligence on part of defendant, in absence of other evidence tending to establish the affirmative of the issue, defendant is entitled to a verdict. *Omaha St. Ry. Co. v. Boesen (Neb.)*, 100.

Stranger's wrongful act is not sufficient to make street railway liable for injury to its passenger, unless it might reasonably have been foreseen and guarded against. *Bevard v. Lincoln Traction Co. (Neb.)*, 79.

Where flagman of passenger train said: "This door," statement was merely declaration to passenger as to door by which he should leave car, and not an invitation to alight. *Alabama & V. Ry. Co. v. Jones (Miss.)*, 367.

Where operatives of street car after having diminished its speed in response to passenger's notice of her desire to alight, suddenly increased speed while she was making an effort to alight, by which she was thrown and injured, carrier was liable for injuries so sustained. *Paul v. Salt Lake City R. Co. (Utah)*, 45.

Where person traveling on shipper's pass to look after cattle was struck by engine on other track while walking to make a change of cars, negligence of carrier was question for jury, and the evidence was sufficient to warrant finding that carrier was guilty of actionable negligence which was proximate cause of the injury. *Chicago B. & Q. R. Co. v. Troyee (Neb.)*, 350.

While "gross negligence," as used in Mass. Rev. Laws, c. 111, § 267, requires something more than mere want of common prudence, the difference is one of degree, and the term is satisfied by proof of a reckless or willful disregard of consequences on the part of carrier's servants. *Spooner v. Old Colony St. Ry. Co. (Mass.)*, 727.

Who Are Passengers.

Person boarding street car, by mistake, which was only going to the stables, was not a passenger, and was entitled to only ordinary care in the starting of the car. *Robertson v. Boston & N. St. Ry. Co. (Mass.)*, 123.

Person traveling on freight train on stock shipper's pass. *Chicago B. & Q. R. Co. v. Troyee (Neb.)*, 350.

Person waiting for train at station. *Pendleton's Adm'r v. Richmond F. & P. R. Co. (Va.)*, 73.

Relation of carrier and passenger did not exist between plaintiff and the initial carrier after the train left its road. *McDonald v. Central R. Co. of New Jersey (N. J.)*, 58.

Relation of passenger and carrier is created by contract, and does not necessarily arise from mere fact that person runs toward a moving street car to get on board. *Chicago Union Traction Co. v. O'Brien (Ill.)*, 95.

Termination of relation between street car passenger and carrier. *Conroy v. Boston Elevated Ry. Co. (Mass.)*, 384.

CAUSE OF ACTION.

See ACTIONS.

CHARTERS.

See RIGHT OF WAY.

CHILDREN.

See FENCES; TRESPASSERS.

Care due child trespassing on railroad premises. *Ellington v. Great Northern Ry. Co.* (Minn.), 174.

Contributory Negligence.

Care required of infant for its own safety. *Goldstein v. People's Ry. Co.* (Del. Super. Ct.), 529.

If conduct of child of tender years was proximate cause of its death, no recovery can be had therefor. *Goldstein v. People's Ry. Co.* (Del. Super. Ct.), 529.

Infant trespasser caused by order or threat of motorman to jump or fall from dangerous position on front platform of moving car, company liable. *Goldstein v. People's Ry. Co.* (Del. Super. Ct.), 529.

Injury to child ordered to jump from moving car by motorman, negligence was question for jury. *Goldstein v. People's Ry. Co.* (Del. Super. Ct.), 529.

Street railway not bound to so guard its cars as to prevent trespassing children from getting on or off while car is in motion. *Goldstein v. People's Ry. Co.* (Del. Super. Ct.), 529.

Unobserved and trespassing child of tender years killed in consequence of its falling or jumping from platform of street car, company not liable in absence of negligence in causing the exit of the child. *Goldstein v. People's Ry. Co.* (Del. Super. Ct.), 529.

Where infant trespasser on street car was seen in perilous position by operatives, who could have prevented injury to him, caused by his jumping or falling off, but they made no effort to do so, there was such lack of care as to constitute gross negligence. *Goldstein v. People's Ry. Co.* (Del. Super. Ct.), 529.

CLAIMS AGAINST CARRIERS.

See CONSTITUTIONAL LAW.

COMMON CARRIERS.

See CARRIERS.

COMPARATIVE NEGLIGENCE.

See CROSSINGS.

CONCURRING NEGLIGENCE.

See FELLOW SERVANTS.

CONDEMNATION PROCEEDINGS.

See EMINENT DOMAIN.

CONNECTING CARRIERS.

See CARRIERS OF PASSENGERS.

Authority of local freight agent to contract for shipment of freight beyond his principal's line. *Gulf C. & S. F. Ry. Co. v. Jackson & Edwards* (Tex.), 125.

Certain evidence, tending to show that two roads were under same management, although using distinct name and having separate charter, was sufficient to authorize finding that the railroads were not separate organizations, but that one was simply a division of the other. *Southern Ry. Co. in Kentucky v. Thomas* (Ky.), 759.

Limiting Liability.

Carrier may stipulate for immunity from responsibility for damage to goods occurring on connecting road after its discharge of its full duty by delivering them to another road. *Kibby v. Michigan Cent. R. Co.* (Mich.), 757.

Initial carrier was not absolved from liability by shipping order limiting its liability to its own line, as by its contract it was

CONNECTING CARRIERS—Continued.

bound to furnish a suitable car for entire trip and deliver car and cargo to connecting line in good condition. *Kibby v. Michigan Cent. R. Co.* (Mich.), 757.

Termination of initial carrier's liability. *Gulf C. & S. F. Ry. Co. v. Jackson & Edwards* (Tex.), 125.

Where passenger, who had purchased from initial carrier transportation on its and connecting lines, and received an order on agent of connecting carrier for ticket on that line, but was unable to obtain ticket on connecting line because of negligence of agent, the connecting carrier was liable for indignities to the passenger offered by its conductors. *Cincinnati, etc., Ry. Co. v. Harris* (Tenn.), 762.

CONSTITUTIONAL LAW.

See STATUTES; TAXATION.

Constitutionality of South Carolina penal statute providing that every claim for loss or damages to property in possession of a common carrier shall be adjusted and paid within a specified time. *Seegers Bros. v. Seaboard Air Line Ry.* (S. Car.), 83.

Constitutionality of South Carolina penal statute requiring common carriers to pay claims against them within specified time. *Frasier v. Charleston & W. C. Ry. Co.* (S. Car.), 768.

Expense of removing soil attendant to improving channel of creek across railroad right of way, under authority of Illinois farm drainage act of July 1, 1885, cannot be imposed upon railroad. *Chicago, etc., Ry. Co. v. People* (U. S.), 657.

Since Tex. Rev. St. 1875, art. 4367, requires railroads to maintain its general offices, etc., at city where it has contracted to maintain them, enforcement by courts of such a contract is not against public policy. *City of Tyler v. St. Louis S. W. Ry. Co.* (Tex.), 625.

Validity of imposition, under Illinois farm drainage act of July 1, 1885, upon railroad of entire cost of removing and rebuilding bridge and culvert. *Chicago, etc., Ry. Co. v. People* (U. S.), 657.

CONTRACTS.

See RIGHT OF WAY; SLEEPING CAR COMPANIES; TICKETS AND FARES.

CONTRACTORS.

See FELLOW SERVANTS; INDEPENDENT CONTRACTORS; LICENSEES; MASTER AND SERVANT.

CONTRIBUTORY NEGLIGENCE.

See CARRIERS; CHILDREN; CROSSINGS; FIRES SET BY LOCOMOTIVES; LICENSEES; MASTER AND SERVANT; NEGLIGENCE; STREET RAILWAYS; TRESPASSERS.

Defense of contributory negligence is not inconsistent with denial of negligence on part of defendant. *Jackson v. Natchez & W. Ry. Co.* (La.), 385.

Where defendant was given full benefit of defense of contributory negligence both in the evidence and in the instructions given, it was not prejudiced by the sustaining of a demurrer to a plea invoking such defense. *Lookout Mountain Iron Co. v. Lea* (Ala.), 10.

CORPORATIONS.

See CONNECTING CARRIERS; NEGLIGENCE; RAILROADS.

CROSSINGS.

See DEATH BY WRONGFUL ACT; NEGLIGENCE;
STOCK, INJURIES TO; STREET RAILWAYS.

Collision between street car and another vehicle, negligence and contributory negligence were questions for jury, and verdict for plaintiff was justified by evidence. *Smith v. Minneapolis St. Ry. Co.* (Minn.), 536.

Contributory Negligence.

Attempting to drive across tracks with knowledge of train's approach. *Storrs v. Grand Trunk Western Ry. Co.* (Mich.), 194.

Care required of traveler who, after having exercised proper care, is suddenly confronted with imminent peril from train.

Bilton v. Southern Pac. Co. (Cal.), 797.

Driver of wagon's efforts to escape imminent danger from train, question for jury whether they were reasonable. *Bilton v. Southern Pac. Co.* (Cal.), 797.

Driver of wagon struck by train at street crossing where his view was obstructed was not shown to have been guilty of contributory negligence as matter of law. *Bilton v. Southern Pac. Co.* (Cal.), 797.

Evidence showed that bicyclist struck by crossing gate was not in the exercise of due care. *Briggs v. Boston & M. R. R.* (Mass.), 508.

Fact that crossing gate was going up when bicyclist started to cross did not justify him in ignoring all the other sights and sounds indicating that he could not safely advance. *Briggs v. Boston & M. R. R.* (Mass.), 508.

Vehicle struck by street car, happening of accident did not show contributory negligence on part of driver as matter of law. *Smith v. Minneapolis St. Ry. Co.* (Minn.), 536.

Where decedent, who had hired buggy and driver, was not driving himself at the time of the accident at a crossing, his widow cannot recover for injuries received, where contributory negligence was conclusively established. *Dryden v. Pennsylvania R. Co.* (Pa.), 168.

Evidence.

In action for death of one killed at railroad crossing, it was competent for one who had made actual observations as to the physical conditions of the crossing to state whether certain obstructions, conceded to exist, obstructed the view or were in line of vision of track. *Rietveld v. Wabash R. Co.* (Iowa), 181.

Gates.

Death of person resulting from his frightened team breaking through crossing gate and dropping him in front of train, mere failure to have flagman or gateman on ground instead of on gate operating tower, was not negligence. *Brooks v. Boston & M. R. R.* (Mass.), 526.

Need not be strong enough to successfully sustain shock of runaway team hitched to vehicle. *Brooks v. Boston & M. R. R.* (Mass.), 526.

Mutual duty of trainmen and highway traveler to keep lookout for danger, and the degree of diligence required. *Cooper v. North Carolina R. Co.* (N. Car.), 857.

Negligence and contributory negligence were questions for jury. *Cohen v. Philadelphia & R. R. Co.* (Pa.), 558.

Signals.

Duty to give adequate warnings of approach of train. *Cooper v. North Carolina R. Co.* (N. Car.), 857.

Failure to give signals no excuse for failure of highway traveler to use his senses. *Carlson v. Chicago & N. W. Ry. Co.* (Minn.), 208.

CROSSINGS—Continued.**Speed.**

Care required of trainmen when train is approaching street crossing where view of other users of streets is obstructed. *Bilton v. Southern Pac. Co. (Cal.)*, 797.

Extra-hazardous crossing, allegation of complaint was insufficient to so characterize the crossing as to require speed of trains to be restricted. *Lake Shore & M. S. Ry. Co. v. Barnes (Ind.)*, 145.

Negligence in running train towards street crossing is question for jury. *Bilton v. Southern Pac. Co. (Cal.)*, 797.

Negligence in running train towards street crossing was shown by the evidence. *Bilton v. Southern Pac. Co. (Cal.)*, 797.

No rate speed of trains over country crossings is negligent per se, with respect to persons on track. *Lake Shore & M. S. Ry. Co. v. Barnes (Ind.)*, 145.

Stop, Look, and Listen.

Care required where view is obstructed. *Bilton v. Southern Pac. Co. (Cal.)*, 797.

Driver of team not required to stop and listen for any particular length of time. *Bilton v. Southern Pac. Co. (Cal.)*, 797.

Failure to after going on tracks may or may not be negligence. *Cohen v. Philadelphia & R. R. Co. (Pa.)*, 558.

If a driver of team looks and listens attentively, and cannot see or hear train, he is not guilty of negligence, as matter of law, in attempting to cross track, and thereby leaving his place of safety and entering upon a place of danger. *Bilton v. Southern Pac. Co. (Cal.)*, 797.

Instruction was erroneous as relieving traveler of all obligation to look and listen where there was failure on part of railroad to give usual and ordinary signals. *Copper v. North Carolina R. Co. (N. Car.)*, 857.

One driving on tracks, at point where his view was obstructed, was guilty of contributory negligence as matter of law. *State v. Western Maryland R. Co. (Md.)*, 830.

Presumption raised by circumstances that deceased either did not look and listen, or that if he did look or listen, or both, he afterwards heedlessly disregarded the knowledge thus obtained, and negligently went into obvious danger. *Carlson v. Chicago & N. W. Ry. Co. (Minn.)*, 208.

Presumption that one about to cross track stopped to look and listen for car overcome only by evidence that he failed to do so. *Hanna v. Philadelphia & R. Ry. Co. (Pa.)*, 819.

Proximate cause where failure to look and listen and failure to give signals, error in instruction not cured by fact that court qualified the words exempting plaintiff from obligation to "look and listen" by the words "if he exercised that prudence and care which a prudent man would use under the circumstances," nor by the fact that the instruction required the jury to find that deceased's failure to look was not the proximate cause of the injury. *Cooper v. North Carolina R. Co. (N. Car.)*, 857.

Speed of train, distance at which it might have been seen from the crossing, or that the crossing was particularly dangerous, are immaterial, where person did not look and listen at any reasonable place before driving on the track. *Dryden v. Pennsylvania R. Co. (Pa.)*, 168.

Street railway crossings. *Smith v. Minneapolis St. Ry. Co. (Minn.)*, 536.

Where ordinary and reasonable care is required of highway traveler, which varies with the circumstances, question of his contributory negligence, is for jury. *Cohen v. Philadelphia & R. R. Co. (Pa.)*, 558.

CROSSINGS—Continued.

That train which collided with highway traveler was an extra one did not relieve either party to collision from duty to exercise care. *Carlson v. Chicago & N. W. Ry. Co.* (Minn.), 208.

DAMAGES.

See BAGGAGE; CARRIERS; CARRIERS OF GOODS; CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; DEATH BY WRONGFUL ACT; EMINENT DOMAIN; FIRES SET BY LOCOMOTIVES; NUISANCES; PERSONAL INJURIES; STOCK, INJURIES TO.

Exemplary damages, whether warranted by evidence a question for the court. *Southern Ry. Co. in Kentucky v. Goddard* (Ky.), 116.

Interest on value of destroyed property not recoverable *eo nomine*, but amount of damages may be increased by jury by adding to value of destroyed property sum equal to interest on such value, the entire sum being returned as damages, and not exceeding amount sued for. *Central of Georgia Ry. Co. v. Hall* (Ga.), 741.

It was the law of the case that punitive damages were not recoverable therein; instructions excluding such element from consideration having been given without objection. *Atchison T. & S. F. Ry. Co. v. Ringle* (Kan.), 192.

Punitive damages are not recoverable in a negligence case unless the negligence is so gross as to amount to wantonness. *Atchison T. & S. F. Ry. Co. v. Ringle* (Kan.), 192.

DEATH BY WRONGFUL ACT.

See CARRIERS OF PASSENGERS.

Administrator may sue for death of his intestate, though he was an alien leaving no heirs or next of kin residents or citizens of the United States. *Rietveld v. Wabash R. Co.* (Iowa), 181.

Burden on plaintiff of showing that defendant's negligence proximately caused death of plaintiff's intestate. *Byrd v. Southern Express Co.* (N. Car.), 150.

Character of proof required that defendant's negligence proximately caused the injury complained of. *Byrd v. Southern Express Co.* (N. Car.), 150.

Common law gave no right of action for. *Harshman v. Northern Pac. Ry. Co.* (N. Dak.), 515.

Contributory Negligence.

Burden not on defendant to show that plaintiff's intestate was guilty of contributory negligence when attempting to cross tracks at railroad crossing. *Rietveld v. Warbash R. Co.* (Iowa), 181.

Court could not, and jury should not, select as between certain conjectures as to cause of death, unless there is something more which might lead a reasoning mind to one conclusion rather than to the other. *McTaggart v. Maine Cent. R. Co.* (Me.), 240.

Damages.

Father, who sues as his son's administrator for death of his son, is not entitled, under N. Car. Code, § 1498, to recover for mental suffering, nor for loss of services of his son. *Byrd v. Southern Express Co.* (N. Car.), 150.

Sorrow, mental distress, and bereavement of father. *Kelley v. Ohio River R. Co.* (W. Va.), 807.

Death of diseased person who had been injured by street car, right to recover as affected by fact that his injuries merely hastened his death. *Strode v. St. Louis Transit Co.* (Mo.), 569.

Evidence.

Inventory of decedent's personal property, and plaintiff's annual account as his administratrix, were incompetent for the pur-

DEATH BY WRONGFUL ACT—Continued.

- pose of showing deceased's capacity to earn and accumulate money. *Cooper v. North Carolina R. Co.* (N. Car.), 857.
- Life tables. *Illinois Cent. R. Co. v. Cane's Adm'x* (Ky.), 823.
- Not error to permit witness to testify that, in his opinion, deceased was one of the men he saw walking on track shortly before deceased was killed, from the resemblance of dead man, in form and clothes, to second man he saw going along track. *Gulf C. & S. F. Ry. Co. v. Matthews* (Tex.), 493.
- Father cannot recover for himself for death of minor son, under N. Dak. Rev. Codes 1899, § 5976. *Harshman v. Northern Pac. Ry. Co.*, 515.
- Husband or father, who suffers injuries through negligence of another, cannot, by executing release, deprive his widow or children, in case he dies from the injuries, of right of recovery given them by Mo. Rev. St. 1899, §§ 2864, 2865. *Strode v. St. Louis Transit Co.* (Mo.), 569.
- In action for death of plaintiff's husband at grade crossing, it was error to enter compulsory nonsuit. *Hanna v. Philadelphia & R. Ry. Co.* (Pa.), 819.
- Insufficiency of evidence that express company's delay in delivering medicine was proximate cause of the death. *Byrd v. Southern Express Co.* (M. Car.), 150.
- Presumption of due care by person killed by train at railroad crossing, certain instructions as to weight to be given to it, and its rebuttal, should have been given at defendant's request. *Rietveld v. Wabash R. Co.* (Iowa), 181.
- Presumption of due care on part of person killed at crossing was rebutted by plaintiff's evidence and the circumstances. *Carlson v. Chicago & N. W. Ry. Co.* (Minn.), 208.

DEEDS.

See RIGHT OF WAY.

DEFECTS.

See FELLOW SERVANTS; MASTER AND SERVANT.

DEGREE OF CARE.

See CARRIERS; MASTER AND SERVANT.

DEGREES OF NEGLIGENCE.

See NEGLIGENCE.

DEMURRAGE.

See CARRIERS OF GOODS.

DEPOTS.

See STATIONS AND DEPOTS.

DETECTIVES.

See ASSAULTS.

DIFFERENT DEPARTMENT LIMITATION.

See FELLOW SERVANTS.

DISCOVERED PERIL.

See ACCIDENTS ON TRACK; CHILDREN; FRIGHTENING TEAMS; MASTER AND SERVANT.

DISCRIMINATION.

See STATUTES.

DIVERSE CITIZENSHIP.

See FEDERAL JURISDICTION.

DOGS.

See ANIMALS.

ELECTRICITY.

See JUDICIAL NOTICE; NEGLIGENCE.

ELECTRIC WIRES.

See EVIDENCE; STREET RAILWAYS.

EMINENT DOMAIN.

See RAILROADS; RIGHT OF WAY; TRIAL.

Damages.

As a general rule, compensation for the land proposed to be taken is to be estimated by reference to the uses for which it is suitable, having regard to existing business or wants of the community or such as may be reasonably expected in the immediate future. *Norfolk & W. Ry. Co. v. Davis (W. Va.)*, 593.

As to value of property taken, the proper inquiry is what is its value for the most advantageous uses to which it may be applied. *Norfolk & W. Ry. Co. v. Davis (W. Va.)*, 593.

Defendant, in proceedings to assess damages to property by operation of elevated railway, was not prejudiced by refusal to charge that the fact that horses of customers of tenants might be or were frightened by elevated trains did not constitute an element of damages which could be considered by jury as diminishing value of the property. *Swain v. Boston Elevated Ry. Co. (Mass.)*, 463.

Depreciation of property because of danger of fire from passing locomotives may be considered, but possibility of destruction of buildings is not an element of damage. *St. Louis Belt & Ter. Ry. Co. v. Mendonsa (Mo.)*, 618.

Elements to be considered in arriving at just compensation for the land proposed to be taken. *Norfolk & W. Ry. Co. v. Davis (W. Va.)*, 593.

Fright of horses caused by operation of elevated railway, whether an element of damage to property owner, where the inconvenience was of a general character. *Swain v. Boston Elevated Ry. Co. (Mass.)*, 463.

Noise, smoke, and danger from fire from locomotives, instruction precluding any consideration of depreciation from such causes was erroneous. *St. Louis Belt & Ter. Ry. Co. v. Mendonsa (Mo.)*, 618.

Presumption that objecting party was prejudiced by the permitting of false, speculative, and conjectural basis of value of property proposed to be taken to go in evidence. *Norfolk W. Ry. Co. v. Davis (W. Va.)*, 593.

Railroad not entitled to compensation for improvements made by it on property upon which it has entered pending its proceeding to condemn same, upon reversal of final judgment in its favor, subsequently obtained in the action, and an adjudication against its right to condemn the land. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co. (W. Va.)*, 412.

Witness may base his opinion as to damage to land on possibility of danger from fire from sparks from locomotives. *Illinois I. & M. Ry. Co. v. Ring (Ill.)*, 675.

Effect of existence of receivership on right of corporation to condemn land. *Detroit & T. S. L. R. Co. v. Campbell (Mich.)*, 482.

Evidence.

Claim of priority of location of railroad by one company against another in condemnation proceedings, is the assertion of a right against a stranger to such corporation, and the records

EMINENT DOMAIN—Continued.

- of respective litigating corporations are not evidence in their favor, except to the extent and for the purpose above stated. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co. (W. Va.)*, 412.
- Whether questions of can be considered on appeal. *Detroit & T. S. L. R. Co. v. Campbell (Mich.)*, 482.
- If under Mich. Comp. Laws, § 6232, a map of proposed route is essential in condemnation proceedings, one showing route of proposed road, but not the land to be devoted to right of way, is sufficient. *Detroit & T. S. L. R. Co. v. Campbell (Mich.)*, 482.
- Mich. Comp. Laws, § 6232, contemplates that one jury shall determine in one proceeding questions relating to condemnation by railroad company of lands of different persons in a locality. *Detroit & T. S. L. R. Co. v. Campbell (Mich.)*, 482.
- Owner of the property sought to be taken has right to have issues he has raised tried before jury legally qualified. *Louisville & A. Ry. Co. v. Moseley (La.)*, 602.
- Power of railroad to condemn land purchased by another railroad, as affected by earlier location of former's road. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co. (W. Va.)*, 412.
- Quære: When one internal improvement company has been erroneously adjudged to have right to condemn and take land belonging to another such company, may plaintiff be stayed from taking possession thereof by order of supersedeas or other process? *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co. (W. Va.)*, 412.
- Right of de facto corporation to maintain condemnation proceedings. *Detroit & T. S. L. R. Co. v. Campbell (Mich.)*, 482.
- Right of individual to institute condemnation proceedings in name of railroad. *Detroit & T. S. L. R. Co. v. Campbell (Mich.)*, 482.
- Verdict will not be disturbed on appeal, where evidence is conflicting, and jury viewed premises, and there is no showing of prejudice or that the amount is grossly excessive. *Illinois I. & M. Ry. Co. v. Ring (Ill.)*, 675.
- Where railroad had entered into possession of the land, pending its proceedings to condemn it, upon reversing judgment in its favor and ascertaining that its action cannot be maintained, appellate court will order restitution to landowner of possession of the premises, and remand case, with leave to plaintiff in error to sue out writ of possession, and direct dismissal of the action with costs, after the effectuation of such restitution. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co. (W. Va.)*, 412.

EMPLOYEES.

See MASTER AND SERVANT; SLEEPING CAR COMPANIES.

EMPLOYER'S LIABILITY ACTS.

- Danger to which plaintiff was subjected was not one of the hazards peculiar to the operation of a railroad, and therefore was not within section 2701 Minn. Gen. St. 1894. *Jemming v. Great Northern Ry. Co. (Minn.)*, 697.
- Complaint under Ala. Code 1896, § 1749, subsec. 5, for injuries to servant caused by his being struck by master's locomotive, failing to charge that the person whose negligence was complained of was in charge of the engine, did not state a cause of action under such section. *Tennessee Coal, Iron & R. Co. v. Bridges (Ala.)*, 688.
- Complaint under Indiana employers' liability act, making railroad liable for injury to employee caused by negligence of the person in charge of an engine, was fatally bad for failing to allege the facts making it the duty of the alleged negligent engineer not

EMPLOYER'S LIABILITY ACTS—Continued.

- to move the cars unless signaled. *Pittsburgh C. C. & St. L. Ry. Co. v. Peck* (Ind.), 693.
- Operating railway, what did not constitute. *Jemming v. Great Northern Ry. Co.* (Minn.), 697.
- Under Ala. Code 1896, § 1794, subsec. 5, complaint for injuries to servant by the intentional or willful act of a fellow servant operating a locomotive and cars, did not state cause of action against master, where it failed to allege that the engine or car was "on any railroad track." *Tennessee Coal Iron & R. Co. v. Bridges* (Ala.), 688.

ESCORTS.

See STATIONS AND DEPOTS.

EVIDENCE.

- See ANIMALS; ASSAULTS; BILLS OF LADING; CARRIERS OF GOODS; CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; CROSSINGS; EMINENT DOMAIN; FIRES SET BY LOCOMOTIVES; LICENSEES; PERSONAL INJURIES; RAILROADS; SPURS AND SIDETRACKS; STOCK, INJURIES TO.
- Copy of a lease by railroad company of its lines, certified as required by Hurd's Rev. St. 1903, c. 51, § 15, admissible as paper of corporation. *Chicago B. & Q. R. Co. v. Weber* (Ill.), 34.
- Experiments, in action for injuries to passenger by sudden starting of train before she had time to alight, it was not error to exclude evidence of a subsequent test to determine length of time that engineer probably took to oil his engine at the point in question on the occasion of the accident. *O'Dea v. Michigan Cent. R. Co.* (Mich.), 53.

Expert Testimony.

- Speed of train and within what distance it could be stopped are questions on which expert testimony cannot be introduced, unless based on the operation of cars or engines of similar construction and equipment, and under like circumstances. *Wise Terminal Co. v. McCormick* (Va.), 23.
- Sufficiency of alleged defective electric insulators. *Warren v. City Electric Ry. Co.* (Mich.), 164.
- Where the physical facts surrounding an accident are established, expert evidence that the result should have been different than it actually was will not be permitted to overcome the facts themselves. *Louisville H. & St. L. Ry. Co. v. Jolly's Adm'x* (Ky.), 154.
- In action for injuries by live electric wire, which had become hot by contact with defendant's trolley span wire, it was proper to ask defendant's foreman on cross-examination whether he had not warned linemen against hot span wires. *Warren v. City Electric Ry. Co.* (Mich.), 164.
- In action for injuries caused by live wire, it was proper to introduce an insulator or hanger in evidence which was alleged to be defective and insufficient. *Warren v. City Electric Ry. Co.* (Mich.), 164.

Res Gestæ.

- Are connected with or grow out of the principal transaction which is the subject of the litigation, and must tend to elucidate and explain such transaction. *Leach v. Oregon Short Line R. Co.* (Utah), 212.
- Evidence that car, while approaching place where dog was run over, was making a great deal of noise, was admissible as part of res gestæ. *Wallace v. North Alabama Traction Co.* (Ala.), 804.
- Evidence that immediately after passenger fell she exclaimed:

EVIDENCE—Continued.

"Yes let down the step after I fall," was admissible. *Hutchies v. Cedar Rapids & M. C. Ry. Co. (Iowa)*, 362.

Exclamation of conductor to brakeman, made a few seconds after accident to another brakeman: "My God! go back and see if you can find L. (the killed brakeman). The bridge knocked him off." *Leach v. Oregon Short Line R. Co. (Utah)*, 212.

Similar accidents. *Mayer v. Detroit Y. A. A. & J. Ry. Co. (Mich.)*, 267.

EXCURSION TRAINS.

See CARRIERS OF PASSENGERS.

EXECUTION.

See RAILROADS.

EXEMPTION FROM LIABILITY.

See EXPRESS COMPANIES; FIRES SET BY LOCOMOTIVES; MASTER AND SERVANT; SLEEPING CAR COMPANIES.

EXPERIMENTS.

See EVIDENCE.

EXPERT TESTIMONY.

See EVIDENCE; STREET RAILWAYS.

EXPRESS COMPANIES.

Care due from railroad to express messengers. *Shannon's Adm'r v. Chesapeake & O. Ry. Co. (Va.)*, 91.

Under Va. Code 1904, p. 669, § 1294c (25), contract between express company and its messenger stipulating that the messenger shall exempt company from liability for its own negligence, and undertaking to afford similar immunity to railroad companies in whose cars he might travel in performance of his duties, was void. *Shannon's Adm'r v. Chesapeake & O. Ry. Co. (Va.)*, 91.

EXTRATERRITORIAL EFFECT OF STATUTES.

See CARRIERS OF LIVE STOCK.

FEDERAL JURISDICTION.

Presumption that plaintiff did not join defendant railroad's employees as defendants with it merely to defeat federal jurisdiction. *Illinois Cent. R. Co. v. Rutherford (Ky.)*, 624.

Where, in action against foreign railroad for death of its brakeman, the engineer, a resident of Kentucky, was made a defendant, and petition stated cause of action against him, the action was not removal to federal court. *Illinois Cent. R. Co. v. Cane's Adm'r (Ky.)*, 823.

FELLOW SERVANTS.

See EMPLOYER'S LIABILITY ACTS; MASTER AND SERVANT.

Concurring negligence of master and fellow servant, liability of master. *Merrill v. Oregon Short Line R. Co. (Utah)*, 221.

Different Department Limitation.

To bring case within general exemption of master from liability for injury to servant caused by his fellow servant's negligence, it is sufficient if such employees are in the employment of same master, engaged in same common enterprise, and both employed to perform duties tending to accomplish same general purpose or directed to the accomplishment of same general end. *Mollhoff v. Chicago R. I. & P. R. Co. (Okla.)*, 709.

FELLOW SERVANTS—Continued.

Employee while on engine, killed in a collision caused by fellow servants' violation of rule, master liable. *Spangler v. Baltimore & O. R. Co.* (Pa.), 687.

Message of division superintendent made conductor negligent in putting crippled car before cabin car, and thereby relieved company of liability for injuries received by car inspector, conductor's fellow servant, in consequence of the conductor's act. *Shuster v. Philadelphia B. & W. R. Co.* (Del.), 6.

Negligence of servant will not render master liable for injuries to former's fellow servant. *Mollhoff v. Chicago R. I. & P. R. Co.* (Okla.), 709.

Presumption that all persons engaged in common employment of same master are fellow servants. *Mollhoff v. Chicago R. I. & P. R. Co.* (Okla.), 709.

Vice principal's negligence causing injury to another employee will render master liable. *Mollhoff v. Chicago R. I. & P. R. Co.* (Okla.), 709.

Wanton, reckless, or intentional act of fellow servant causing injury to servant, complaint demurrable in failing to further charge that master was negligent in selection of alleged negligent servant or in giving him orders, etc. *Tennessee Coal, Iron & R. Co. v. Bridges* (Ala.), 688.

Wanton, reckless, willful, or intentional act of fellow servant causing injury to servant, liability of master. *Tennessee Coal, Iron & R. Co. v. Bridges* (Ala.), 688.

Who Are Fellow Servants.

Criterion for determining existence of relation. *Merrill v. Oregon Short Line R. Co.* (Utah), 221.

Division superintendent was not fellow servant of car inspector. *Shuster v. Philadelphia B. & W. R. Co.* (Del.), 6.

Employee of subcontractor injured by negligence of employees of elevated railway was not their fellow servant. *Wagner v. Boston Elevated Ry. Co.* (Mass.), 187.

Engineer was fellow servant of plaintiff, who was a gravel pitman and whose work it was, with assistance of others, to take section of temporary track from rear of outfit, carry it forward, and fasten it in position in front of steam shovel. *Jemming v. Great Northern Ry. Co.* (Minn.), 697.

Fireman fellow servant of brakeman of same train, injured by reason of fireman's negligence in throwing fresh coal into boiler, contrary to custom under the circumstances in question. *Johnson v. Boston & M. R. R.* (Vt.), 680.

Servants of independent contractor and servants of the principal by whom the contractor was employed are not fellow servants, though working in a common employment. *Lookout Mountain Iron Co. v. Lea* (Ala.), 10.

Vice principals, who are. *Mollhoff v. Chicago R. I. & P. R. Co.* (Okla.), 709.

Yardmaster, brakeman, and conductor were fellow servants of car inspector. *Shuster v. Philadelphia B. & W. R. Co.* (Del.), 6.

FENCES.

See TRESPASSERS.

Failure of a railroad to fence its road as required by statute is prima facie, but not conclusive, evidence of negligence. *Ellington v. Great Northern Ry. Co.* (Minn.), 174.

Fence constructed in accordance with the provisions of Minn. Gen. St. 1894, § 2055, is a sufficient compliance with the statutes requiring railroad to fence its right of way, even though the road so fenced extends parallel to and within 100 feet of a public highway. *Ellington v. Great Northern Ry. Co.* (Minn.), 174.

Minn. Gen. St. 1894, § 2698, was repealed, by implication, by certain

FENCES—Continued.

other statutory enactments. *Ellington v. Great Northern Ry. Co.* (Minn.), 174.

When railroad is not fenced, as required by statute, question whether a properly constructed fence would have prevented child of tender years from going upon right of way is a question of fact. *Ellington v. Great Northern Ry. Co.* (Minn.), 174..

FIRES.

See CARRIERS.

FIRES SET BY LOCOMOTIVES.

See EMINENT DOMAIN; NEGLIGENCE.

Charge that the uncontroverted evidence showed that the engine was in good condition was properly refused, as not warranted by the evidence. *Alabama Great Southern R. Co. v. Clark* (Ala.), 170.

Common carrier, railroad was liable as such for staves destroyed by fire while loaded in freight car ready for shipment. *Cincinnati N. O. & T. P. Ry. Co. v. Saulsbury* (Tenn.), 202.

Contributory Negligence.

Burden of proving on defendant, unless it appears from plaintiff's evidence or may be fairly inferred from the circumstances. *Southern Ry. Co. v. Patterson* (Va.), 828.

Contributory negligence of warehouse company in permitting other cotton to remain on open platform of the warehouse was not chargeable to plaintiff, who had entrusted his cotton to the company. *Alabama Great Southern R. Co. v. Clark* (Ala.), 170.

Warehouse for storing barrels of kerosene built within few inches of railroad right of way. *Southern Ry. Co. v. Patterson* (Va.), 828.

Damages.

Where plaintiff proves market price of cotton, but fails to prove grade of cotton destroyed, whether it should be presumed that plaintiff's cotton was of average grade or of lowest price is question for jury. *Alabama Great Southern R. Co. v. Clark* (Ala.), 170.

Evidence.

Evidence of what the engine was doing a little before or about the time the fire was discovered was admissible on the question of the origin of the fire. *Alabama Great Southern R. Co. v. Clark* (Ala.), 170.

Plaintiff's counsel was properly permitted to ask witness for defendant, on cross-examination, whether the railroad men were not hurrying the movement of the engine. *Alabama Great Southern R. Co. v. Clark* (Ala.), 170.

Evidence authorizing finding that fire was caused by red-hot clinker being thrown from tender by fireman, or suffered to fall from footboard and to roll down right of way, was sufficient, as against demurrer to evidence; and in absence of any explanation or denial by the fireman, to establish railroad's negligence. *Southern Ry. Co. v. Patterson* (Va.), 828.

Instruction that plaintiff was not entitled to recover if defendant's engine was carefully operated, nor unless it was improperly handled, was properly refused, in that it ignored the condition of its spark arresters. *Alabama Great Southern R. Co. v. Clark* (Ala.), 170.

Under contract exempting railroad from liability for injury to stove mill by fire, it was not liable for damages to staves piled on right of way near mill. *Cincinnati N. O. & T. P. Ry. Co. v. Saulsbury* (Tenn.), 202.

Where contract with railroad authorized the other party to erect

FIRES SET BY LOCOMOTIVES—Continued.

mill on right of way, provision exempting railroad from liability for injury to mill by fire was not void as contrary to public policy. *Cincinnati N. O. & T. P. Ry. Co. v. Saulsbury* (Tenn.), 202.

Whether the engine was operated near enough in point of time or position, and in the proper direction with reference to the wind, to have caused the fire, was question for jury. *Alabama Great Southern R. Co. v. Clark* (Ala.), 170.

FOREIGN LAWS.

See CARRIERS OF LIVE STOCK.

FREIGHT TRAINS.

See CARRIERS OF PASSENGERS.

FRIGHTENING TEAMS.

See EMINENT DOMAIN.

Charge was erroneous, and court should have charged that engineer was not negligent in blowing whistle unless he was chargeable with notice that the blowing of the whistle would frighten the horse. *Choctaw O. & G. R. Co. v. Coker* (Ark.), 159.

Question whether motorman was negligent in failing to do what he could to avert threatened danger to traveler whose horse was apparently frightened by sounding of gong and other noises of approaching car. *Dulin v. Metropolitan St. Ry. Co.* (Kan.), 844.

Railroad liable for damages occasioned by failure of trainmen, on discovering that horse attached to plow is frightened and attempting to run away, to refrain from doing any unnecessary or wanton act which would increase the fright or danger. *Choctaw O. & G. R. Co. v. Coker* (Ark.), 159.

Right to make necessary noises in operating trains. *Choctaw O. & G. R. Co. v. Coker* (Ark.), 159.

Team of gentle and well-broken mules driven along highway frightened at hand car, negligently and unlawfully left in highway, railroad liable for injuries to driver. *Southern Indiana Ry. Co. v. Norman* (Ind.), 545.

Unlawful, *prima facie*, to leave hand car in highway. *Southern Indiana Ry. Co. v. Norman* (Ind.), 545.

FUNERAL PROCESSIONS.

See STREET RAILWAYS.

GROSS NEGLIGENCE.

See CARRIERS OF PASSENGERS; NEGLIGENCE.

HOSPITALS.

See MASTER AND SERVANT.

HOTELS.

See RAILROADS.

HUSBAND AND WIFE.

See PERSONAL INJURIES.

IMMINENT PERIL.

See CROSSINGS.

IMPROVEMENTS.

See EMINENT DOMAIN.

IMPUTED NEGLIGENCE.

See CROSSINGS; FIRES SET BY LOCOMOTIVES; NEGLIGENCE.

INDEPENDENT CONTRACTORS.

See FELLOW SERVANTS.

Liability of principal for acts of independent contractor where work to be done is intrinsically dangerous. *Montgomery St. Ry. Co. v. Smith* (Ala.), 131.

Where an employer owes certain duties to third persons, he cannot relieve himself from liability by committing the work to a contractor. *Montgomery St. Ry. Co. v. Smith* (Ala.), 131.

Where plaintiff's intestate was injured by negligence of defendant's servants, while he was employed in defendant's mine as the servant of the defendant's independent contractor, intestate was not a mere licensee in the mine, but was in the exercise of a lawful right to be in the mine at the time of his injury. *Lookout Mountain Iron Co. v. Lea* (Ala.), 10.

Where plaintiff's intestate was injured in defendant's mine as servant of independent contractor, through negligence of defendant's servants in operating a train in the mine, and died from injuries so received, defendant was liable for his death. *Lookout Mountain Iron Co. v. Lea* (Ala.), 10.

INJUNCTIONS.

See RIGHT OF WAY.

INJURIES TO PROPERTY.

See EMINENT DOMAIN.

INSTRUCTIONS.

See DAMAGES; MASTER AND SERVANT; PERSONAL INJURIES; STREET RAILWAYS; TRIAL.

INTEREST.

See DAMAGES.

JOHNSON GRASS.

See RIGHT OF WAY.

JOINDER OF PARTIES.

See FEDERAL JURISDICTION.

JOLTS AND JERKS.

See CARRIERS OF PASSENGERS.

JUDICIAL NOTICE.

Danger from live wires. *Warren v. City Electric Ry. Co.* (Mich.), 164.

JURORS.

See EMINENT DOMAIN.

LEASES AND RUNNING POWERS.

In action for personal injuries against railroad company, a folder issued after an alleged lease by it of its lines, issued by lessee, was inadmissible to contradict defendant's evidence that it had leased its lines prior to the time of the injury. *Chicago B. & Q. R. Co. v. Weber* (Ill.), 34.

Lessor's liability for negligence of servants of lessee in operating railroad under the lease. *Chicago B. & Q. R. Co. v. Weber* (Ill.), 34.

Servants of lessee railroad are not employees of lessor railroad for the purpose of accepting service; and service of summons on an agent of the lessee is not service against the lessor. *Chicago B. & Q. R. Co. v. Weber* (Ill.), 34.

LICENSEES.

See ACCIDENTS ON TRACK; INDEPENDENT CONTRACTORS; TRESPASSERS.

Care due employee of subcontractor, while he was working on elevated railway structure, to prevent his being injured by exposure to unusual dangers, not known to him, that might be caused by the negligent running of defendant's surface cars. *Wagner v. Boston Elevated Ry. Co. (Mass.)*, 187.

Contributory Negligence.

Employee of subcontractor, thrown from platform by trolley pole of surface car, was not guilty of contributory negligence, as matter of law, his place to work on elevated railway structure having been furnished him by his employer. *Wagner v. Boston Elevated Ry. Co. (Mass.)*, 187.

Of shipper, injured by falling into ditch on carrier's premises, was question for jury. *Southern Ry. Co. in Kentucky v. Goddard (Ky.)*, 116.

Shipper, engaged in loading horses on car, is bound, in going about the premises of the railroad, to use ordinary care for his own safety, but need not anticipate danger. *Southern Ry. Co. in Kentucky v. Goddard (Ky.)*, 116.

Duty of carrier to notify shipper of danger from ditch on its premises. *Southern Ry. Co. in Kentucky v. Goddard (Ky.)*, 116.

Duty to warn licensees of unusual dangers. *Wagner v. Boston Elevated Ry. Co. (Mass.)*, 187.

Evidence.

Testimony of defendant's general manager that defendant had never consented to use of track in city as passway by persons other than those having business with the company on its right of way, etc., was inadmissible, where company had knowingly permitted public to so use tracks. *Gulf C. & S. F. Ry. Co. v. Matthews (Tex.)*, 493.

Where carrier maintains a ditch on its premises, about or near which a shipper, who has no knowledge of its presence, might have occasion to go in loading his stock at night, and negligently fails to guard the ditch, it is liable for damages to the shipper who is injured thereby. *Southern Ry. Co. in Kentucky v. Goddard (Ky.)*, 116.

Whether ditch, causing injury to shipper, made railroad premises dangerous, and whether railroad was negligent in failing to guard it, was question for jury. *Southern Ry. Co. in Kentucky v. Goddard (Ky.)*, 116.

Whether employee of subcontractor at work on elevated railway structure assumed the risk of being thrown from platform by trolley pole of car, as it passed under the platform, was question for jury. *Wagner v. Boston Elevated Ry. Co. (Mass.)*, 187.

Who Are.

Employee of subcontractor working on elevated railway structure. *Wagner v. Boston Elevated Ry. Co. (Mass.)*, 187.

Person walking on track within city limits was a licensee. *Gulf C. & S. F. Ry. Co. v. Matthews (Tex.)*, 493.

That railroad does not prosecute persons walking upon its track between crossings and stations, in violation of Me. Rev. St., c. 52, § 77, does not authorize persons to use its tracks. *Copp v. Maine Cent. R. Co. (Me.)*, 199.

Where railroad was delivering cars to be unloaded to consignee's men, and was permitting all proper uses of track, it was under no special duty to one of the men, while he was not at work. *Texas & N. O. Ry. Co. v. McDonald (Tex.)*, 503.

LIENS.

See CARRIERS OF GOODS.

LIFE TABLES.

See DEATH BY WRONGFUL ACT.

LIGHT COMPANIES.

See NUISANCES.

LIMITATIONS.

See RIGHT OF WAY.

LIMITING LIABILITY.

See BILLS OF LADING; CARRIERS; CONNECTING CARRIERS.

LIVE STOCK.

See CARRIERS.

LIVE WIRES.

See STREET RAILWAYS.

LOCATION OF RAILROAD.

See EMINENT DOMAIN; RAILROADS; RIGHT OF WAY.

LOCATION OF RAILROAD BUILDINGS.

See RIGHT OF WAY.

MAIL ROUTES.

Adjustment of compensation to railway company for carrying mails, may be confined, where an extension is made beyond terminal of established mail route, to the extension alone, without readjusting compensation for whole route as extended. *Chicago M. & St. P. Ry. Co. v. United States (U. S.), 406.*

MALICIOUS TORTS OF SERVANT.

See MASTER AND SERVANT.

MASTER AND SERVANT.

See ACCIDENTS ON TRACK; ASSAULTS; EMPLOYERS' LIABILITY ACTS; EVIDENCE; FEDERAL JURISDICTION; FELLOW SERVANTS; INDEPENDENT CONTRACTORS; LEASES AND RUNNING POWERS; NEGLIGENCE; SLEEPING CAR COMPANIES; VENUE.

Assumption of Risks.

Brakeman killed by bridge had right to assume that railroad had so constructed its bridges as to permit him to perform his duties, and in absence of advice against passing along the railing of the car while the train was passing over such bridges, did not assume risk. *Leach v. Oregon Short Line R. Co. (Utah), 212.*

Brakeman struck by low bridge when raising his head, being choked by smoke from engine, which he knew leaked steam. *Johnson v. Boston & M. R. R. (Vt.), 680.*

Car repairer injured while working between cars standing in yards, question for jury whether he assumed risk from failure of master to see that rules were observed. *Merrill v. Oregon Short Line R. Co. (Utah), 221.*

Employee engaged in and around one of his master's freight yards, and chargeable with notice of the location of a culvert under an embankment in the yard, could not be heard to say that he did not know exactly where it was, and that his master should have warned him of the danger of falling into it before sending him at night to attend to his duties on and around an engine which had been left directly over the culvert. *Central of Georgia Ry. Co. v. Price (Ga.), 246.*

Employee injured by reason of over-crowding of hand car upon

MASTER AND SERVANT—Continued.

- which he was riding. *Anderson v. Great Northern Ry. Co.* (Minn.), 238.
- General statement as to risks assumed by servants. *Merrill v. Oregon Short Line R. Co.* (Utah), 221.
- Motorman, who failed to use sand provided when he saw slippery condition of track assumed risk of his car's running away on downgrade. *Mayer v. Detroit Y. A. A. & J. Ry. Co.* (Mich.), 267.
- Rule does not apply to or include concealed risks or subsequent negligence of master. *Wagner v. Boston Elevated Ry. Co.* (Mass.), 187.
- Servant voluntarily undertaking to perform for master duties so perilous as to subject himself to imminent danger. *Griffith v. Lexington Terminal R. Co.* (Ga.), 715.
- Willful, wanton, and reckless conduct of master's engineer causing injury to servant, pleas alleging assumption of risk were unavailable. *Tennessee Coal, Iron & R. Co. v. Bridges* (Ala.), 688.
- Yardmaster injured by movement of engine did not, as matter of law, assume the risk. *Graham v. Minneapolis St. P. & S. Ste. M. Ry. Co.* (Minn.), 232.
- Automatic sand boxes, evidence, in action for injury to motorman, showed negligence in not furnishing them. *Mayer v. Detroit Y. A. A. & J. Ry. Co.* (Mich.), 267.

Contributory Negligence.

- Car repairer's failure to observe rules made for his protection, while working in yard, question for jury, in view of evidence of general disregard of such rules by employees for period of a year. *Merrill v. Oregon Short Line R. Co.* (Utah), 221.
- Duty of freight yard employee to make himself familiar with excavations and other dangerous surroundings in the yard. *Central of Georgia Ry. Co. v. Price* (Ga.), 246.
- Employee who, without necessity, went into his employer's yard to give the watchman a coach key, and for that purpose stood in the middle of the track when he knew the engine was approaching him backwards, and attempted to get on the foot-board in the rear, when he slipped and was injured, was guilty of contributory negligence precluding recovery. *Wise Terminal Co. v. McCormick* (Va.), 23.
- Evidence warranted finding that deceased brakeman was not guilty of contributory negligence in making use of the handhold while getting off the tender in question. *Wood's Adm'x v. Southern Ry. Co.* (Va.), 19.
- Instruction that if injured servant's conduct approximately contributed to his own injury he could not recover, without requiring that his conduct must have been negligent, was properly refused. *Tennessee Coal, Iron & R. Co. v. Bridges* (Ala.), 688.
- Of brakeman killed through alleged negligence of engineer was question or jury. *Illinois Cent. R. Co. v. Cane's Adm'x* (Ky.), 823.
- Right of brakeman, in performing his duties, to rely upon engineer not to move train except in response to his signals. *Illinois Cent. R. Co. v. Cane's Adm'x* (Ky.), 823.
- Switchman's contributory negligence, and not the fact that certain of the switch lights had become extinguished, which caused him to turn the wrong switch, was proximate cause of his death. *Louisville & N. R. Co. v. Mounce's Adm'r* (Ky.), 1.
- Unnecessarily remaining on running board of trestle where car to be unloaded was being placed, instruction stating that if servant's conduct in so doing proximately contributed to his

MASTER AND SERVANT—Continued.

injury, he could not recover, was properly refused, because it did not hypothesize that the running board was an obviously dangerous place. *Tennessee Coal, Iron & R. Co. v. Bridges (Ala.)*, 688.

Willful, wanton, and reckless conduct of master's engineer proximately causing injury to servant, where there was proof sustaining allegations of, request to charge that if there was a safe way and an obviously dangerous way for injured servant to discharge his duties, and he selected the dangerous way, he could not recover, was properly refused. *Tennessee Coal, Iron & R. Co. v. Bridges (Ala.)*, 688.

Yardmaster injured by movement of engine was not guilty of, as matter of law. *Graham v. Minneapolis, St. P. & S. Ste. M. Ry. Co. (Minn.)*, 232.

Yardmaster's right to rely upon custom of railroad with respect to movements of trains and engines. *Graham v. Minneapolis St. P. & S. Ste. M. Ry. Co. (Minn.)*, 232.

Degree of Care Required of Master.

Care due person permitted to learn to be an engineer, to furnish him a safe place to work. *Norfolk & W. Ry. Co. v. Bell (Va.)*, 263.

Care required in furnishing safe place to work. *McTaggart v. Maine Cent. R. Co. (Me.)*, 240.

Care required in furnishing safe place to work not affected with respect to injured servant, by fact that place is so arranged as to be safe or unsafe to other employees working there. *McTaggart v. Maine Cent. R. Co. (Me.)*, 240.

Care required of company to see that handhold on engine tender is in reasonably safe condition for use of brakeman. *Wood's Adm'x v. Southern Ry. Co. (Va.)*, 19.

Care required of master in furnishing and selecting appliances. *Norfolk & W. Ry. Co. v. Bell (Va.)*, 263.

Character of appliances master must furnish. *Norfolk & W. Ry. Co. v. Bell (Va.)*, 263.

Where servant, while breaking rock with steel instrument intended to cut steel rails and made of best steel and practically new, was injured by piece of steel flying from instrument, master was not liable, though a tool called a wedge was generally used for splitting rock. *Langhorn Johnson & Co. v. Wiley (Ky.)*, 707.

Engineer's negligence in moving train without waiting for brakeman's signal was question for jury in action for death of latter. *Illinois Cent. R. Co. v. Cane's Adm'x (Ky.)*, 823.

Evidence.

Evidence as to general practice of masters with reference to similar appliances and the comparative safety of different appliances is admissible on question of negligence of a master in furnishing appliances. *Norfolk & W. Ry. Co. v. Bell (Va.)*, 263.

Not competent to show that appliances of another master are better than those used by the master whose conduct is being called in question. *Norfolk & W. Ry. Co. v. Bell (Va.)*, 263.

Similar accidents, evidence of is admissible on issue of notice to defendant of the danger. *Mayer v. Detroit Y. A. A. & J. Ry. Co. (Mich.)*, 267.

Evidence held to require denial of general charge for master. *Tennessee Coal, Iron & R. Co. v. Bridges (Ala.)*, 688.

Evidence showed, in action for injury to defendant's brakeman, that defendant was not guilty of actionable negligence in leaving an oil can used by the engine hostler on the foot-board of the engine, or in not having a rule forbidding such obstruction. *Wise Terminal Co. v. McCormick (Va.)*, 23.

MASTER AND SERVANT—Continued.

Evidence sufficient to support verdict for plaintiff, and to show that the acts done by servant were within the general scope of his employment and authority. *Chicago R. I. & P. Ry. Co. v. Kerr* (Neb.), 369.

Exemption from Liability.

Contract creating an exemption from liability for injuries caused to a servant by his master's negligence is in violation of Mass. Rev. Laws, c. 106, § 16. *Wagner v. Boston Elevated Ry. Co.* (Mass.), 187.

Validity and application of stipulation of contract for construction of elevated railway, purporting to exempt railroad from liability for injuries to employees of subcontractor. *Wagner v. Boston Elevated Ry. Co.* (Mass.), 187.

In action against street railway company for injuries to motorman, where declaration charged negligence in failing to supply car with automatic "sand boxes and sand," whether defendant failed to provide car with "pail of sand and a shovel to be used by hand" was immaterial. *Mayer v. Detroit Y. A. A. & J. Ry. Co.* (Mich.), 267.

In action or death of car inspector, it appeared that company was not guilty of actionable negligence in failing to give further notice of the crippled car, which had been placed in train, than that given by placing repair shop card on the car. *Shuster v. Philadelphia B. & W. R. Co.* (Del. super. ct.), 6.

In action for death of defendant's baggage master, killed by contact with structure near track, it appeared that he was at the time acting outside of the scope of his duties, at the request of the station agent, in delivering telegram by throwing it from moving train, and therefore, the master was not liable. *McTaggart v. Maine Cent. R. Co.* (Me.), 240.

In action for injuries to brakeman while attempting to board tender of engine approaching him at night, evidence held insufficient to entitle plaintiff to recover on theory that man in charge of engine was negligent in failing to stop same after he discovered plaintiff's danger. *Wise Terminal Co. v. McCormick* (Va.), 23.

In action for injuries to employee, evidence authorized charge that if plaintiff, as one of the inducements to his employment, was permitted to run locomotives so as to learn to be an engineer, it was the duty of defendant to use ordinary care to provide and maintain a reasonably safe place for him to work. *Norfolk & W. Ry. Co. v. Bell* (Va.), 263.

Inspection of Appliances.

Lantern globe not an implement of such character as to require inspection either before or after use by employees. *Gulf C. & S. F. R. Co. v. Larkin* (Tex.), 235.

Railroad was not liable for injury to fireman from defective lantern globe, merely because it could not prove that it had inspected the particular globe which caused the injury. *Gulf C. & S. F. R. Co. v. Larkin* (Tex.), 235.

Master liable for acts of servant within the general scope of his employment while about his master's business, though the act be negligent, wanton, willful or malicious. *Chicago R. I. & P. Ry. Co. v. Kerr* (Neb.), 369.

Master not chargeable with notice that a baggage master in a car with two doors on the side would leave the car, and go down upon the lower steps for the purpose of throwing off a telegraph message. *McTaggart v. Maine Cent. R. Co.* (Me.), 240.

Master not liable for death of baggage man, killed while acting outside of the scope of his duty, in attempting to perform a service at the request of the station agent. *McTaggart v. Maine Cent. R. Co.* (Me.), 240.

Master not liable where injury to servant resulted from latter's negligence or that of his fellow servant in selecting an obviously de-

MASTER AND SERVANT—Continued.

- fective plank to use in constructing gangway for their trucks. *Fewell v. Southern Ry. Co. (Va.)*, 677.
- Negligence in failing to keep handhold on tender in reasonably safe condition was question for jury. *Wood's Adm'x v. Southern Ry. Co. (Va.)*, 19.
- Notice to servant when notice to master. *Merrill v. Oregon Short Line R. Co. (Utah)*, 221.

Relief Associations.

- Hospital corporation, a relief association for the benefit of railroad employees, was a separate and distinct organization from the railroad, and the latter was not liable for conduct of hospital directors, nor for negligence of physicians or attendants of the hospital, in treating a railroad employee. *Illinois Cent. R. Co. v. Buchanan (Ky.)*, 521.

Rules.

- Duty to promulgate and enforce rules for safety of servants is a nonassignable one, and is not performed by merely promulgating them, and using ordinary care in selecting men to enforce them. *Merrill v. Oregon Short Line R. Co. (Utah)*, 221.
- Failure of all railroad to establish rule prohibiting car inspectors from riding on trains while they were run on a track for inspection was not such negligence as to render it liable for injuries received by a car inspector. *Shuster v. Philadelphia B. & W. R. Co. (Del.)*, 6.
- Failure to use ordinary care in establishing and enforcing rules for protection of servants, sufficiency of evidence. *Merrill v. Oregon Short Line R. Co. (Utah)*, 221.
- Impracticable to prescribe by general rule the place in which all crippled cars should be placed in train, and railroad not guilty of actionable negligence toward a servant in failing to establish such a general rule. *Shuster v. Philadelphia, B. & W. R. Co. (Del.)*, 6.
- Notice of violation of rules, when is master chargeable with. *Merrill v. Oregon Short Line R. Co. (Utah)*, 221.
- Servant, who knowingly engages to do what no prudent man would risk his life in undertaking to accomplish, cannot, if injury ensues, rely upon the law to throw around him the protection of a fiction that his employer impliedly undertook to take steps to minimize the risk assumed, at least to the extent of making performance possible. *Griffith v. Lexington Terminal R. Co. (Ga.)*, 715.
- Testimony of brakeman struck by low bridge was insufficient to establish that ice on the bridge was cause of accident, or that presence of such ice as might have been on bridge was unusual. *Johnson v. Boston & M. R. R. (Vt.)*, 680.
- Where, in action for injuries to servant, while he was attempting to board an engine, plaintiff testified that he both saw and heard the engine coming toward him prior to the accident, defendant was not negligent in failing to have marking lights on rear of the tender. *Wise Terminal Co. v. McCormick (Va.)*, 23.

NEGLIGENCE.

See ACCIDENTS ON TRACK; CARRIERS; CHILDREN; CONTRIBUTORY NEGLIGENCE; CROSSINGS; DAMAGES; DEATH BY WRONGFUL ACT; EMPLOYERS' LIABILITY ACTS; FELLOW SERVANTS; FENCES; FIRES SET BY LOCOMOTIVES; FRIGHTENING TEAMS; INDEPENDENT CONTRACTORS; LICENSEES; MASTER AND SERVANT; PERSONAL INJURIES; SLEEPING CAR COMPANIES; STATIONS AND DEPOTS; STOCK. INJURIES TO; STREET RAILWAYS; TRESPASSERS.

- Burden of proof on plaintiff. *Goldstein v. People's Ry. Co. (Del. Super. Ct.)*, 529.

NEGLIGENCE—Continued.

Care required of persons having charge of electric wires. *Warren v. City Electric Ry. Co.* (Mich.), 164.

Complaint was objectionable as containing allegations in the alternative. *Pittsburgh C. C. & St. L. Ry. Co. v. Peck* (Ind.), 693.

Degrees of negligence, in action for death of passenger, under Mass. Rev. Laws, c. 111, § 267. *Dolphin v. Worcester Consol. St. Ry. Co.* (Mass.), 161.

Existence question for jury. *Goldstein v. People's Ry. Co.* (Del. Super. Ct.), 529.

Facts must be alleged showing that defendant owed a legal duty to person injured and that he negligently failed to perform the duty. *Pittsburgh C. C. & St. L. Ry. Co. v. Peck* (Ind.), 693.

Imputed Negligence.

In action against railroad for burning cotton in warehouse by emitting sparks from its engine, contributory negligence of warehouse company in permitting other cotton to remain on the open platform of the warehouse was not chargeable to plaintiff, who had entrusted his cotton to such company. *Alabama Great Southern R. Co. v. Clark* (Ala.), 170.

Negligence of driver at crossing imputed to person by whom he was hired, and who was in the vehicle at time of accident. *Dryden v. Pennsylvania R. Co.* (Pa.), 169.

In action for death of one killed at railroad crossing, instruction announcing rule of comparative negligence was not rendered harmless by instructions stating correct rule. *Rietveld v. Wabash R. Co.* (Iowa), 181.

In action for death of person killed at railroad crossing certain instruction, purporting to define proximate cause, was erroneous, in that it virtually announced the rule of comparative negligence, not prevailing in Iowa. *Rietveld v. Wabash R. Co.* (Iowa), 181.

In actions for personal injuries from negligence, that the facts are undisputed does not make question of negligence one of law. *Sharp v. Erie R. Co.* (N. Y.), 683.

Master not liable for servant's torts, unless done in or about duties assigned to him, or in the accomplishment of objects within the line of his duties. *Palos Coal & Coke Co. v. Benson* (Ala.), 185.

Negligence of servant as negligence of corporation. *Lookout Mountain Iron Co. v. Lea* (Ala.), 10.

Plaintiff, in action for personal injuries, is only required in order to make out prima facie case to make it appear more probable that the injury was the proximate result of defendant's negligence than of anything else. *Wood's Adm'x v. Southern Ry. Co.* (Va.), 19.

Proof confined to specific acts of negligence alleged. *Jemming v. Great Northern Ry. Co.* (Minn.), 697.

Proximate Cause.

Fire hose cut by street car, and control of fire consequently lost by fireman. *Little Rock Traction & Electric Co. v. McCaskill* (Ark.), 513.

Request to charge that the term "gross," in the term "gross negligence," is merely an expletive when the degree required is the very highest, was properly refused, since under such circumstances the term implies a gross failure to exercise that degree of care. *Dolphin v. Worcester Consol. St. Ry. Co.* (Mass.), 161.

To render defendant liable, connection of cause and effect must be established and defendant's negligence must be shown to have been proximate cause of the injury. *Byrd v. Southern Express Co.* (N. Car.), 150.

To render railroad liable for injuries resulting from operation of its trains or other conduct of its affairs, it must appear that the company failed in the performance of some duty it owed to the injured party. *Ellington v. Great Northern Ry. Co.* (Minn.), 174.

NEGLIGENCE—Continued.

What constitutes negligence is question for court. *Goldstein v. People's Ry. Co.* (Del. Super. Ct.), 529.

Where, on plaintiff's own evidence, it is as probable that injury sued for was not due to defendant's negligence as that it was due to such negligence, plaintiff cannot recover. *Louisville H. & St. L. Ry. Co. v. Jolly's Adm'x* (Ky.), 154.

Where plaintiff was injured by coming in contact with a live telephone wire, which had been pressed down against an improperly insulated trolley span wire by limb of tree, which was broken by a severe storm the previous evening, failure to guard the span wire and want of insulation were concurring causes establishing a liability, and the breaking of the wire was not the sole proximate cause of the injury. *Warren v. City Electric Ry. Co.* (Mich.), 164.

NEGOTIABLE INSTRUMENTS.

See **BILLS OF LADING.**

NUISANCES.

Machine and repair shops "and the like" cannot, under Tex. Const. art. 1, § 17, and Rev. St. 1895, arts. 4424, 4445, be arbitrarily located by railroad without reference to property in vicinity, as can its right of way. *Rainey v. Red River T. & S. Ry. Co.* (Tex.), 617.

Punitive damages recoverable where railroad refused to remove bodies of animals, killed by locomotive, from near house. *Yazoo & M. V. R. Co. v. Sanders* (Miss.), 656.

Where the power house of defendant street railway and light company constitutes a nuisance to adjoining property by reason of the injurious effects incidental to its operation, the company is as liable for the injury as if it were an individual, the authority conferred by statute to construct and operate plants for the generation of electricity, for its own use and for sale, not being imperative, but only permissive. *Townsend v. Norfolk Ry. & Light Co.* (Va.), 635.

ORDINANCES.

See **STREET RAILWAYS.**

PARTIES.

See **DEATH BY WRONGFUL ACT.**

PENAL STATUTES.

See **CARRIERS; CONSTITUTIONAL LAW.**

PERSONAL INJURIES.

See **ACCIDENTS ON TRACK; CARRIERS; CARRIERS OF LIVE STOCK; CHILDREN; CROSSINGS; DAMAGES; DEATH BY WRONGFUL ACT; FRIGHTENING TEAMS; LICENSEES; NEGLIGENCE; STATIONS AND DEPOTS; STREET RAILWAYS; TRESPASSERS.**

Damages.

Compensatory damages, elements of. *Southern Ry. Co. in Kentucky v. Goddard* (Ky.), 116.

Earnings of wife in her independent business after her recovery cannot be set off to damages recovered by her husband for her injuries. *Hutcheis v. Cedar Rapids & M. C. Ry. Co.* (Iowa), 362.

Excessive verdict. *MacGregor v. Rhode Island Co.* (R. I.), 510.

In action for injuries to married woman, where there was no evidence as to whether credit was given plaintiff or her husband

PERSONAL INJURIES—Continued.

- for medical services, presumption was that the credit was given to the husband. *Montgomery St. Ry. Co. v. Smith* (Ala.), 131.
- In an action for personal injuries, plaintiff could recover, under an assignment to her by her husband of his right of action for loss of her services, only the value of her services of which he had been or in the future might be deprived by reason of the injury. *Hutcheis v. Cedar Rapids & M. C. Ry. Co.* (Iowa), 362.
- Measure of damages, recoverable by husband for injury to wife. *Hutcheis v. Cedar Rapids & M. C. Ry. Co.* (Iowa), 362.
- While, in personal injury actions, present worth, rather than the aggregate of future damages, should be estimated, yet where no specific instruction as to present worth is asked, jury may be directed as to the general basis on which right to recover is founded, and allowed to fix such sum as, in their judgment, is reasonable. *Hutcheis v. Cedar Rapids & M. C. Ry. Co.* (Iowa), 362.
- \$9,000 was not excessive verdict for certain injuries which appeared to be permanent. *Latson v. St. Louis Transit Co.* (Mo.), 845.
- Defendant, where petition alleges gross negligence, does not acquire the burden of proof, and right to close argument, by admitting ordinary negligence and damages in an insignificant sum. *Southern Ry. Co. in Kentucky v. Steele* (Ky.), 815.

Evidence.

- Admission of evidence in personal injury case as to number and ages of plaintiff's children is prejudicial error. *Atchison T. & S. F. Ry. Co. v. Ringle* (Kan.), 192.
- Admission of evidence that plaintiff had family dependent on him is cured by instructing that jury are not to consider such evidence. *Southern Ry. Co. in Kentucky v. Steele* (Ky.), 815.
- Complaints of pain, admissibility of evidence of. *O'Dea v. Michigan Cent. R. Co.* (Mich.), 53.
- Harmless error in admitting testimony that plaintiff had visited certain places in an attempt to regain her health. *Latson v. St. Louis Transit Co.* (Mo.), 845.
- In action for personal injuries, evidence as to what plaintiff's weight had been before the accident was admissible. *O'Dea v. Michigan Cent. R. Co.* (Mich.), 53.
- In action for personal injuries, plaintiff may testify fully as to her condition, pain, and suffering, and its duration. *O'Dea v. Michigan Cent. R. Co.* (Mich.), 53.
- Life tables, admission of was erroneous where there was not sufficient evidence as to permanency of injuries. *MacGregor v. Rhode Island Co.* (R. I.), 510.
- Of complaints of present sufferings to physician were not mere natural expressions, but were hearsay. *O'Dea v. Michigan Cent. R. Co.* (Mich.), 53.
- Though plaintiff in personal injury case has testified, without objection, that he has children, permitting him to further testify as to their number and ages is not harmless. *Atchison T. & S. F. Ry. Co. v. Ringle* (Kan.), 192.
- Future consequences, degree of proof required to entitle plaintiff to recover for. *MacGregor v. Rhode Island Co.* (R. I.), 510.
- Where description of injuries sued for did not show that they were necessarily permanent, plaintiff should allege their permanency in order to recover therefor. *MacGregor v. Rhode Island Co.* (R. I.), 510.

PHYSICIANS' NEGLIGENCE.

See MASTER AND SERVANT.

PLEADING.

See ACTIONS; CARRIERS; CARRIERS OF LIVE STOCK; EMPLOYERS' LIABILITY ACTS; NEGLIGENCE; STOCK, INJURIES TO; STREET RAILWAYS; VENUE.

POLICE POWER.

See CONSTITUTIONAL LAW.

PRACTICE.

See EMINENT DOMAIN; PERSONAL INJURIES.

PRESCRIPTION.

See RIGHT OF WAY.

PRESUMPTION OF NEGLIGENCE.

See CARRIERS OF PASSENGERS.

PRESUMPTIONS.

See CROSSINGS; DEATH BY WRONGFUL ACT; FELLOW SERVANTS.

PROCESS.

See LEASES AND RUNNING POWERS.

PROXIMATE CAUSE.

See CARRIERS OF GOODS; DEATH BY WRONGFUL ACT; MASTER AND SERVANT; NEGLIGENCE.

PUBLIC LANDS.

See RIGHT OF WAY.

PUBLIC POLICY.

See CONSTITUTIONAL LAW.

PUNITIVE DAMAGES.

See DAMAGES.

RAILROAD COMMISSIONS.

See SPURS AND SIDETRACKS.

RAILROADS.

See CARRIERS; CONNECTING CARRIERS; CONSTITUTIONAL LAW; EMINENT DOMAIN; LEASES AND RUNNING POWERS; MASTER AND SERVANT; NEGLIGENCE; NUISANCES; RIGHT OF WAY; STREET RAILWAYS; TAXATION.

Adoption of survey, so as to make a location of railroad. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co. (W. Va.)*, 412.

Location of railroad, as between rival companies, need not be exact as to width of right of way claimed or other matters of detail. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co. (W. Va.)*, 412.

Location of railroad, as to the landowner, gives right to acquire his title by purchase, or the further exercise of the power of eminent domain, paramount to that of a company claiming under subsequent location. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co. (W. Va.)*, 412.

Location of railroad, definition of term. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co. (W. Va.)*, 412.

Location of railroad, how made by corporation. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co. (W. Va.)*, 412.

Location of railroad, sufficiency of. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co. (W. Va.)*, 412.

Location of railroad, what constitutes. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co. (W. Va.)*, 412.

Material used for repairs of bridges, tracks, sidings, and other railroad emergency purposes, cannot be levied on and sold under ordinary writ of execution. *Margo v. Pennsylvania R. Co. (Pa.)*, 578.

Mere filing plat in office of Secretary of State, without proof that

RAILROADS—Continued.

it was authorized by the company, is not evidence of adoption of the survey of a railroad route shown by it. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co.* (W. Va.), 412.

Property necessary to existence of railroad and in actual use cannot be sold under ordinary writ of fieri facias. *Margo v. Pennsylvania R. Co.* (Pa.), 578.

Right of company, from prior location of its railroad, to seize and hold, as against rival company, land on any part of its proposed route, without having made survey of its entire road. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co.* (W. Va.), 412.

Survey made by promoters, in compliance with section 53 of Chapter 54 of W. Va. Code of 1899, may be adopted as a location of the railroad after incorporation or the filing of the certificate. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co.* (W. Va.), 412.

The references in the resolution of company's stockholders to maps included those already made; and the act of ordering them filed was prima facie proof of adoption of the surveys of the proposed railroad location shown on them. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co.* (W. Va.), 412.

Under charter of railroad company, Md. Acts 1852, c. 304, §§ 14, 15, 18; Md. Acts 1872, p. 102, c. 71; Md. Acts 1884, p. 209, c. 153, a contract by which the company contracted to pay out certain of its earnings such "commissions" on its receipts as would make good to hotel company a deficit in latter's earnings, sufficient to enable hotel company to pay dividends on its stock and interest on its bonds, was ultra vires and void. *Western Maryland R. Co. v. Blue Ridge Hotel Co.* (Md.), 581.

Where railroad had executed contract by which it guaranteed payment of interest and dividends on bonds and stock of a hotel company to aid in improvement of latter's property, and thereafter received nothing of benefit from the hotel company except increased earnings for transportation of passengers and freight over its road, it was not precluded from subsequently claiming that contract was ultra vires and void. *Western Maryland R. Co. v. Blue Ridge Hotel Co.* (Md.), 581.

RAILROAD WORK.

See EMPLOYERS' LIABILITY ACTS.

RECEIVERS.

See EMINENT DOMAIN.

RELATION OF PARTIES.

See CARRIERS.

RELIEF ASSOCIATIONS.

See MASTER AND SERVANT.

REMOVAL OF CAUSE.

See FEDERAL JURISDICTION.

RES GESTÆ.

See EVIDENCE.

REVIEW.

See EMINENT DOMAIN.

RIGHT OF WAY.

See EMINENT DOMAIN; RAILROADS.

Abandonment of land for railroad purposes does not operate to

RIGHT OF WAY—Continued.

- divest railroad of fee therein conveyed to it by warranty deed. *Enfield Mfg. Co. v. Ward* (Mass.), 600.
- Abandonment of land for railroad purposes is, in part at least, a question of intention. *Enfield Mfg. Co. v. Ward* (Mass.), 600.
- Adverse possession, when public land granted to a railroad company becomes subject to. *Blumer v. Iowa R. Land Co.* (Iowa), 607.
- As against railroad company entitled to public land under grant, statute of limitations begins to run in favor of an occupant under timber culture act from time such occupant enters into possession under receiver's receipt. *Blumer v. Iowa R. Land Co.* (Iowa), 607.
- As between rival railroad companies claiming same location, priority of location gives superiority of right to use of land covered by location, for railroad purposes. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co.* (W. Va.), 412.
- Contract between railroad and city requiring, as a consideration, the location of railroad shops, etc., within the city, was not within the statute of frauds of Texas. *City of Tyler v. St. Louis S. W. Ry. Co.* (Tex.), 625.
- Court may, by enjoining railroad from removing its offices, etc., from city where it has contracted to maintain same, enforce specific performance of such contract. *City of Tyler v. St. Louis S. W. Ry. Co.* (Tex.), 625.
- Fact that trustees under mortgage of railroad and its franchises pay no taxes on certain of the railroad land, and do not know of its existence, and pay no attention to it, does not tend to prove an abandonment of such land by them or the railroad company. *Enfield Mfg. Co. v. Ward* (Mass.), 600.
- Johnson grass, where it was communicated to land from railroad right of way, but the owner permits it to mature thereon he cannot recover from railroad, under Tex. Laws 1901, p. 283, c. 117. *San Antonio & A. P. Ry. Co. v. Burns* (Tex.), 410.
- Municipal corporation could enforce by suit contract obligating railroad to locate and maintain its general offices, etc., in the city. *City of Tyler v. St. Louis S. W. Ry. Co.* (Tex.), 625.
- Railroad acquired by prescription title to no more land than it took and held by actual occupancy. *St. Louis Southwestern Ry. Co. v. Davis* (Ark.), 456.
- Railroad, which had acquired an adverse title to land, enjoined from entering on land and tearing up tracks of company which had previously laid its tracks thereon with consent of one long in possession under claim of title, and subsequently taken deed from person in possession. *Donora Southern R. Co. v. Pennsylvania R. Co.* (Pa.), 673.
- Under Tex. Rev. St. 1895, art. 4367, requiring railroads to keep their general offices at some place named in the charter, etc., a railroad which has located its general offices, etc., in a city, and contracted for a valuable consideration to keep them there, and has received the consideration, cannot by amending its charter remove its offices, etc., to another city. *City of Tyler v. St. Louis S. W. Ry. Co.* (Tex.), 625.
- Where deed conveyed land in consideration of the building of a railroad, "to be completed by Jan. 1, 1899," the quoted clause imparted nothing more than a covenant to complete road by date specified, a breach of which entitled grantor to damages, but did not invalidate the deed. *Bain v. Parker* (Ark.), 614.

RIVAL COMPANIES.

See EMINENT DOMAIN; RAILROADS; RIGHT OF WAY.

RULES.

See FELLOW SERVANTS; MASTER AND SERVANT.

RUNNING POWERS.

See LEASES AND RUNNING POWERS.

SCHEDULES.

See CARRIERS OF PASSENGERS.

SERVANTS.

See MASTER AND SERVANT.

SHIPPERS.

See LICENSEES.

SIDETRACKS.

See SPURS AND SIDETRACKS.

SIMILAR ACCIDENTS.

See EVIDENCE; MASTER AND SERVANT.

SIGNALS.

See ACCIDENTS ON TRACK; CROSSINGS.

SLEEPING CAR COMPANIES.

Provision of contract between sleeping car company and its porter releasing railroads from liability for injuries to such porter, was effective as to any occurrence after the contract was executed, though it was not signed until seven months after the porter was employed. *Chicago R. I. & P. Ry. Co. v. Hamler* (Ill.), 252.

Railroad company not a common carrier of sleeping cars belonging to another, and is, therefore, entitled to exempt itself from liability for injuries to sleeping car company's employees. *Chicago R. I. & P. Ry. Co. v. Hamler* (Ill.), 252.

Sleeping car porter was not an employee of the railroad company. *Chicago R. I. & P. Ry. Co. v. Hamler* (Ill.), 252.

Validity of contract between sleeping car porter and sleeping car company, releasing railroad companies from liability for personal injury to him while traveling over their lines. *Chicago R. I. & P. Ry. Co. v. Hamler* (Ill.), 252.

Where sleeping car porter was injured by blowing up of locomotive, his contract with sleeping car company by which he released the railroad from liability for injuries, was a complete defense, without regard to whether railroad's negligence was gross or slight. *Chicago R. I. & P. Ry. Co. v. Hamler* (Ill.), 252.

SLIGHT NEGLIGENCE.

See CARRIERS OF PASSENGERS.

SPURS AND SIDETRACKS.

Evidence that railroad had previously maintained a switch at place in question without inconvenience or accident was admissible on issue of reasonableness of order of corporation commission requiring establishment of private switch. *North Car. Corp. Com. v. Seaboard Air Line Ry. Co.* (N. Car.), 652.

Fact that switch would increase danger of operating road no cause for reversing judgment of circuit court affirming action of corporation commission requiring establishment of private switch. *North Car. Corp. Com. v. Seaboard Air Line Ry. Co.* (N. Car.), 652.

STATION AGENT'S KNOWLEDGE.

See TRESPASSERS.

STATIONS AND DEPOTS.

See CARRIERS OF PASSENGERS.

Duty of railroad to keep station warehouse, practically abandoned, and its approaches in safe condition for use of person, who goes there without permission at instance of third person to look after some private property. *Chattanooga Southern R. Co. v. Wheeler* (Ga.), 561.

Not negligence for station to be so arranged that passengers are obliged to cross tracks in order to reach their train. *Dieckmann v. Chicago & N. W. Ry. Co.* (Iowa), 736.

There were no circumstances requiring carrier to furnish passenger escort from station across tracks to his train. *Dieckmann v. Chicago & N. W. Ry. Co.* (Iowa), 736.

STATUTE OF FRAUDS.

See RIGHT OF WAY.

STATUTES.

See CARRIERS; CARRIERS OF PASSENGERS.

Statute forbidding railroads to charge for transportation for any specific distance greater sum than they charge for carriage over greater distance is within legislative discretion, and valid. *Chicago B. & Q. Ry. Co. v. Anderson* (Neb.), 333.

The title: "An act to fix a maximum standard of freight charges on railroads, and to prevent unjust discrimination therein, or secret rebates or drawbacks therefor" (Neb. Comp. St. 1903, c. 72, art. 5), contains only one subject. *Chicago B. & Q. Ry. Co. v. Anderson* (Neb.), 333.

STOCK, INJURIES TO.

See NUISANCES.

Complaint alleging that one of defendant's servants in charge of locomotive, so negligently operated it that it struck plaintiff's cows, was sufficient in its allegations of negligence. *Western Ry. of Alabama v. Stone* (Ala.), 835.

Complaint need not allege name of employee who was in control of locomotive which struck the cattle. *Western Ry. of Alabama v. Stone* (Ala.), 835.

Complaint was sufficiently definite in its allegations of time and place of injury. *Western Ry. of Alabama v. Stone* (Ala.), 835.

Damages.

Instruction was erroneous, because plaintiff, although he failed to establish amount of damages, was entitled, at least, to nominal damages on proof of the wrongful killing of his cattle. *Western Ry. of Alabama v. Stone* (Ala.), 835.

Instruction was properly refused, as misleading, in view of evidence that the cows killed were milk and butter producers and were used for that purpose alone. *Western Ry. of Alabama v. Stone* (Ala.), 835.

Measure of damages as affected by value of carcasses, erroneous instruction. *Western Ry. of Alabama v. Stone* (Ala.), 835.

Evidence.

Evidence of yield of milk and butter of cows killed was admissible on issue of their market value. *Western Ry. of Alabama v. Stone* (Ala.), 835.

Testimony of engineer, that he did not have time to make any effort to prevent killing the cattle, was but the conclusion of the witness on a question of fact, and was properly excluded. *Western Ry. of Alabama v. Stone* (Ala.), 835.

Where the negligence alleged was in operation of the train, testimony as to its equipment was properly excluded. *Western Ry. of Alabama v. Stone* (Ala.), 835.

STOCK, INJURIES TO—Continued.

- Evidence sustained verdict for plaintiff, in action for wanton and willful negligence of trainmen in killing his stock. *Best v. Great Northern Ry. Co. (Minn.)*, 519.
- Instruction that engineer was not bound "to keep a lookout for animals beyond the light thrown from his engine, that is, on the outside of the track," was properly refused as obscure and misleading. *Western Ry. of Alabama v. Stone (Ala.)*, 835.
- Instruction was properly refused, because it failed to take into consideration question of negligence in operation of the train with respect to speed and illuminating power of headlight. *Western Ry. of Alabama v. Stone (Ala.)*, 835.
- Negligence to run train at night so fast that it is impossible to stop train within distance that headlight illuminates track. *Western Ry. of Alabama v. Stone (Ala.)*, 835.
- Owner of stock killed by train beyond crossing could not recover, although it appeared that in approaching crossing the engineer did not observe statutory requirements as to checking speed; his failure so to do not being proximate cause of injury. *Central of Georgia Ry. Co. v. Duggan (Ga.)*, 803.
- Where engineer is negligent in keeping a lookout, but afterwards, when it is too late, discovers an animal upon track, the railroad is liable for consequent injury to the animal. *Western Ry. of Alabama v. Stone (Ala.)*, 835.

STREET RAILWAYS.

- See ANIMALS; CARRIERS OF PASSENGERS; CHILDREN; EVIDENCE; FRIGHTENING TEAMS; MASTER AND SERVANT; NEGLIGENCE; NUISANCES; TAXATION.
- Application of ordinance requiring company to keep street in repair. *Montgomery St. Ry. Co. v. Smith (Ala.)*, 131.
- Burden of proving negligence where collision between car and another vehicle at crossing. *Foulk v. Wilmington City Ry. Co. (Del. Super. Ct.)*, 541.
- Care required of motorman in approaching crossing, as affected by its surroundings and the slippery condition of rails. *Foulk v. Wilmington City Ry. Co. (Del. Super. Ct.)*, 541.
- Care required of motorman in approaching crossing where there is steep down grade. *Foulk v. Wilmington City Ry. Co. (Del. Super. Ct.)*, 541.
- Care required of motorman to avoid collision with another vehicle at crossing, circumstances to be considered in determining. *Smith v. Minneapolis St. Ry. Co. (Minn.)*, 536.
- Care required of those in charge of street cars to avoid collisions with other vehicles at crossings. *Boudwin v. Wilmington City Ry. Co. (Del. Super. Ct.)*, 564.
- Collision between car and another vehicle at crossing, rules for determining negligence of company. *Smith v. Minneapolis St. Ry. Co. (Minn.)*, 536.
- Collision between car and another vehicle, company not liable where both negligence and contributory negligence, if latter was proximate cause. *Foulk v. Wilmington City Ry. Co. (Del. Super. Ct.)*, 541.

Contributory Negligence.

- Care required at street car crossing not necessarily the same as that required at steam railway crossing. *Smith v. Minneapolis St. Ry. Co. (Minn.)*, 536.
- Care required of one driving vehicle in funeral procession as affected by fact that it was the courtesy custom of street railways to yield right of way at crossings to such processions. *Foulk v. Wilmington City Ry. Co. (Del. Super. Ct.)*, 541.
- Collision between car and vehicle driven in funeral procession, custom of company to yield right of way to such processions

STREET RAILWAYS—Continued.

- at crossings could be taken into account in estimating degree of care required of driver of such vehicle. *Foulk v. Wilmington City Ry. Co.* (Del. Super. Ct.), 541.
- Driver of vehicle was not guilty of contributory negligence, either in going upon track to avoid another vehicle or in driving along ahead of car. *Latson v. St. Louis Transit Co.* (Mo.), 845.
- Driver of wagon not a trespasser, nor guilty of negligence, in driving on street car track. *Strode v. St. Louis Transit Co.* (Mo.), 569.
- Instruction for plaintiff was not erroneous for failing to take into consideration his negligence contributory to a collision between his vehicle and street car. *Latson v. St. Louis Transit Co.* (Mo.), 845.
- Not negligence, as matter of law, to drive team so near street car track that car going in same direction will collide with it. *Logan v. Old Colony St. Ry. Co.* (Mass.), 141.
- Right of driver of another vehicle to assume that motorman will so run his car that a collision will not occur even though such driver fails to do his duty. *Latson v. St. Louis Transit Co.* (Mo.), 845.
- Rights and duties of persons using streets upon which are street car tracks. *Kerr v. Boston Elevated Ry. Co.* (Mass.), 533.
- Defendant could not complain of an instruction, because it merely required the motorman to use common-law care, while petition charged violation of ordinance requiring motorman to stop on first appearance of danger to person using street. *Latson v. St. Louis Transit Co.* (Mo.), 845.
- Evidence.**
- Declaration of motorman, made after occurrence, was not binding on defendant street railway, in action for killing dog, and was inadmissible. *Wallace v. North Alabama Traction Co.* (Ala.), 804.
- Motorman of several months' experience is competent to give his opinion that it was impossible to have stopped car in time to have prevented injury complained of. *Wallace v. North Alabama Traction Co.* (Ala.), 804.
- Where there was an obstruction, shutting a car out of view at a certain point, answer that a person could not see the car was not objectionable as involving a conclusion. *Wallace v. North Alabama Traction Co.* (Ala.), 804.
- Where the testimony of a witness, having no personal knowledge of the facts, showed that the car running over the dog could have been stopped in time to have prevented the injury, error, if any, in refusing to exclude such evidence was not prejudicial to plaintiff. *Wallace v. North Alabama Traction Co.* (Ala.), 804.
- Fact that city engineer is overlooking work done by a street railway in a public street does not relieve the company from the duty resting on it to keep such part of the street in a safe condition. *Montgomery St. Ry. Co. v. Smith* (Ala.), 131.
- Fact that person was negligent in failing to drive his wagon off street car track, when he heard car gong, did not authorize motorman to run his wagon down. *Strode v. St. Louis Transit Co.* (Mo.), 569.
- Fact that street railway is by ordinance required to keep that part of the street over which its track passes in good repair does not make it any the less liable for negligence in leaving an excavation made by it in such street without the usual safeguards. *Montgomery St. Ry. Co. v. Smith* (Ala.), 131.
- Implied obligation of company to keep that part of street occupied by it free from pitfalls and in safe condition. *Montgomery St. Ry. Co. v. Smith* (Ala.), 131.

STOCK, INJURIES TO—Continued.

- Evidence sustained verdict for plaintiff, willful negligence of trainmen in killing plaintiff received by plaintiff Northern Ry. Co. (Minn.), 519.
- Instruction that engineer was not negligent by defendant in street, the animals beyond the light thrown by defendant not demurrable as charge. Montgomery St. Ry. Co.
- "outside of the track," was proper if by reason of excessive speed leading. Western Ry. of Ala.
- Instruction was properly given to avert the collision with plaintiff's consideration question on the ground that there was no with respect to speed. what space the car could have been Western Ry. of Ala. St. Louis Transit Co. (Mo.), 845.
- Negligence to run train into collision with other vehicle at crossing, stop train within general rule. Boudwin v. Wilmington Ry. Co. (N. C.), 564.
- Owner of stock requested by defendant, that "unless although it prevented stopping the car," was properly did not observe danger of a collision with plaintiff's vehicle failure so would have been averted, and the special defense Georgia that the accident was caused by plaintiff who was Where car was close in front of car as to render a collision unavoidable when v. St. Louis Transit Co. (Mo.), 845.
- is liable was guilty of negligence in running his car into another Ala. vehicle, which was moving on the track, under ordinance
- STREET** motorman to stop on first appearance of danger. Latson v. St. Louis Transit Co. (Mo.), 845.
- rights and duties of those in charge of cars and drivers of vehicles at crossings. Smith v. Minneapolis St. Ry. Co. (Minn.), 536.
- rights and duties of those in charge of cars and other users of streets. Kerr v. Boston Elevated Ry. Co. (Mass.), 533.
- Negligence of motorman in causing collision with team was question for jury. Logan v. Old Colony St. Ry. Co. (Mass.), 141.
- Negligence with respect to electric wire was question for jury, notwithstanding the short time that elapsed, between the breaking of the wire and the accident to a child, in which to discover break and make repairs. Warren v. City Electric Ry. Co. (Mich.), 164.
- Ordinance of city of Wilmington limiting speed of railroad cars, etc., has no application to street railway cars. Licznarski v. Wilmington City Ry. Co. (Del. Super. Ct.), 613.
- Ordinary care, as applied to management of electric cars in motion, means all the care, prudence, and discretion which the circumstances require. Goldstein v. People's Ry. Co. (Del. Super. Ct.), 529.
- Person struck by street car, question of negligence and contributory negligence were for jury. Kerr v. Boston Elevated Ry. Co. (Mass.), 533.
- Proper to refuse to instruct, in view of the evidence, that, if the motorman was unable to stop car in time to prevent collision with plaintiff's vehicle, plaintiff could not recover. Latson v. St. Louis Transit Co. (Mo.), 845.
- Proper to refuse to instruct, in view of the evidence, that motorman had right to assume that driver of vehicle would use reasonable diligence to get off track, unless motorman was chargeable with notice that vehicle was hindered in its progress by a vehicle in front of it. Latson v. St. Louis Transit Co. (Mo.), 845.
- Right of way at street intersections, as between funeral processions and cars. Foulk v. Wilmington City Ry. Co. (Del. Super. Ct.), 541.
- The exemption of subsurface street railway in New York City from operation of the special franchise tax authorized by N. Y. Laws 1899, chap. 712, does not make the statute invalid, as deny-

STREET RAILWAYS—Continued.

of surface street railways in that city equal property or as depriving them of their property without law. *People, etc., of New York v. State Board of Tax Com's* (U. S.), 468.

connected with electricity, upon what depends reasonable inspection of. *Warren v. City Electric Ry. Co.* (Mich.),

STREETS AND HIGHWAYS.

See CROSSINGS; EMINENT DOMAIN; FRIGHTENING TEAMS; STREET RAILWAYS.

SUMMONS.

See LEASES AND RUNNING POWERS.

SURVEYS.

See RAILROADS.

SWITCHES.

See SPURS AND SIDETRACKS.

TAXATION.

Constitutionality of N. Y. Laws 1899, chap. 712, imposing special franchise tax upon street railways. *People, etc., of New York v. State Board of Tax Com's* (U. S.), 468.

No exemption from municipal taxation of the business of defendant street railway company resulted from certain provisions in its agreement with municipality. *Savannah T. & I. of H. Ry. v. Mayor, etc., of Savannah* (U. S.), 465.

Special franchise tax imposed upon street railways by N. Y. Laws 1899, chap. 712, does not impair obligations of the contracts by which the state and municipality granted for certain consideration right to construct and operate railways in city of New York. *People, etc., of New York v. State Board of Tax Com's* (U. S.), 468.

Street railway not denied equal protection of laws by certain municipal tax on its business, because a steam railroad, making extra charge for local deliveries of freight brought over its road from outside city, is not subjected to such tax. *Savannah T. & I. of H. Ry. v. Mayor, etc., of Savannah* (U. S.), 465.

TICKETS AND FARES.

See CARRIERS OF GOODS; CARRIERS OF PASSENGERS; CONNECTING CARRIERS.

Actual contract between carrier and passenger governs, notwithstanding recitals of ticket, which is but evidence of the contract. *Cincinnati, etc., Ry. Co. v. Harris* (Tenn.), 762.

TIME TABLES.

See CARRIERS OF PASSENGERS.

TORTS.

See ASSAULTS; NEGLIGENCE.

TRESPASSERS.

See RIGHT OF WAY; ACCIDENTS ON TRACK; ASSAULTS; CHILDREN; LICENSEES; STREET RAILWAYS.

Body of intoxicated trespasser, who had apparently, been struck by train while he was lying on track, found near track, not error to direct verdict for railroad. *Hall v. Western & A. R. Co.* (Ga.), 567.

MASTER AND SERVANT—Continued.

Evidence sufficient to support verdict for plaintiff, and to show that the acts done by servant were within the general scope of his employment and authority. *Chicago R. I. & P. Ry. Co. v. Kerr* (Neb.), 369.

Exemption from Liability.

Contract creating an exemption from liability for injuries caused to a servant by his master's negligence is in violation of Mass. Rev. Laws, c. 106, § 16. *Wagner v. Boston Elevated Ry. Co.* (Mass.), 187.

Validity and application of stipulation of contract for construction of elevated railway, purporting to exempt railroad from liability for injuries to employees of subcontractor. *Wagner v. Boston Elevated Ry. Co.* (Mass.), 187.

In action against street railway company for injuries to motorman, where declaration charged negligence in failing to supply car with automatic "sand boxes and sand," whether defendant failed to provide car with "pail of sand and a shovel to be used by hand" was immaterial. *Mayer v. Detroit Y. A. A. & J. Ry. Co.* (Mich.), 267.

In action or death of car inspector, it appeared that company was not guilty of actionable negligence in failing to give further notice of the crippled car, which had been placed in train, than that given by placing repair shop card on the car. *Shuster v. Philadelphia B. & W. R. Co.* (Del. super. ct.), 6.

In action for death of defendant's baggage master, killed by contact with structure near track, it appeared that he was at the time acting outside of the scope of his duties, at the request of the station agent, in delivering telegram by throwing it from moving train, and therefore, the master was not liable. *McTaggart v. Maine Cent. R. Co.* (Me.), 240.

In action for injuries to brakeman while attempting to board tender of engine approaching him at night, evidence held insufficient to entitle plaintiff to recover on theory that man in charge of engine was negligent in failing to stop same after he discovered plaintiff's danger. *Wise Terminal Co. v. McCormick* (Va.), 23.

In action for injuries to employee, evidence authorized charge that if plaintiff, as one of the inducements to his employment, was permitted to run locomotives so as to learn to be an engineer, it was the duty of defendant to use ordinary care to provide and maintain a reasonably safe place for him to work. *Norfolk & W. Ry. Co. v. Bell* (Va.), 263.

Inspection of Appliances.

Lantern globe not an implement of such character as to require inspection either before or after use by employees. *Gulf C. & S. F. R. Co. v. Larkin* (Tex.), 235.

Railroad was not liable for injury to fireman from defective lantern globe, merely because it could not prove that it had inspected the particular globe which caused the injury. *Gulf C. & S. F. R. Co. v. Larkin* (Tex.), 235.

Master liable for acts of servant within the general scope of his employment while about his master's business, though the act be negligent, wanton, willful or malicious. *Chicago R. I. & P. Ry. Co. v. Kerr* (Neb.), 369.

Master not chargeable with notice that a baggage master in a car with two doors on the side would leave the car, and go down upon the lower steps for the purpose of throwing off a telegraph message. *McTaggart v. Maine Cent. R. Co.* (Me.), 240.

Master not liable for death of baggage man, killed while acting outside of the scope of his duty, in attempting to perform a service at the request of the station agent. *McTaggart v. Maine Cent. R. Co.* (Me.), 240.

Master not liable where injury to servant resulted from latter's negligence or that of his fellow servant in selecting an obviously de-

MASTER AND SERVANT—Continued.

- fective plank to use in constructing gangway for their trucks. *Fewell v. Southern Ry. Co. (Va.)*, 677.
- Negligence in failing to keep handhold on tender in reasonably safe condition was question for jury. *Wood's Adm'x v. Southern Ry. Co. (Va.)*, 19.
- Notice to servant when notice to master. *Merrill v. Oregon Short Line R. Co. (Utah)*, 221.

Relief Associations.

Hospital corporation, a relief association for the benefit of railroad employees, was a separate and distinct organization from the railroad, and the latter was not liable for conduct of hospital directors, nor for negligence of physicians or attendants of the hospital, in treating a railroad employee. *Illinois Cent. R. Co. v. Buchanan (Ky.)*, 521.

Rules.

- Duty to promulgate and enforce rules for safety of servants is a nonassignable one, and is not performed by merely promulgating them, and using ordinary care in selecting men to enforce them. *Merrill v. Oregon Short Line R. Co. (Utah)*, 221.
- Failure of all railroad to establish rule prohibiting car inspectors from riding on trains while they were run on a track for inspection was not such negligence as to render it liable for injuries received by a car inspector. *Shuster v. Philadelphia B. & W. R. Co. (Del.)*, 6.
- Failure to use ordinary care in establishing and enforcing rules for protection of servants, sufficiency of evidence. *Merrill v. Oregon Short Line R. Co. (Utah)*, 221.
- Impracticable to prescribe by general rule the place in which all crippled cars should be placed in train, and railroad not guilty of actionable negligence toward a servant in failing to establish such a general rule. *Shuster v. Philadelphia, B. & W. R. Co. (Del.)*, 6.
- Notice of violation of rules, when is master chargeable with. *Merrill v. Oregon Short Line R. Co. (Utah)*, 221.
- Servant, who knowingly engages to do what no prudent man would risk his life in undertaking to accomplish, cannot, if injury ensues, rely upon the law to throw around him the protection of a fiction that his employer impliedly undertook to take steps to minimize the risk assumed, at least to the extent of making performance possible. *Griffith v. Lexington Terminal R. Co. (Ga.)*, 715.
- Testimony of brakeman struck by low bridge was insufficient to establish that ice on the bridge was cause of accident, or that presence of such ice as might have been on bridge was unusual. *Johnson v. Boston & M. R. R. (Vt.)*, 680.
- Where, in action for injuries to servant, while he was attempting to board an engine, plaintiff testified that he both saw and heard the engine coming toward him prior to the accident, defendant was not negligent in failing to have marking lights on rear of the tender. *Wise Terminal Co. v. McCormick (Va.)*, 23.

NEGLIGENCE.

See ACCIDENTS ON TRACK; CARRIERS; CHILDREN; CONTRIBUTORY NEGLIGENCE; CROSSINGS; DAMAGES; DEATH BY WRONGFUL ACT; EMPLOYERS' LIABILITY ACTS; FELLOW SERVANTS; FENCES; FIRES SET BY LOCOMOTIVES; FRIGHTENING TEAMS; INDEPENDENT CONTRACTORS; LICENSEES; MASTER AND SERVANT; PERSONAL INJURIES; SLEEPING CAR COMPANIES; STATIONS AND DEPOTS; STOCK. INJURIES TO; STREET RAILWAYS; TRESPASSERS.

- Burden of proof on plaintiff. *Goldstein v. People's Ry. Co. (Del. Super. Ct.)*, 529.

NEGLIGENCE—Continued.

Care required of persons having charge of electric wires. *Warren v. City Electric Ry. Co.* (Mich.), 164.

Complaint was objectionable as containing allegations in the alternative. *Pittsburgh C. C. & St. L. Ry. Co. v. Peck* (Ind.), 693.

Degrees of negligence, in action for death of passenger, under Mass. Rev. Laws, c. 111, § 267. *Dolphin v. Worcester Consol. St. Ry. Co.* (Mass.), 161.

Existence question for jury. *Goldstein v. People's Ry. Co.* (Del. Super. Ct.), 529.

Facts must be alleged showing that defendant owed a legal duty to person injured and that he negligently failed to perform the duty. *Pittsburgh C. C. & St. L. Ry. Co. v. Peck* (Ind.), 693.

Imputed Negligence.

In action against railroad for burning cotton in warehouse by emitting sparks from its engine, contributory negligence of warehouse company in permitting other cotton to remain on the open platform of the warehouse was not chargeable to plaintiff, who had entrusted his cotton to such company. *Alabama Great Southern R. Co. v. Clark* (Ala.), 170.

Negligence of driver at crossing imputed to person by whom he was hired, and who was in the vehicle at time of accident. *Dryden v. Pennsylvania R. Co.* (Pa.), 169.

In action for death of one killed at railroad crossing, instruction announcing rule of comparative negligence was not rendered harmless by instructions stating correct rule. *Rietveld v. Wabash R. Co.* (Iowa), 181.

In action for death of person killed at railroad crossing certain instruction, purporting to define proximate cause, was erroneous, in that it virtually announced the rule of comparative negligence, not prevailing in Iowa. *Rietveld v. Wabash R. Co.* (Iowa), 181.

In actions for personal injuries from negligence, that the facts are undisputed does not make question of negligence one of law. *Sharp v. Erie R. Co.* (N. Y.), 683.

Master not liable for servant's torts, unless done in or about duties assigned to him, or in the accomplishment of objects within the line of his duties. *Palos Coal & Coke Co. v. Benson* (Ala.), 185.

Negligence of servant as negligence of corporation. *Lookout Mountain Iron Co. v. Lea* (Ala.), 10.

Plaintiff, in action for personal injuries, is only required in order to make out prima facie case to make it appear more probable that the injury was the proximate result of defendant's negligence than of anything else. *Wood's Adm'x v. Southern Ry. Co.* (Va.), 19.

Proof confined to specific acts of negligence alleged. *Jemming v. Great Northern Ry. Co.* (Minn.), 697.

Proximate Cause.

Fire hose cut by street car, and control of fire consequently lost by fireman. *Little Rock Traction & Electric Co. v. McCaskill* (Ark.), 513.

Request to charge that the term "gross," in the term "gross negligence," is merely an expletive when the degree required is the very highest, was properly refused, since under such circumstances the term implies a gross failure to exercise that degree of care. *Dolphin v. Worcester Consol. St. Ry. Co.* (Mass.), 161.

To render defendant liable, connection of cause and effect must be established and defendant's negligence must be shown to have been proximate cause of the injury. *Byrd v. Southern Express Co.* (N. Car.), 150.

To render railroad liable for injuries resulting from operation of its trains or other conduct of its affairs, it must appear that the company failed in the performance of some duty it owed to the injured party. *Ellington v. Great Northern Ry. Co.* (Minn.), 174.

NEGLIGENCE—Continued.

What constitutes negligence is question for court. *Goldstein v. People's Ry. Co.* (Del. Super. Ct.), 529.

Where, on plaintiff's own evidence, it is as probable that injury sued for was not due to defendant's negligence as that it was due to such negligence, plaintiff cannot recover. *Louisville H. & St. L. Ry. Co. v. Jolly's Adm'x* (Ky.), 154.

Where plaintiff was injured by coming in contact with a live telephone wire, which had been pressed down against an improperly insulated trolley span wire by limb of tree, which was broken by a severe storm the previous evening, failure to guard the span wire and want of insulation were concurring causes establishing a liability, and the breaking of the wire was not the sole proximate cause of the injury. *Warren v. City Electric Ry. Co.* (Mich.), 164.

NEGOTIABLE INSTRUMENTS.

See **BILLS OF LADING.**

NUISANCES.

Machine and repair shops "and the like" cannot, under Tex. Const. art. 1, § 17, and Rev. St. 1895, arts. 4424, 4445, be arbitrarily located by railroad without reference to property in vicinity, as can its right of way. *Rainey v. Red River T. & S. Ry. Co.* (Tex.), 617.

Punitive damages recoverable where railroad refused to remove bodies of animals, killed by locomotive, from near house. *Yazoo & M. V. R. Co. v. Sanders* (Miss.), 656.

Where the power house of defendant street railway and light company constitutes a nuisance to adjoining property by reason of the injurious effects incidental to its operation, the company is as liable for the injury as if it were an individual, the authority conferred by statute to construct and operate plants for the generation of electricity, for its own use and for sale, not being imperative, but only permissive. *Townsend v. Norfolk Ry. & Light Co.* (Va.), 635.

ORDINANCES.

See **STREET RAILWAYS.**

PARTIES.

See **DEATH BY WRONGFUL ACT.**

PENAL STATUTES.

See **CARRIERS; CONSTITUTIONAL LAW.**

PERSONAL INJURIES.

See **ACCIDENTS ON TRACK; CARRIERS; CARRIERS OF LIVE STOCK; CHILDREN; CROSSINGS; DAMAGES; DEATH BY WRONGFUL ACT; FRIGHTENING TEAMS; LICENSEES; NEGLIGENCE; STATIONS AND DEPOTS; STREET RAILWAYS; TRESPASSERS.**

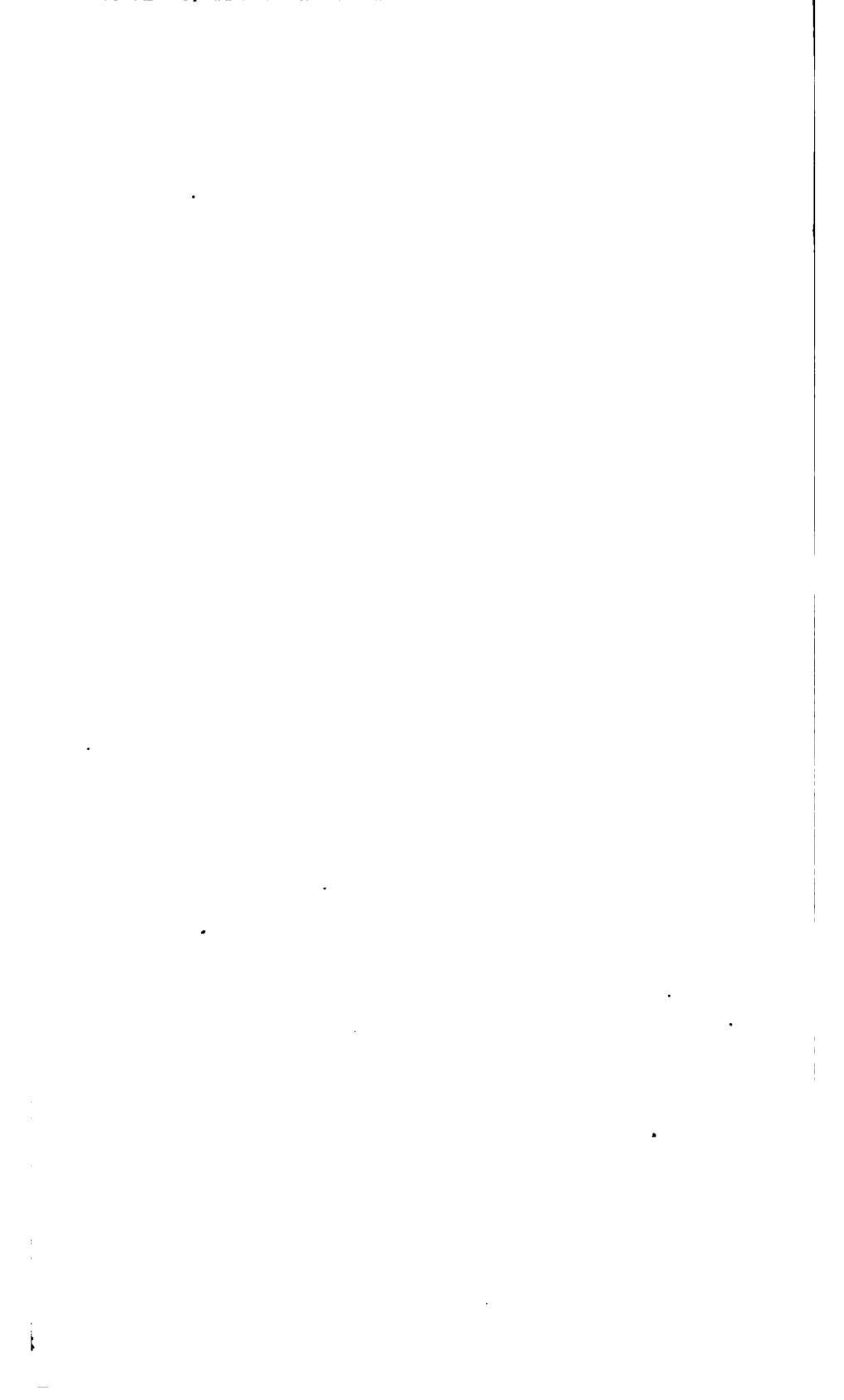
Damages.

Compensatory damages, elements of. *Southern Ry. Co. in Kentucky v. Goddard* (Ky.), 116.

Earnings of wife in her independent business after her recovery cannot be set off to damages recovered by her husband for her injuries. *Hutcheis v. Cedar Rapids & M. C. Ry. Co.* (Iowa), 362.

Excessive verdict. *MacGregor v. Rhode Island Co.* (R. I.), 510.
In action for injuries to married woman, where there was no evidence as to whether credit was given plaintiff or her husband









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